EMPLOYMENT TRIBUNALS

Claimant: Vanessa Hough

Respondent: Early Years At the Brow School

HELD AT: Liverpool **ON:** 24, 25 & 26 April 2019

BEFORE: Employment Judge Shotter

MEMBERS: Mr G Pennie
Mr PC Northam

REPRESENTATION:

Claimant: In person
Respondents: Mr R Lassey, counsel

JUDGMENT having been sent to the parties on 1 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. By a claim for received 31 May 2018 following ACAS Early Conciliation between 8 May 2018 and 14 May 2018 the claimant claimed direct and indirect disability discrimination by association to her autistic daughter, and constructive unfair dismissal. She also claimed damages for the respondent's failure to provide her with a statement of terms and conditions of employment in accordance with section 1 of the Employment Rights Act 1996 as amended ("the ERA").

2. The claimant amended her Particulars of Claim on 26 June 2018. However, at a case management conference held on 4 September 2018 she confirmed that the case related to her request to reduce her working day in order to meet her daughter after school. The claimant confirmed at the outset of the liability

hearing that the other matters referred to in her amended Particulars of Claim were not part of the claim and as matters transpired, no evidence was given by the claimant in respect of them during this liability hearing following which oral judgement with reasons were given, dismissing all of the claimant's claims.

Witnesses

3. The Tribunal heard from the claimant on her own behalf, and on behalf of the respondent it heard oral evidence given by Mrs L Web, the headteacher employed by the respondent, and Elaine Maine, chair of governors of the respondent. The claimant was not found to be a credible witness by the Tribunal, she was an inaccurate historian in relation to evidence that was clearly not the case. For example, the claimant maintains she was not provided with a statement of terms and conditions of employment, a claim she explored with Mrs Webb during cross-examination when the claimant put to her that she had never seen the unsigned contract produced by the respondent during the hearing. Elaine Maine gave undisputed evidence that the contract had been issued to the claimant, she had queried it, signed it and then been provided with a copy. The claimant clearly indicated that she accepted Elaine Maine's evidence, which was unsurprising given the claimant's inadvertent admission when she was giving evidence and asking questions on cross-examination that a contract of employment existed, and she had signed the contract. There are numerous other instances when the claimant gave inaccurate and misleading evidence that have been dealt with below, and cumulatively it brought into question the claimant's credibility, the Tribunal taking the view that when it came to conflicts in the evidence Lindey Webb and Elaine Maine were the more believable witnesses, who gave honest and credible evidence.

Agreed issues

4. The parties agreed the issues in the case are as follows;

Constructive Dismissal:

1.1 Was there a fundamental breach of the Claimant's contract of employment on the part of the Respondent in accordance with Section 136(1)(c) of the Employment Rights Act 1996? The Claimant alleges that the requirement to work until 4:30pm constitutes the fundamental breach in this case.

Direct Associative Disability Discrimination:

1.2 Did the Respondent treat the Claimant less favourably because of the associated protected characteristic of disability, specifically her daughter's autism, in relation to the acts set out below in comparison to other colleagues at Early Years at the Brow, namely; Ms. Lisa Arikboga, Ms. Carolyn Pendlebury and Ms. Sarah Gerraghty.

1.3 In relation to the actual comparators relied upon, do they meet the criteria specified in Section 23 of The Equality Act 2010 the alleged less favourable treatment being the requirement to work until 4:30pm Monday – Friday.

1.4 Are there facts from which the Tribunal could decide, in the absence of any other explanation that the respondent contravened Section 13 of The Equality Act 2010 such that the burden of proof passes to the Respondent?

1.5 Can the Respondent show that it did not contravene the provisions of Section 13 of The Equality Act 2010 as per Section 136(2)?

Indirect Associative Disability Discrimination

1.6 Did the Respondent apply to the Claimant, the provision, criterion or practice of requiring employees to work their contracted hours as per Section 19 Equality Act 2010?

1.7 If so, did this provision, criterion or practice place the Claimant at a particular disadvantage, vis-à-vis any person with whom she does not share that associated characteristic?

1.8 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? In this case, the respondent relies on the proportionate aim of achieving business efficiency.

1.9 The Tribunal was referred to an agreed bundle of documents, witness statements, written submission submitted on behalf of the claimant, a skeleton argument submitted on behalf of the respondent and oral submissions from both parties, which the Tribunal does not intend to repeat and has attempted to incorporate into this judgment with reasons. The Tribunal has made the following findings of the relevant facts.

Facts

2. The respondent is a privately and voluntary run pre-school relying on government fees run independently to Brow CP School ("Brow CP"). A number of staff from Brow CP have dealings with and were seconded to the respondent. Lindey Web was and remains the headteacher of the respondent and Brow CP School and she is answerable to the board of governors.

