



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs V Greenwood

**Respondent:** Pinewood School Limited

**Heard at:** Bristol                      **On:** 14-18 September 2020  
25 September 2020 (in chambers)

**Before:** Employment Judge Oliver  
Ms P Simpson  
Mr H Launder

## Representation

**Claimant:** Mr M Greenwood  
**Respondent:** Mr A Roberts, counsel

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for direct discrimination because of sex in relation to interview scoring is well founded.
2. The claim for harassment related to sex in relation to comments made on 27 March 2019 is well founded.
3. The claim for indirect sex discrimination is well founded.
4. The claim for victimisation in relation to full-time teaching in Pre-Prep is well founded.
5. The claim for victimisation relating to Prep teaching and the claims of direct discrimination and harassment relating to the grievance process are dismissed upon withdrawal.
6. The remaining claims do not succeed and are dismissed.

# REASONS

1. The claimant had made claims for direct sex discrimination, indirect sex discrimination, harassment and victimisation. These claims arose from the claimant's application for the post of full-time maths teacher at the respondent's Prep school. Judgment was reserved at the end of day five of the hearing as there was not sufficient time remaining for the Tribunal to deliberate and deliver a judgment.

## Issues

2. The issues in the case were set out in the summary of the case management hearing conducted by EJ Livesey on 18 February 2020. This included a waiver of privilege by both parties in relation to a without prejudice conversation and subsequent settlement offers. The parties confirmed at the start of the hearing that these issues were correct and remained in dispute. However, during the course of the hearing a number of the claims were withdrawn. The claimant made an application towards the conclusion of her evidence to amend her claim in order to reclassify some of her specific claims as victimisation. The Tribunal rejected this application and full oral reasons were given at the time.

3. The issues for the Tribunal to decide were as follows:

### 4. **Direct discrimination on grounds of sex**

- a. Did the respondent subject the claimant to the following treatment falling within section 39 Equality Act (items 6.1.1 to 6.1.6 in the original list of issues), namely:
  - i. The failure to require the claimant to submit a formal application form and/or written reference.
  - ii. The decision to forego any lesson observation as part of the selection criteria.
  - iii. The Headmaster's selection of the interview panel and, in particular, the exclusion from that panel of the Director of Education, Mrs Hall.
  - iv. The panel's scoring, which was based upon different criteria to those specified in the job advertisement and which skewed the weighting in favour of the successful applicant's sporting prowess, rather than in the claimant's favour as a result of her maths teaching.
  - v. The Headmasters questions at interview, which were overtly biased against her as a female candidate, including:
    - The implied lack of credibility for a female teacher to instruct year 8 boys in rugby and/or cricket.
    - Questions around matters that were not part of the job description (for example, a candidate's willingness to drive a minibus).
  - vi. The Headmaster's comments to the claimant on 27 March 2019, as set out in paragraphs 21-24 of the claim form.
- b. Did the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies

upon Mr Crossley, the male candidate who succeeded in his application for the post.

- c. If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of sex?
- d. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

**5. Harassment on grounds of sex**

- a. Did the respondent engage in the unwanted conduct set out at paragraph 4 above?
- b. Was the conduct related to the claimant's sex?
- c. Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

**6. Indirect discrimination on grounds of sex**

- a. Did the respondent apply the following provisions, criteria and/or practices (the "PCPs") generally, namely the manner in which the job specification and/or description for the role included the following unconnected, severable responsibilities and/or tasks – the requirement to undertake duties in connection with boarders at the school which may have necessitated work until 10.30pm.
- b. The respondent denies that the criteria was essential and, as such, that no PCP existed.
- c. Did the application of the PCP put other women and a particular disadvantage when compared with persons who do not have this protected characteristic, in that fewer women with childcare responsibilities would be able to fulfil such functions in addition to those responsibilities?
- d. Did the application of the PCP put the claimant at that disadvantage in that she has 2 children, the youngest of whom was 7 at that stage?
- e. The respondent does not alternatively, seek to argue any defence of justification.

**7. Victimisation**

- a. Did the claimant carry out a protected act? She relies on her grievance

of 13 May 2019. This is not disputed by the respondent.

- b. Did the respondent carry out any of the treatment because of the act? The treatment is denying the claimant the chance to teach full-time in the Pre-Prep as punishment for having raised a grievance.
8. Of the remaining issues, using the original paragraph numbering, part of 6.1.7 and all of 6.1.8 to 6.1.10 were withdrawn on clarification that the claimant was not alleging this treatment was because of sex. The remainder of 6.1.7 withdrawn after C confirmed she no longer wished to cross-examine the relevant witness following an incident outside the hearing room. The claim of victimisation in relation to teaching in the Prep was also withdrawn (paragraph 8).