3. The board of governors consisted of a number of volunteers and staff including Brian Hadgraft, chair of finance, Elaine Main, chair of the respondent committee, Gill Jones, associate member and deputy head, Lindey Web and Carolyn Pendlebury, a teacher employed by Brow CP and seconded to the respondent. In respect of that secondment, Carolyn Pendlebury was paid a salary by Brow CP who in turn charged the respondent and was reimbursed in this way. Carolyn Pendlebury as a full-time teacher, was on a much higher rate

of pay compared to the claimant, and this increased substantially if Carolyn Pendlebury worked overtime.

4. The respondent's finances were dependent on the number of children aged 3 and over who used the nursery, and there existed a critical ratio for safeguarding purposes of one member of staff for eight children. At the relevant time 12 children were on the roll, one child requiring care until 5pm on a Monday, and apart from that day all other children (unless the pick-up was inadvertently late) required care until 3.30pm. Safeguarding required key members of staff, such as Carolyn Pendlebury the nursery leader and the claimant, her deputy, to physically hand-over children to their parent/carer, and no other person could carry out this role, including supply teachers/agency workers and assistants who were not leaders or deputy. The Tribunal accepted Lindey Web's evidence that she could not guarantee the respondent would be provided with the same agency worker/teacher and this caused safeguarding issues as there was no continuity with care.

5. The claimant was employed by Brow CP School from 2005 to 2011 until she started her employment with the respondent in January 2012 upon her promotion to deputy nursery lead. The claimant's daughter attended Brow CP School and the respondent was aware she was disabled having been diagnosed with Autism. The respondent accepts the claimant's daughter was disabled and the claimant her carer. It is undisputed that some of the care was shared between the claimant's husband, who also worked, and the claimant's Mother, who both collected the daughter from the bus when she attended high school. The claimant lived 5 minutes away from her place of employment with the respondent.

Employment contract

6. There is a conflict in the evidence as to whether the claimant was issued with a contract and/or a statement of terms and conditions of employment in accordance with section 1 of the Employment Rights Act 1996 as amended. The claimant's pleaded case was that the respondent had not provided her with a statement of terms and conditions. Her evidence, including some of her questions on cross-examination as indicated above, made it clear at some stage she had signed a contract, and her evidence that she had not was not credible. The claimant challenged Lindey Web's evidence that a contract had been provided, and even when an unsigned copy was produced to the Tribunal the claimant maintained she had never seen the contract. The Tribunal heard oral evidence from Elaine Maine, under oath, who confirmed that she had been party to the production of the contract and a copy had been handed to the claimant together with her colleague, Lisa Arikboga. Lisa Arikboga worked for the respondent mornings only as she had three children, one of whom was under the age of three and was too young to attend the nursery. Elaine Main's

evidence that the claimant had raised issues with the contract, signed it and been provided with a copy was not disputed by the claimant. The Tribunal took the view that the inconsistencies in the claimant's evidence gave rise to a real issue of credibility, and the Tribunal found that she was a less than accurate historian that brought into question her evidence. In conclusion, it found the claimant was issued with a statement of terms and conditions of employment, and her claim that she was not is not well-founded.

7. The claimant was also issued with an Employee Handbook that set out a number of policies and procedures, including the grievance procedure. The policies were shared with Brow CP, and the claimant's evidence that she had never seen the policies was less than credible, bearing in mind the number of years she had worked for Brow CP before joining the respondent, and given the close connection between the nursery and the school.

8. The respondent made a number of allowances to accommodate the claimant in relation to her daughter, including authorising pay when the claimant took time off to seek specialist advice, turning a blind eye when the claimant failed to attend training on Tuesday afternoons that ran until 16.45 and gave her time off to take her daughter to Florida during term time. The claimant disputed that safeguarding training had been arranged for her (and some governors who had also missed the original session) during the workday so that she could attend, and given the conflict in the claimant's evidence the Tribunal concluded it preferred the evidence of Lindey Web that it did take place in the day and not late afternoon, this was the only training session attended by the claimant. In addition, she was paid for the time when she did not attend any training although she was required to do so. The undisputed evidence was that the claimant attended one training session in a period of approximately 2-years, and yet her pay was unaffected. The clear evidence before the Tribunal was that the respondent, particularly Lindey Web, valued the claimant, understood the difficulties she had with managing her daughter and did all they could to assist and this was the backdrop against which the claimant alleged she had been unlawfully discriminated against by way of association on the grounds of her daughter's disability.

9. There was also an issue with the amount of overtime undertaken by the claimant, who underplayed this part of her case in attempt to persuade the Tribunal that she could not work beyond 3.30pm. Mr Lassey in closing submissions made on behalf of the respondent, reminded the Tribunal that in the final quarter of 2017 going into 2018 the claimant undertook overtime on a number of occasions, and yet in the previous 2 years and 9 months as evidenced in contemporaneous documentation, the claimant worked overtime twice in a much longer period. On the balance of probabilities, the Tribunal preferred the contemporaneous evidence to the oral evidence of the claimant that she could not work overtime, and it concluded overtime was worked. There was no way of knowing from the contemporaneous document whether overtime

was worked in the morning or afternoon, however, the clear evidence before the Tribunal was that the claimant was looking to increase her overtime and this was understood to be the case by the respondent during the relevant period.