### Evidence

9. We had an agreed bundle of documents, which was provided electronically.
10. We also heard evidence from the following witnesses:
  - a. The claimant
  - b. Mr Colin Acheson-Gray (Deputy Head)
  - c. Mr Philp Hoyland (Headmaster at the time of the events in question)
  - d. Ms Eleanor Lyon-Taylor (Head of Middle School)
  - e. Ms Joanne Ranstead (Assistant Bursar)
  - f. Ms Nicola McAvoy (Bursar)

We had witness statements from three further witnesses, but these individuals did not give evidence as the relevant claims were withdrawn by the claimant.

11. We had oral submissions from both parties, and additional written submissions from the respondent.

12. In closing submissions, the respondent raised the fact that the Employment Judge had asked a number of detailed questions of the respondent's witnesses, particularly Mr Hoyland. We were asked to take account of the EAT guidance in ***Nawaz v Docklands Buses Ltd*** (UKEAT/0104/15), and the principle that questions which go beyond clarification of the evidence the witness is trying to give may risk unconscious bias.

13. The claimant was represented at the hearing by her husband, who is not legally trained, meaning it was necessary for the Tribunal to assist with the process and ask additional questions. We can appreciate that it may appear to a respondent that the Tribunal is favouring the other party if they provide this type of assistance.

14. In this case, the claimant was subject to a thorough cross-examination by experienced counsel which lasted almost two days, meaning detailed further questions from the Tribunal were not necessary. The Tribunal's intention in asking questions to the respondent's witnesses was to ensure that all of the claimant's case was put to the witnesses so that they could answer it fully, to

clarify answers given to questions put in cross-examination, and to give the witnesses an opportunity to comment on items of evidence in the bundle that had been seen by the Tribunal but had not been put to the witness during cross-examination. We have reminded ourselves of the guidance in **Nawaz** and ensured we took into account the risk of unconscious bias during our deliberations.

## **Facts**

15. We have taken into account all of the evidence and submissions presented to us, and find those facts necessary to decide the issues in the case. Page numbers refer to pages in the agreed bundle.

16. The respondent is a private co-educational day and boarding school for 3 to 13 year olds, divided into Pre-Prep for younger children and Prep for older children.

17. The claimant works for the respondent as a teacher in Pre-Prep at the respondent's school. She has worked for the Respondent since 2006. She is Pre-Prep maths coordinator. She has recently obtained a role as a Learning Skills teacher in the Prep 3 days per week, and remains a Pre-Prep teacher 2 days per week. At the time of the events complained of she worked 4 days per week as Pre-Prep teacher, teaching a mixture of nursery and years 1 and 2.

18. The claimant has a maths degree. She qualified as a teacher specialising in ages 7/8 to 11 (years 4-7). She taught younger children after moving to work for the respondent in 2006, during which time she had two periods of maternity leave, and had not taught the older age group since 2004. Her appraisals at the respondent rated her as excellent, and she was promoted to the upper pay range in February 2019.

19. In September 2018 the claimant had a career review meeting with Mr Philip Hoyland, the Headmaster of the respondent. She wrote to Mr Hoyland on 24 September setting out her experience and interest in a role teaching maths to older children in the Prep school (page 117). She was told that the Prep maths department was fully recruited at the time, and she asked Mr Hoyland to keep her in mind if anything changed.

20. The claims arise from the claimant's application for a role as a full-time maths teacher in the Prep in March 2019.

21. This vacancy arose due to the resignation of Mr Ed Benbow. He taught maths in the Prep school. He also had a number of other roles – year 8 form tutor, Head of Boarding, assistant Head of House, and coach for the second team rugby, cricket and hockey. We accept the respondent's evidence that teaching in the respondent's Prep school requires teachers to participate in the all-round life of the school, not simply teaching in a classroom.

22. On 2 February 2019, Mr Hoyland had received a speculative CV from a teacher then working in Kenya, Mr Neil Crossley (page 131-133). He was then Director of Sport and Head of House at a school in Nairobi. He said he was looking to return to a preparatory school in the UK, either in a similar sporting role

or teaching an academic subject. His letter also said, "*Teaching Year 4, or Mathematics to the upper years in the school is something I am interested in doing.*" His CV showed that he had always specialised in teaching sport, with extensive coaching experience, and he held a category D1 driving licence. He had assisted with teaching sports science in 2009, and completed his PGCE in 2012. He had never taught maths.

23. The usual recruitment window for teachers is January to March each year. Mr Benbow resigned in the week of 4 March 2019. Most teachers, particularly in the private sector, have to give at least a term's notice. We accept Mr Hoyland's evidence that there was insufficient time to allow for external advertising if they wanted to fill the post in time for September.

24. Mr Hoyland regularly receives speculative CVs, and keeps them on file. He contacted Mr Crossley to ask if he was interested in being considered for the role, and Mr Crossley confirmed that he was on 11 March. The role was also advertised internally in accordance with the respondent's policy.

25. On 11 March, Jo Ranstead sent an email to all staff with details about 3 positions available in September (page 137). This said the following in relation to the maths role:

***Maths Teacher- Prep***

*We have a vacancy for a full-time Maths teacher within the Prep. This role would include a games responsibility, boarding duty and Saturday commitments in line with full-time Prep positions. If you wish to be considered for this role please register your interest with me by Monday 18th March. Please feel free to speak to Philip for further details on the responsibilities involved.*

26. The claimant asked to meet with Mr Hoyland to discuss the role, and they met on 12 March. The claimant explained that she would not be able to commit to boarding duties due to her then childcare commitments (as her younger child was in year 3 and would not be eligible to board until year 5). Mr Hoyland told her that they could be flexible on boarding duty, and this should not preclude her from the role. They also discussed the fact that the role involved being a form tutor, taking games, and Saturday school. Mr Hoyland did not tell the claimant any detail about games, or say that this would involve teaching specific sports or year groups. He said in evidence that he did not want to put her off from applying, and he assumed she knew what Mr Benbow had done. Mr Hoyland also told the claimant that there was no need for her to submit an application form.

27. The claimant was not provided with a job specification for this role, and no specific job specification for this maths teacher role was prepared. She did not request one. The respondent does have a general job specification for the position of Prep Teacher, and we have seen examples in the bundle of generic job descriptions and specific job descriptions for teaching particular subjects.

28. The claimant sent Mr Hoyland an updated CV and covering letter on 17 March. Mr Hoyland obtained verbal references from Mrs Ruth Hall (the claimant's line manager) and Mr Sam Downe (head of maths in the prep school).

It is not clear to what extent Mrs Hall provided an actual reference, as during her grievance interview she states that she “*was really not involved apart from an initial conversation*” (page 305). We do not have any written record of these references. He also requested written references for Mr Crossley, as this is a safeguarding requirement for external applicants. Mr Hoyland provided verbal feedback on these references to the interview panel.

29. Mr Crossley was available for interview in the UK on 26 March 2019, as he was running a school rugby tour from Kenya. He was only available for some 90 minutes. Recruitment at the respondent usually involves a lesson observation (45 minutes for a Prep lesson plus briefing time), and an interview. The respondent had previously recruited some teachers without a lesson observation when they were based overseas and interviewed via skype. Mr Hoyland decided that a lesson observation was not necessary, as there was not time to do this within the window of availability, and the interview was more important. There was also no lesson observation for the claimant. Mr Hoyland’s explanation for this is that he wanted to treat both candidates the same, and the claimant’s ability to teach was not in question.

30. The interview panel was Mr Hoyland, Colin Acheson-Grey (Deputy Head), and Eleanor Lyon-Taylor (Head of Middle School, who would be the direct line manager of the successful candidate). Ms Lyon-Taylor had not conducted an interview before and had not been provided with any training. Mrs Hall as the Director of Education would often sit in interview panels. The respondent’s explanation for not including her this time is that she was the claimant’s direct line manager, and so it would not be appropriate and might risk bias. Mrs Hall was on the interview panel for the claimant’s recent appointment as a Learning Skills teacher, but in that case she was also the line manager of the other candidate.

31. Jo Ranstead (Assistant Bursar) had a conversation with Mr Hoyland about interview questions. She says he asked for clarification to ensure he wasn’t showing discrimination by asking a female teacher to teach boys’ games.