10. The claimant's need for additional hours builds a picture which changed dramatically after the claimant made inquiries with Halton Borough Council about carers allowance for her daughter in or around late 2017. It was after the claimant made these inquiries she was put on notice that a reduction of hours from 4.5 a day to 3.5 a day would result in her benefitting financially as she would be eligible for financial support as her daughter's carer. The Tribunal accepted Mr Lassey's submissions that this was when the claimant's concerns crystallised, and she cannot be blamed for this given the possibility that she would need to be working less hours in order to receive financial support. It is notable the claimant made no reference to the advice she received from Halton Borough Council in her witness statement, and the fact that she was required to reduce her working hours to qualify for financial support came out in the oral evidence.

11. The respondent reviewed the respondent nursery due to falling numbers of children attending and during a consultation period a reduction of hours in the claimant's working day was discussed. The claimant had worked 9am until 3.30pm and following consultation she agreed to the later time of 4.30pm and this was confirmed in a letter dated 14 July 2017 sent to the claimant on behalf of Elaine Maine but signed by Lindey Web. In one of the consultation meetings the claimant indicated she may take up a college course, but this never came to pass and the claimant also requested overtime hours, which she worked on occasion as evidenced in the contemporaneous monthly wages authorisation forms which were essentially timesheets. Without overtime the claimant was contracted to work a total of 22.5 hours per week and it was expressly stated that the number of hours were "subject to the needs of the business in relation to the number of children accessing the provision." The contemporaneous documentation reflects the claimant worked 32 hours until 1 September 2017 when her hours dropped to 22.5 hours. The clear evidence before the Tribunal was that the claimant agreed the change in her hours, and her attempt at distancing herself from this at the liability hearing was not credible. It is notable that under cross-examination her evidence was she would "give it a go."

12. In the Early Years Meeting held on 15 September 2017 the claimant indicated she was more than happy to work overtime providing her wages did not go above the £1000 per month threshold as she would then be taxed.

13. On the 8 November 2017 the claimant's line manager Carolyn Pendlebury, emailed Lindey Web complaining that the claimant "is blaming me for not being given any addition hours." There was no reference to any complaint being made by the claimant that the respondent was in breach of contract by making her

work until 4.30pm, and the Tribunal finds that no such complaints were raised as the claimant had agreed that she would finish work at 4.30pm and this time became her contractual finishing time.

14. The claimant raised no complaint about her working hours to Lindey Web, and she did not invoke the grievance procedure. To all intent and purposes there were no issues with the claimant working hours until in or around December 2017/January 2018 when the claimant received the advice from Halton Borough Council referred to earlier that (a) she could be eligible for a number of benefits/carers allowance due to her daughter's disability and (b) she would need to reduce her working hours to 17.5 hours per week, a reduction of 5 hours. In order to assess the benefits, the claimant could not work more than 17.5 hours per week and receive no more that wages amounting to £502.00 per month.

15. In or around 10 January 2018 the claimant discussed the advice she had been given by Halton Borough Council and her need to meet her daughter at the bus stop after school with Lindey Web. This discussion resulted in the claimant submitting a hand-written letter at Lindey Web's request with a view to it being put before the respondent's committee meeting. The claimant's letter included the following: "I am writing to you to request a change in hours to be able to be my daughter's carer…it makes me worry daily that my daughter has arrived home safe…she has just recently started her periods…she finds it hard to talk to her Dad about this…I have spoken to Halton Borough Council about carer's allowance and with 3.5 hours a day I will be entitled to the allowance. The most I can earn if £502 per month. This will also open up a lot of support…I love my job…" There was no reference to the claimant complaining the change of hours as of 1 September 2017 was a breach of contract, and the main thrust of the letter was that the claimant wanted to spend more time with her daughter as her carer, reduce her hours at work and qualify for carer's allowance and other benefits.

16. The claimant's oral evidence before the Tribunal was that her Mother and partner had previously been responsible for meeting her daughter from the school bus sometime after 4pm. At no point did the claimant suggest to the respondent she could have worked until 4pm, which would then have allowed her to pick up her daughter from the school bus in time. The respondent understood the claimant's position was that she wanted to reduce her working day by one hour finishing 3.30pm instead of 4.30pm and no other proposals were requested or suggested i.e. a 4pm finish, even when the claimant's request was refused. The evidence before the Tribunal was after the claimant's resignation staff finished at 4pm on occasions due to a change of circumstances as there was no need for a late cover and two members of staff shared the responsibility. The 4pm finish was an issue explored by the Tribunal, who was satisfied that a 4pm finishing time for the claimant had not crossed Lindey Web's mind because she believed the claimant was adamant that the

finishing time was to be 3.30pm or nothing, this was supported by the evidence given at the liability hearing by the claimant and so the Tribunal finds concluding that the claimant was seeking a reduction of her hours in order to qualify for benefits and/or allowances and had she proposed a 4pm finish that would have bene granted by the respondent and the claimant would have been able to meet her daughter from the bus.