32. On 14 March, Ms Ranstead sent Mr Hoyland an email about the questions as follows (page 145):

*“Following our conversation it might help to know it is perfectly ok for you to ask the following questions in your interviews for the Maths Post. These questions might also help with providing evidence for whatever decision you then make:*

*In order to replace Ed we are looking not just for someone to teach Maths but also for someone to play a full role within the Prep School:*

- How do you feel about getting involved with boarding? Could you make a regular commitment?*
- Are you able to fully commit to Saturdays? Both matches and Saturday lessons/ activities/chapel?*
- As highlighted this role will also need to take on a full games responsibility. Given the current breakdown of staff and Ed's current responsibilities it looks very likely that this will need to be managing a boys' rugby and boys' cricket team. There is no reason at all boys sport cannot be managed by a*

*female teacher - would you be happy to take on this coaching responsibility? What support would you need to be able to manage these sports?*

- *Prep School teachers are also asked to offer a Thursday activity - what activity/activities would you be prepared to offer?"*

33. The interview panel met to agree the approach to the interviews. It was agreed that Mr Acheson-Gray would cover pastoral, safeguarding and classroom management and discipline; Ms Lyon Taylor would cover academic matters; and Mr Hoyland would cover boarding, extra-curricular, Saturday school and games questions. The scoring would be equally weighted across all elements.

34. We have seen the final set of questions (page 151). These were used for both candidates during the interviews. This states at the top, "***in order to replace Ed we are looking not just for someone to teach Maths but also someone to play a full role within the Prep School***". The questions to be asked by Mr Hoyland are as follows:

- "1. How do you feel about getting involved with boarding? Could you make a regular commitment?"*
- 2. Are you happy to drive a minibus to match commitments if we provide you with training?"*
- 3. As highlighted this role will also need to take on a full games responsibility. Given the current breakdown of staff and Ed's current responsibilities it looks very likely that this will need to be managing a boys' rugby and boys' cricket team. There is no reason at all boys sport cannot be managed by a female teacher - would you be happy to take on this coaching responsibility? What support would you need to be able to manage these sports?"*
- 4. Are you able to fully commit to Saturdays? Both in terms of matches and minibus driving?"*

35. These questions are different from those set out in the email from Ms Ranstead. The question about Saturdays has been limited to matches and minibus driving, instead of also covering Saturday lessons/activities/chapel. A specific question about minibus driving had been added. The question about Thursday activities has been removed. Mr Hoyland's evidence was that he was hoping the candidates would use their initiative and use the opportunity to ask questions at the end of the interview to sell what else they could offer, for example by asking about Thursday activities.

36. The claimant's interview took place on 21 March 2019. She says that the interview started with an explicit direction to the panel from Mr Hoyland not to ask any questions about maths teaching. Mr Hoyland denies this, but says it was reiterated at the start of the interview that the panel was not going to probe into her maths teaching as they knew her abilities and were satisfied that she would be able to teach maths at Prep school level. We note that the claimant's original complaint of 29 April puts this as Mr Hoyland saying, "*we know you would be an excellent Maths teacher ... so there's no need for us to discuss that*" (page 176). We find that this was made as a comment to the claimant, not an instruction to the panel.



37. The claimant and the interview panel agree that the first part of the interview went well, and she was able to use maths examples in answering the questions from Mr Acheson-Gray and Ms Lyon Taylor.

38. The claimant's issue is with the questions asked by Mr Hoyland.

- a. She alleges he started his section of questions by saying "well you know Ed Benbow". Mr Hoyland does not recall the words used, but says he may have mentioned his name to emphasise the profile of the role to be filled. We note that the claimant has been consistent on this point, which was included in her original complaint on 29 April (page 176), so find this comment was made at the start of the final section of questions.
- b. Mr Hoyland asked the question set out above about commitment to boarding. He said in evidence that he asked this so the other panel members would know the claimant's position. He did not tell the other panellists that he had already told the claimant they could be flexible on boarding.
- c. Mr Hoyland asked the question set out above about coaching boys' rugby and cricket. Mr Benbow had coached year 8 rugby and cricket, as well as hockey. The claimant said she would try, that she would prefer cricket, and she would be better at netball.
- d. Mr Hoyland asked a question about being happy to drive the school minibus. The claimant said she was not happy to do this. She says she was involved in a serious car accident during snowy weather while she was 8 months' pregnant in 2010, Mr Hoyland's wife drove her to hospital, and so people at the school knew she was not a confident driver. Mr Hoyland said in evidence that neither he nor his wife could recall this incident. We are somewhat surprised he did not remember this incident, and we understand how major an issue this was for the claimant - but on balance we recognise that this occurred 9 years previously and find that Mr Hoyland did not recall this specific incident when asking the question about the minibus.
- e. Mr Hoyland was leading the questions on contribution to the general life of the school outside classroom teaching. He asked only those questions set out above. He did not ask the claimant any wider questions about other activities that she could contribute to, Thursday activities, or becoming a form tutor. Neither did any of the other panellists. The claimant says that she had particular experience of drama and music, but she was not asked about this. Mr Hoyland said in evidence that he did say during the interview they could be flexible on boarding, although he also said he had not briefed the panellists on the claimant's position. The claimant denies they discussed flexibility during the interview. The other panellists did not say they were aware of this, and they noted boarding as an issue on some of the interview scoring forms. We find that Mr Hoyland did not tell the other panellists that he had already had a conversation with the claimant about her current inability to offer boarding, or that he had told her they could be flexible on the boarding.