16 January 2016 Governors meeting

17. On the 16 January 2016 the governors of Brow Primary CP attended a full committee meeting on an away-day. The meeting was fully minute by an external clerk. The claimant maintained the minutes were a sham, and therefore these minutes were produced during the liability hearing as evidence that the respondent's minutes were not a sham as alleged. The minutes reveal the full committee meeting finished at 5.16pm (unbeknown to the claimant until this liability hearing) and the respondent's committee meeting minutes reflect the meeting commenced at 4.45pm 31 minutes earlier. Lindey Web gave a satisfactory explanation for this. There was a splintering of governors who attended different meetings. At the close of business of the full governors meeting there was sub-meeting between some governors and the clerk to discuss expulsions of students, details of which remained confidential to other governors who may have been required to hear an appeal.

18. The Early Years Committee consisted of Brian Hadgraft (finance chair), chair of finance, Lindey Web, Elaine Maine (chair of governor for both the respondent and Brown Primary CP) and Gill Jones, the deputy head. Lindey Web took handwritten notes that were transcribed into the typed-up notes before the Tribunal, who accepted her evidence and that of Elaine Maine that (a) the meeting took place despite the claimant alleging that it had not, and (b) the minutes properly reflected what had been discussed. It is clear from the evidence the committee fully considered the claimant's request to reduce her hours, explored the impact on the claimant and the nursery, and a possible way forward before concluding unanimously that they were unable to grant her request to "finish an hour early each day." The committee took the following into account before arriving at their decision:

18.1 If the claimant were to start work at 11 and finish at 3.30pm it would meet the claimant's request for her daughter but not the respondent's needs to safeguard the children in its care. It could not cope with the reduction in hours with the staff it employed on the basis that nursery already had sufficient staff for the morning/lunch period and therefore business needs would not be met if the claimant was unable to work for one hour in the afternoon as it could not arrange suitable cover for that hour.

18.2 Lisa Arikboga worked mornings 8.30am to 12 pm and it was not fair to ask her to return to work for one hour in the afternoon to cover the 3.30 to

4.30pm slot, she had a 2-year-old child and no childcare in place. Lindey Web confirmed she had approached Lisa Arikboga concerning the claimant's request, and Lisa Arikboga had refused on that basis. In cross-examination the claimant accepted that it would not have been reasonable for Lisa Arikboga to have worked the hour in the afternoon. It is not disputed by the claimant that Lisa Arikboga was not a deputy or lead and thus ineligible to hand over the children to parent/carer on a safeguarding basis; accordingly, she could not have undertaken the claimant's duties in the event of a child being picked up late even had she agreed to work the additional hour.

18.3 The availability of agency/supply teachers was discussed and rejected due to safeguarding issues and high costs of employing agency staff for a minimum of half-a-day to cover a one-hour slot as they were not available to be employed on an hourly basis. The cost would be excessive given the duties already covered by other staff, and the number of children on the roll. The Tribunal accepted that the respondent could not have afforded to employ agency/supply teachers given the income and ratio of teacher/staff to children when the numbers were so small and this evidence was relevant to the issue of objective justification.

18.4 Safeguarding of the children was a key consideration and the committee took into account the fact that Caroline Pendlebury was present at the start of the day and the claimant as her deputy, at the end of day, was necessary and this was for safeguarding purposes. The minutes reflect the following; "know the children and who the parents are/who collects them/drops them off. Supply wouldn't know that information…safeguarding is the key, we can't compromise the safety of the children at any point…we can't find cover for an hour a day…there's also the safeguarding issue of staff handing children over…it's got to be the room leader or deputy."

18.5 Caroline Pendlebury came in at 7.30 and worked until 4pm, and the committee took the view it was unacceptable to ask her to work an excessive number of hours beyond those she already worked. Lindey Web confirmed to the Tribunal that she had approached Caroline Pendlebury concerning the claimant's request, and she had refused to work the extra hour. It was not disputed by the claimant that as Caroline Pendlebury had been seconded from Brow Primary working as a teacher, she was on a much higher rate of pay in comparison to the claimant, and attracted a much higher rate of overtime pay. She had many duties, including SENCO coordinator, and the committee took the view she did not have the capacity to work additional hours.

19. Lindey Web expressed her sympathy to the claimant, and it clear from the minutes the committee were very sympathy and there was no suggestion the decision not to grant the claimant's request was causally connected or motivated by the fact she had a disabled daughter and so the Tribunal found.

The committee carried out a balancing exercise, concluding that it was more important for the respondent to protect the children and act in their best interests taking into account statutory safeguarding requirements, the financial and practical implications and the "very limited options" which were not in the children's best interests. The committee concluded the children's best interests was for the claimant to finish at 4.30pm, and this was also in the best interests of the business. For the avoidance of doubt the committee did not consider whether a 4pm finish was achievable as this was not an option requested by the claimant who had made it clear she wanted to reduce the number of hours worked. A 4pm finish would not have achieved the necessary reduction.

20. The claimant gave evidence both in her witness statement and under cross-examination that between 3.30 and 4.30pm the only duties she carried out was cleaning, and there was no need for a deputy to do this, except for a Monday when a child was picked up at 5pm. Lindey Web disagreed, her evidence was as deputy the claimant was required to produce reports on children, and the claimant accepted she did produce reports for her key children and other children but only on a Friday when Mrs Lunt provided cover. The claimant maintained throughout she was not required to write up her observations on children Monday to Thursday, the inference being she could have left work earlier. The contemporaneous evidence before the Tribunal was that the claimant did produce reports in the hour between 3.30pm to 4.30pm, and she was available if any child was picked up late, in addition to Caroline Pendlebury who finished at 4pm. Lindey Web gave evidence that the hour between 3.30 and 4.30pm assisted the claimant because it was more difficult for her to work at home and complete the reports there, when other members of staff worked unpaid at home. In response the claimant put to her in cross-examination that she prepared reports at home on a Sunday morning when her daughter was still in bed, but this was not found to be credible evidence by the Tribunal given the claimant's earlier position that she could prepare all the reports on the Friday afternoon. The Tribunal found the claimant had completed reports during the working week as set out in the contemporaneous evidence. The claimant was not a credible witness on this point, her evidence lacked consistency and contradicted itself. In short, the 3.30-4.30pm time slot was necessary for the claimant to carry out her duties as deputy, she prepared the class for school the next day and the evidence before the Tribunal was that it would not have been an easy matter to have replaced the claimant for one hour between 3.30 to 4.30pm a 5-days a week as per the claimant's request.

21. In her written statement the claimant proposed that Mrs Geraghty, who worked as overall manager of the respondent, should have covered the claimant's hours between 3.30 and 4.30pm except for the Monday. The Tribunal did not agree, as submitted by Mr Lassey, Mrs Geraghty was not a member of staff employed by the respondent, she looked after reception class in the primary school. She was a highly qualified individual fully employed in her role, and there was no satisfactory evidence that the claimant's hour was suitable or

appropriate. The claimant also suggested Mrs Lunt, who was employed to work on a Friday to provide cover, however the claimant acknowledged Mrs Lunt did not have the authority to release children to the parent's or carers, she did not meet safeguarding requirements in this respect and in any event worked for another nursery the rest of the week and would thus not have been available to cover the one hour per day.

Resignation and retraction by the claimant

22. The claimant was informed of the Committee's decision refusing her request, and she sent in an undated letter of resignation expiring 9 February 2018 on the basis that the respondent has not supported her as a "parent with a child who has autism so I need to move my employment to a place that can." The resignation was accepted by Lindey Webb, who confirmed the effective date of termination was 9 February 2018.

23. In a text message sent by the claimant to Lindey Webb immediately she received the letter accepting her resignation, the claimant wrote "would you be willing to accept a retraction for my resignation letter. What I didn't tell you…was that me and Pelae [the claimant's husband] separated at New Year…sorry for messing you about…I never wanted to leave the school and feel the people I help with can help me with this rough patch…I'm sorry for messing you around. xxx"

24. A meeting took place between the claimant and Lindey Webb. At the outset the claimant made it clear she was not retracting her resignation. At the liability hearing the claimant stated Lindey Web had informed her she could not react because "the wheels had been set in motion." This was denied by Lindey Webb, and the Tribunal preferred her evidence that the claimant 's resignation caused disruption, she would have accepted the claimant because it then took until April 2018 to replace her, they got on well and discussed the respective pressures they were under. This evidence was not disputed by the claimant.

Law: Direct discrimination

25. S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others and direct discrimination can occur when an employer treats an employee less favourably because of a protected characteristic that the employee does not personally possess. This is referred to as 'discrimination by association. The EU Equal Treatment Framework Directive (No.2000/78) protects those who, although not

themselves disabled, nevertheless suffer direct discrimination or harassment owing to their association with a disabled person.

26. The EHRC Employment Code states that this form of discrimination can occur in various ways — for example, where the employee is the parent, son or daughter, partner, carer or friend of someone with a protected characteristic (see para 3.19}. In the context of caring for a disabled person, carers will enjoy protection from less favourable treatment they suffer at the hands of their employers on account of the disability of the person they are caring for — although not, because of the carer's caring responsibilities per se.