39. The interview panel scored the claimant separately using a standard set of marking criteria (pages 152 to 160). All of them gave the claimant good scores and comment for her maths teaching ability, although not perfect scores as she did not have recent experience of teaching maths to this older age group. All of them gave the claimant low scores for her contribution outside the classroom, based on her answers to Mr Hoyland's questions. They all say that she did not answer these questions well or show enthusiasm.

- a. Mr Hoyland noted for overall presence, "*possibly a little gentle for upper school*". His explanation for this was that there are some "difficult characters" in the upper school, such as in bottom maths sets who are reluctant to learn, and the claimant's body language in the interview did not always inspire confidence. He did not ask her any questions about this issue. He said in evidence that he did not intend this comment to relate to her sex. He gave positive comments on maths teaching. He noted, "*I can't see Van offering much outside the classroom*". He scored her 2 out of 5 on qualifications for the post with the comment "*offers little outside the classroom*", and 1 out of 5 for the criterion "as a good all-rounder", with a score of 3 overall. He marked the claimant down for failing to use her initiative and volunteer further information on what she could offer outside the classroom. He confirmed in evidence that he had not asked any specific questions about this outside the questions on the pre-prepared list.
- b. Mr Acheson-Gray also made positive comments about maths teaching. He notes, "*interviewed well and has the skills to teach maths in the Prep school and would have good classroom management, hasn't taught or come across the CE syllabus but I don't see this as a problem. Van has limited skills outside the classroom and possibly wouldn't contribute as much in the full role as Prep school Teacher...at her own admission Van has limited skills on the sports field and may struggle to offer a lot in the full role of a Prep School Teacher*". He also scored her 3 overall. He said that she failed to volunteer information, and confirmed in evidence that the panel did not ask further questions about other things she could offer.
- c. Ms Lyon Taylor noted, "*Vanaja seemed very keen and interested in teaching maths to a variety of age groups within the prep school. She said she was keen to learn and further develop her teaching experience. She would be able to offer some sports coaching but reinforced that this is not an area of strength for her, she did not offer any information about which sports she might be willing to coach. Vanaja is not currently able to commit to boarding (although this may change in the future). She is not able to drive a school minibus. Considering the above she would fit well into the teaching staff but offers little outside of the classroom... Vanaja did not give examples about ways in which she could participate in life outside the classroom...*" She also scored her 3 overall, with a 4 for maths and a 1 for school life. In evidence, she explained that the chance to ask questions was the opportunity to raise things the interviewee wanted to talk about. She also uses the word "gentle" to describe the claimant, but said this could be a positive thing.

40. The claimant says that this was the most awkward interview she had ever

participated in, she felt Mr Hoyland's questions were deliberately intended to make her appear unenthusiastic and negative, and she left the interview feeling despondent.

41. Mr Crossley was interviewed on 26 March 2019. He was asked the same questions, using the same question template (pages 162 to 167). He was able to give some maths teaching examples in his answers to questions. All of the interview panellists say that he came over well and was enthusiastic.

- a. Mr Hoyland noted that Mr Crossley had a *"firm and strong"* handshake. He explained in evidence that this inspires confidence. He noted overall presence was *"very strong"*. He commented, *"An all-round schoolmaster with energy and commitment. Lots to offer in the classroom/boarding/adventure/sport activities."* He scored him as a 5 overall, with lower scores in only 2 categories – a 3 for maths and a 4 as a teacher
- b. Mr Acheson-Gray noted that Mr Crossley came across well in interview and would be a great fit for Pinewood. He commented, *"Neil would fit most of the post perfectly with skills in boarding, games, extra curricular activities and would be happy to teach maths in years 5-7. He would go down really well with children + parents and would be a great addition to the common room"*. He scored Mr Crossley a 4/5 out of 5 overall.
- c. Ms Lyon Taylor noted he was *"keen to offer boarding/form tutor role"*, he would need to develop classroom style and understanding of subject, and he was a *"good all-rounder who to develop teaching ability with improved effort"*. She scored Mr Crossley a 4 for qualifications for the post (not split out between maths and other contribution as she did for the claimant), and she scored him 4/5 out of 5 overall.

42. The interview panel completed their scoring of Mr Crossley and then discussed their decision, which took around 20 minutes in total. The decision to appoint Mr Crossley was unanimous. The evidence from all three panel members was that they recognised Mr Crossley had less experience of maths teaching than the claimant, but he would offer more outside the classroom, and this led to him being appointed.

43. Mr Hoyland's oral evidence was that "character" is a big part of the appointment process, once they are satisfied that a candidate can teach their subject. He described looking for charisma, presence and dynamism, and said it is "presence" that most impresses him. He gave some examples of recent appointments of women who had character and presence. He said the interview is used to help see if a candidate is "the right sort of person for Pinewood", not a one-dimensional person whose offering is limited to the classroom. Mr Hoyland uses the word "schoolmaster" a number of times when describing Mr Crossley and what he was looking for – in his witness statement (paragraph 35), notes of the interview with Mr Crossley (page 162), and during the grievance appeal interview (page 275 – both in describing Mr Crossley, and explaining what makes a "complete schoolmaster"). Mr Hoyland said this was a "bold" appointment in relation to maths teaching with an element of risk, but they felt Mr Crossley would be fine in the classroom.

44. Mr Hoyland could not remember exactly, but thinks they offered Mr Crossley the role before he left site, based on the way claimant informed shortly afterwards. Mr Hoyland sent the claimant an email at 10.37 the same day, which said, *"Thank you for coming to see us the other day with regards to the Prep vacancy and Maths teaching. Having considered our options I am sorry to say that your application was not successful. You did impress us at interview and I am sure there may be further opportunities here at Pinewood in the years to come for you to teach higher year groups. Can I thank you for your Interest In the post and hope this news will not be too disappointing, I will endeavour to catch you before we break for Easter."*

45. On 27 March Mr Hoyland asked the claimant to go to his office during drinks before the end of term lunch. Mr Hoyland says his intention was to check on the claimant's welfare, and it was not intended he would give formal feedback. The claimant said she was disappointed, and Mr Hoyland went on to provide some feedback. The claimant claims that he made comments to her during this conversation which were acts of discrimination or harassment.

a. The claimant says he again said *"well, you know Ed Benbow"*, and then after a pause compared her to three other male teachers, saying, *"the thing is Van, let's look at the Maths department. You have Sam Downe, and Mark Smith. They are big characters. And then you've got Alex Newcombe" (who isn't a maths teacher).* Mr Hoyland accepts that he did mention other male maths teachers, and also Mr Newcombe who did not teach maths as he was his most recent hire. He says this was to point out their extra-curricular and other responsibilities. In evidence Mr Hoyland confirmed that he had also recruited a female teacher in Prep at the same time as Mr Newcombe, and that she also had character and presence, but he did not name her at the time. Mr Hoyland confirmed that he talked about "big characters" during this conversation, and we note he also used similar words in his explanations of what he was looking for when giving evidence at the Tribunal. We therefore find that this part of the conversation did occur as described by the claimant.

b. The claimant also says that Mr Hoyland said he, *"could have swapped the games responsibilities around, Van, but... [and then tailed off]"*. Mr Hoyland did not deny saying this, but explained in evidence that he did not go on to finish the sentence, and this would not have solved the problem.

46. The claimant says she was upset after this meeting, and cried when she got home. She had been told the issue wasn't about teaching maths or games, it was not being a "big character" which meant she did not get the job. She was not told who the successful candidate was, but as Mr Hoyland had compared her to four men she assumed that a man had been given the job. She said she felt she had been compared with successful male teachers and told she was not them, and this indicated that Mr Hoyland had a man in mind for the job. Her evidence was that this made her feel belittled and inadequate, and that she was not worthy to have the job because she was not a man.

47. The claimant was working 4 days per week at this time. On 27 March 2019 she had sent an email to Mrs Hall, stating *"Further to our conversation yesterday,*

*I would like to become a full time member of staff and increase my days from 4 to 5 from Sep 19.*" She says Mrs Hall had told her that two teachers were looking to decrease their hours. It appears that the claimant did not get a reply to this email.