27. In a direct discrimination claim an actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from her. Para 3.23 of the EHRC Employment code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator."

28. Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can intertwine: the less favourable treatment issue cannot be resolved without deciding the reason why issue. Lord Nicholls in the well-known case of Shamoon v Chief Constable Royal Ulster Constabulary [2003] UKHL 11 at paragraph 11 held: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." In the claimant's case the Tribunal found, on the balance of probabilities, that when taking into account the facts the claimant was not treated on the proscribed ground less favourably and the fact the respondent was unable to grant her request to reduce work by one-hour a day had no causal connection with the fact the claimant's daughter was autistic.

29. Less favourable treatment because of a protected characteristic of someone other than the claimant is described as 'discrimination by association' and the claimant must prove that the protected characteristic was the reason for the treatment i.e. the association that matters to the tribunal is the one made in the mind of the alleged discriminator. In a well-known recent case Lee v Ashers Baking Company Ltd and ors *2018 IRLR 1116, SC*, the Supreme Court overturned the decision of the Northern Ireland Court of Appeal (NICA) that a

bakery which cancelled an order for a cake displaying the message 'Support Gay Marriage' had treated the customer less favourably because of his association with the gay and lesbian community. Lady Hale, giving the unanimous judgment of the Court, rejected the contention that because the reason for the less favourable treatment had something to do with the sexual orientation of some people, the less favourable treatment was 'on grounds of' sexual orientation. In her view, a closer connection was required.

Direct and indirect discrimination

30. In R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors *2010 IRLR 136, SC*, Baroness Hale dealt with the difference between direct and indirect discrimination and commented as follows: 'The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins. Direct and indirect discrimination are mutually exclusive. You cannot have both at once… The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.' These comments were approved.

Indirect discrimination

31. In the words of Baroness Hale, 'the law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic' — Chief Constable of West Yorkshire Police and anor v Homer *2012 ICR 704, SC*. The Tribunal recognises that a PCP requiring an employee to look after nursery children between the hours of 3.30 to 4.30pm can disadvantage people who need to meet their autistic child off the bus sometime after 4pm.

32. S.19(1) of the Equality Act 2010 (EqA) states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met:

A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))

•the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic (S.19(2)(b))

•the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and

•A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

33. All four conditions in S.19(2) must be met before a successful claim for indirect discrimination can be established. There must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a disadvantage when compared with those who do not share that characteristic; the claimant must experience that disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

The justification test

34. Section 136 EqA, requires the claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination. S.136 goes on to provide that once the claimant has shown a prima facie case, the Tribunal is obliged to uphold the claim of discrimination unless the respondent can show that no discrimination occurred. The relationship between the four elements of an indirect discrimination claim and S.136 was considered by the EAT in Dziedziak v Future Electronics Ltd *EAT 0271/11*, a claim of indirect sex discrimination. Mr Justice Langstaff, then President of the EAT, stated: 'In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification'. In Ms Hough's case it was accepted by Mr Lassie that the claimant has discharged this burden of establishing the statutory definition of indirect discrimination. The issue therefore was to justify the PCP as a proportionate means of achieving a legitimate aim.

Burden of proof

35. The EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

36. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability discrimination], failing which the claim succeeds. In relation to Ms Hough's claim for direct disability discrimination she has failed to satisfy the Tribunal on the balance of probabilities that there are primary facts from which inferences of unlawful discrimination can arise and the burden of proof had not shifted to the respondent. If the Tribunal is wrong and had the claimant satisfied it that inferences of direct disability discrimination could be drawn, in the alternative, having taken into account the respondent's explanation, the Tribunal would have gone on to find the respondent had provided an explanation untainted by disability discrimination.

The law – constructive dismissal

37. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the 1996 Act") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employers' conduct.

38. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or to put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the well-known case of Paul Buckland –v- Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

39. The House of Lords in Malik –v- Bank of Credit; Mahmud –v- Bank of Credit [1997] UKHL 23, held that the breach occurs when the prescribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited", and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise. It is notable that the balance that had to be struck between the respondent managing its business (and the nursery children's interests) and the claimant's interest, was at the heart of this case and the Tribunal found that the impact of the respondent's conduct on the claimant, was such that viewed objectively, she could not properly conclude the contract was being repudiated.

40. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The Court of Appeal held that an employee can either leave at the instant without giving notice, or may give notice and say that he is leaving at the end of the notice providing the conduct is sufficiently serious to entitle him to leave at once. "Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract". The issues to be decided upon in this respect were: -

1) Was there a fundamental breach on the part of the employer?

2) Did the claimant terminate the contract by resigning?

3) Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation?

4) Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end?

Conclusion- applying the law to the facts

Constructive Dismissal:

41. With reference to the first issue, namely, was there a fundamental breach of the Claimant's contract of employment on the part of the Respondent in accordance with Section 136(1)(c) of the Employment Rights Act 1996, the Tribunal finds there was not. The Claimant alleges that the requirement to work until 4:30pm constitutes the fundamental breach in this case and this breach according to the claimant allegedly arose on 14 July 2017 despite the fact that she had agreed a change to her hours, with effect 1 September 2017. This was not a "last straw case, and nor was the claimant alleging the respondent was in fundamental breach of contract by the way it had conducted itself when considering her request for a reduction in the working day. For the avoidance of doubt taking into account the claimant was a litigant in person who drafted her own pleadings, there was no evidence before the Tribunal that the respondent had acted in a way no reasonable employer would have. The Tribunal found the respondent had a reasonable and proper cause for the decision not to grant the claimant her reduction in hours for the reasons given above, and it found it was a proportionate means for achieving a legitimate aim.

42. Having found there was no breach of contract the Tribunal is not required to consider the remaining issues. In the alternative, if it were to have found the respondent to have been in breach of contract (which it did not for the avoidance of doubt) it would have gone on to find the Claimant had not resigned in response to that breach and had worked without complaint until she received the advice about the benefits. In addition, by way of her conduct i.e. retracting the resignation, she had evidenced that there was no fundamental breach on the part of the respondent. The email sent by the claimant after her resignation was indicative of the fact that a number of matters lay behind her resignation including the separation from her husband, and from her evidence before the Tribunal the advice she had received about the benefits on offer. In the claimant's own words "…I never wanted to leave the school and feel the people I help with can help me with this rough patch…I'm sorry for messing you around. xxx" These are not words of an employee who believes her employer has objectively conducted itself without reasonable and proper cause, in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. Objectively looking at the respondent's conduct as a whole its effect, judged reasonably and sensibly, is not such that the claimant cannot be expected to put up with it; or properly conclude that the respondent was repudiating the contract: Paul Buckland –v- Bournemouth University Higher Education Corporation. It is notable had the claimant requested a 4pm finish she may well have persuaded the respondent to accept this; however the option was not explored as it was not one sought by the claimant who required a reduction of one hour minimum per day in order to qualify for benefits.

Direct Associative Disability Discrimination:

43. With reference to the issue, namely, did the Respondent treat the Claimant less favourably because of the associated protected characteristic of disability, specifically her daughter's autism, in comparison to other colleagues at Early Years at the Brow, namely; Ms. Lisa Arikboga, Ms. Carolyn Pendlebury, and Ms. Sarah Gerraghty, the Tribunal found that it had not and the comparators did not meet the criteria specified in Section 23 of The Equality Act 2010 for the reasons set out above. The claimant does not rely on a hypothetical comparator as pointed out by Mr Lassey when he was invited to deal with the comparators including the possibility of the Tribunal considering a hypothetical comparator. Having invited submissions by the parties, the Tribunal, taking into account all of the evidence before it, came to a view that an employee in the same position as the claimant but who did not have a disabled daughter to look after (i.e. an employee carrying out the same role with reporting and safeguarding responsibilities, who wanted to reduce her hours in order to qualify for benefits and was a carer for a child (who was not disabled with autism) he/she wanted to meet at the school bus, would have been treated in the same way. In a direct discrimination claim an actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from her. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator. The claimant has failed to satisfy the Tribunal that she has been treated less favourably in comparison to Ms. Lisa Arikboga, Ms. Carolyn Pendlebury, and Ms. Sarah Gerraghty, who were in materially different circumstances to the claimant.

44. There are no facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened Section 13 of The Equality Act 2010 such that the burden of proof passed to the respondent, the respondent did not contravene the provisions of Section 13 of The Equality Act 2010 and the claimant's claim is not well-founded and is dismissed. Further, had the claimant satisfied the Tribunal that she had been treated less favourably in comparison to an actual or hypothetical comparator (which she did not) the Tribunal would have gone on to find there was no causal connection between the respondent's decision to refuse the claimant's request and her daughter's disability in accordance with the test set out in Lee v Ashers Baking Company Ltd.

Indirect Associative Disability Discrimination:

45. With reference to the issue, namely did the Respondent apply to the Claimant, the provision, criterion or practice of requiring employees to work contracted hours to 4.30pm in accordance with Section 19 Equality Act 2010, the Tribunal found that it did and this provision, criterion or practice placed the Claimant at

a disadvantage vis-à-vis any person who does not share that associated characteristic as conceded by the respondent. The key issue was; can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, and the Tribunal found that it could applying the case law referred to above and as set out in its findings of facts. The respondent conducted a balancing exercise between the needs of the children using the nursery, taking into account statutory safeguarding requirements that were non-negotiable, the problem they had in replacing the claimant with another suitable qualified member of staff for one hour a day, and the excessive cost of employing an agency/supply teacher for a day or an afternoon in order to cover that one hour with the associated safeguarding issues. In this case the respondent also relies on the proportionate aim of achieving business efficiency.