48. The claimant became more upset and more angry about the maths teacher recruitment process after she realised it was Mr Crossley who had been appointed, and she found out he was a games teacher with no maths or classroom teaching experience. She raised concerns and questions about the process in an informal letter to Ms Ranstead on 29 April 2019.

49. Ms Nicky McAvoy (the Bursar) sent a response to this letter on 2 May 2019. Her evidence was that Ms Ranstead drafted the response, she checked it, and she also sent it to Mr Hoyland to check. They also had a meeting with Mr Hoyland before finalising the letter, and he did not require any changes to be made. Mr Hoyland said in evidence that he was not involved in drafting this letter, but we find that Ms McAvoy's version of events is correct. In response to the claimant's question about boarding duty, the letter states, *"I am sorry if it was not clear in the email sent to all staff on 11<sup>th</sup> March that an ability to complete a boarding duty was still part of the requirement for the Prep Teacher role. I understand from your letter that Philip Hoyland indicated to you that the boarding duty was open to negotiation, but the ability to commit to this duty was still taken into account when the selection panel made their final decision. We are a boarding school and Prep School teachers are expected to be involved in boarding. We need to provide comprehensive support to this important part of our business."*

50. The evidence from the interview panel was that boarding was not an essential requirement, although as noted above it did appear on some of the scoring sheets. Mr Acheson-Gray said it was a useful additional thing to have if candidates could offer it, but denied it was part of the scoring system. Ms Lyon Taylor said it was noted but she did not think it affected the scoring, boarding was an add-on.

51. Boarding duty at the school involves a commitment of one evening per week. There are two male and two female members of staff on duty each evening. This involves being on site until up to 9.45pm, not 10.30pm as stated by the claimant. In her evidence she clarified that she had been told by people who did boarding duty that they may not get home until 10.30pm.

52. The claimant has two young children who attend the school. The claimant takes primary responsibility for caring for the children in the evenings. Her evidence was that her husband has a job which means he is not around in the week. Her younger child is in year 3, and not eligible to board until year 5. She said that she would be able to do boarding duty once her younger child is in year 5, as both children could come with her and board that evening.

53. The split of men and women doing boarding duty was clarified through cross-examination questions put to the claimant. At the time of these events, 9 women and 10 men did boarding duty (the claimant did not know the exact figures, but did not disagree with this). Of the women, 6 were teachers and 3 were "gappers" (individuals working during a gap year). Of the female teachers

who did boarding duty, 2 of them had young children at the time who were below boarding age.

54. There were some without prejudice discussions with the claimant, and on 10 May 2019 she met with Ms McAvoy and Ms Ranstead. They said that two members of staff in Pre-Prep were looking to reduce their hours and offered her an additional day of teaching in Pre-Prep in return for signing a settlement agreement. We did not have any evidence about which teachers were looking to reduce their hours and how an increase in the claimant's hours would have been arranged. However, the fact the respondent was able to make this offer indicates that an additional day of teaching was available and they could have accommodated the claimant's request to increase her hours at this time.

55. The claimant rejected this offer, and submitted a formal grievance. Her grievance and grievance appeal were not upheld. The claims relating to the grievance process were withdrawn by the claimant, so we make no further finding about this process.

56. There was no further communication with the claimant about her request to increase her hours, originally made on 27 March. The grievance outcome was provided to her on 6 June 2019. The claimant appealed on 10 June. On 11 June she sent a further email to Mrs Hall (page 257), stating "*Following on from our conversation where you asked members of staff to put in requests for next year, I just wanted to confirm that I am keen on returning to work full time, and that if at all possible, I would very much like to be a form teacher in Key Stage 1.*" The claimant did not receive a reply to this email. The claimant also says that she was told by Laura Little, one of the teachers who had wanted to reduce her hours, that both of them had been told they were not able to do so.

57. The grievance appeal decision was provided to the claimant on 12 July 2019. She submitted her ET1 on 17 July 2019, which included a victimisation claim relating to the request to increase her hours. On 16 August 2019 Ms McAvoy emailed Mrs Hall saying that the school was keen to accommodate the claimant's wishes to increase her hours, and asking her to contact any teachers who had said they may be interested in reducing their working hours to ask if they wish to reduce hours on a Wednesday. Mrs Hall contacted two teachers the same day about reducing hours on a Wednesday. One individual replied saying, "*I would still like to reduce my hours but not mid week as it would be disruptive for both class and home, dropping my current half day would be the option I would be happy to take but thank you for the offer*". The other (Ms Little) replied saying, "*Thank you for calling today to discuss reducing my hours. I would like to confirm at this point in time I want to keep my hours the same as last year which would be 3 and a half days. Thank you for mentioning this to me but I just feel at this moment in time it would not benefit me.*" The claimant gave oral evidence that she had been contacted by Ms Little in August, who told the claimant that she had been asked if she still wanted to reduce her hours, but it was too late for her to do so.