46. Despite the claimant's lack of credibility, the Tribunal has considerably sympathy for the difficulty she found herself in when she was required to reduce her hours to qualify for various benefits as her daughter's carer, and on the face of it, losing one hour a day did not seem to be a significant request. However, it had severe implications for this respondent. The Tribunal is required to carry out a balancing exercise, and it notes the parallels between the claimant and her employer. On the one hand the claimant has caring responsibilities for her disabled daughter and the prospect of enhancing the life of her family financially though benefits by limiting the number of hours she can work and picking up her daughter from the school bus; on the other hand the respondent has caring and safeguarding responsibilities for all the children in the nursery, and must also look at the financial responsibilities for the whole school, their concerns are for the greater number not just an individual family.

47. The justification test in S.19(2)(d) EqA requires that the application of the PCP is a 'proportionate means of achieving a legitimate aim. Therefore, unless the aim behind the imposition of a PCP is regarded as 'legitimate', respondent's defence will not succeed at the first hurdle and there will be no need for the Tribunal to examine the issue of proportionality. According to the EHRC Employment Code, for an aim to be legitimate it must be 'legal, should not be discriminatory, and it must represent a real, objective consideration' — para 4.28. The Tribunal found in Ms Hough's case the aim of providing suitable care for nursery children for one-hour in the afternoon that complied with safeguarding and the respondent's needs including reasonable cost, was a real objective consideration.

48. The Code states that the health, welfare and safety of individuals may qualify as a legitimate aim (see para 4.28). Other legitimate aims that could justify indirect discrimination include operational and client needs. The respondent must show even though a PCP may have had an adverse impact on a particular protected group (and is therefore, on the face of it, discriminatory), it was implemented for reasons unconnected with the relevant protected

characteristic and was therefore lawful. A balancing exercise, weighing the employer's need to impose the PCP against the PCP's discriminatory effect, must be carried out. Having an apparently sound reason for imposing the relevant PCP is not enough in itself: the respondent must also demonstrate that the reasons for its imposition are strong enough to overcome any indirectly discriminatory impact. The more discriminatory the PCP, the more difficult it will be for the employer to show that it was justified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration — para 4.28 of the EHRC Code. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test — para 4.29. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31. In Ms Hough's case the Tribunal found the high cost of replacing the claimant for one-hour a day was a valid consideration, albeit not the only one taken into account by the respondent who was predominantly concerned with providing a service for the nursery children that was in their best interests and safeguarded them with a difficult task of finding a suitable employee who met all the requirements and agreed to work one-hour between 3.30 and 4.30pm, which proved to be an insurmountable obstacle for the respondent.

49. Cost can be relied on by an employer as one of a number of factors justifying indirect discrimination but not in isolation, and the allocation of financial resources will constitute a 'real need' or legitimate aim, even if the employer could have afforded to make a different allocation with a lesser impact on the disadvantaged class of employee in question. It will then be necessary for the Tribunal to consider the proportionality issue, which involves balancing the reasonable needs of the enterprise against the measure's discriminatory impact. In Ms Hough's case the Tribunal found the respondent had no real alternative to imposing time criterion of 4.30pm and disallowing her request to work until 3.30pm. It could not afford to pay for a supply teacher for one / half a day given the number of children attending the nursery and the method of financing the respondent. The Tribunal has weighed the cost issue up in the balance, in addition to the other considerations taken into account when it came to the weighing exercise.

50. The Tribunal was satisfied in Ms Hough's case that applying the PCP was firmly based in the reasonable business needs of providing a suitably qualified employee to perform the claimant's role for one hour per day 5 days per week in accordance with safeguarding when it came to caring for the children and dealing with the paperwork that arose as a result. The Tribunal accepted that avoiding discrimination in the claimant's case would involve substantially increased expenditure: however even if the additional costs were paid the Tribunal is not convinced the outcome would have been any different given the

requirement for a suitably qualified employee to be present at handover, and the risk of a late pick up by a parent or carer. The respondent has shown on the balance of probabilities, it would be disproportionate to the benefit in terms of eliminating the discriminatory impact to have incurred the cost of employing an agency teacher to cover the one hour at the end of the working day, and it has demonstrated the respondent's decision to refuse the claimant her request was a proportionate means of achieving the aim of ensuring a suitably qualified person was present in the nursery at the end of the working day namely, meeting the operational needs of the business and complying with safeguarding as set out by the Tribunal above.

Employment Judge Shotter

11.6.19

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JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 June 2019

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FOR THE SECRETARY OF THE TRIBUNALS