58. Ms McAvoy's evidence was that the issue of increasing the claimant's hours was not progressed because of the grievance and appeal process. The outcome of the process might have been to uphold the grievance, in which case the claimant might be offered a Prep role. If the claimant had been given more Pre-

Prep hours, this would have made it more difficult to replace her if she was given a Prep role as the outcome of the grievance process. Ms McAvoy confirmed that the claimant was teaching 4 days a week and wanted to increase this to 5 days a week, so an increase in hours would have meant replacing a 5 day rather than 4 day a week position. The Judge asked Ms McAvoy why they could not have increased the claimant's hours irrespective of the outcome of the grievance process, and she said they did not think like that at the time. The claimant was not told at any point that her request to increase her hours had been put on holding pending the outcome of the grievance process. The grievance appeal outcome was provided on 12 July, and she was then on holiday for 2 weeks. Ms McAvoy said they did what they could to provide an extra day after the claimant was not interested in two settlement offers made in August (which involved a severance package).

### Applicable law

59. Discrimination in employment is regulated by the Equality Act 2010 ("EA"). Sex is a protected characteristic under s11 EA.

60. We have considered the burden of proof provisions at 136 EA and reminded ourselves of the relevant case law:

#### *136 Burden of proof*

- (1) *This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

61. The key cases providing guidance on the burden of proof provisions are ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, (EAT), ***Igen Ltd and others v Wong and other cases*** [2005] IRLR 258 (CA), and ***Hewage v Grampian Health Board*** [2012] IRLR 870 (SC). A difference in status and treatment is not sufficient – there must be something more from which a reasonable tribunal could properly conclude that an inference of discrimination can be drawn (***Madarassy v Nomura International*** [2007] IRLR 246).

62. The key question is whether the facts show a prima facie case of discrimination and, if so, whether the respondent's explanation is sufficient to show there has not been discrimination. We are not to apply this in a mechanistic way, and there is rarely direct evidence of discrimination. The essential issue is finding why the claimant was treated as she was. However, under the burden of proof provision so we do require some facts to indicate that there may have been discrimination before we scrutinise the respondent's explanations. A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the respondent or for the Tribunal to find that this treatment was unlawful discrimination.

63. **Harassment** is defined in section 26(1) EA:

- (1) *A person (A) harasses another (B) if—*
  - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
  - (b) *the conduct has the purpose or effect of—*
    - (i) *violating B's dignity, or*
    - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

64. Conduct will be harassment if it was done with the purpose of violating dignity or creating the proscribed environment. Otherwise, the Tribunal must assess whether the conduct had this effect on the claimant. In deciding whether conduct had this effect, the Tribunal must take into account the perception of the claimant (a subjective test), whether it is reasonable for the conduct to have that effect (an objective test), and the other circumstances of the case. A one-off act can be an act of harassment if it is sufficiently serious.

65. **Direct discrimination.** Under section 13 of the EA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

66. A claimant can rely on an actual comparator or a hypothetical comparator. Under section 23 EA, on a comparison of cases there must be no material difference between the circumstances relating to each case.

67. Harassment and direct discrimination are mutually exclusive, meaning that a particular act cannot be found to be both types of discrimination at once. Under section 212(1) EA, "detriment" for the purposes of direct discrimination does not include conduct which amounts to harassment.

68. **Indirect discrimination** is defined as follows under section 19 EA:

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
  - (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
  - (b) *it 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 it,*
  - (c) *it puts, or would put, B at that disadvantage, and*
  - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim."*

69. This requires the Tribunal to identify: a provision, criterion or practice ("PCP") which is applied to both the claimant and to other persons who do not share the relevant protected characteristic; a particular disadvantage that is caused to those sharing this characteristic; and a disadvantage caused to the claimant. If the Tribunal finds all of these elements, this will be unlawful discrimination unless the respondent can justify the PCP.



70. **Victimisation** is defined in section 27 EA:

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
- (a) *B does a protected act, or*
  - (b) *A believes that B has done, or may do, a protected act.*

71. A protected act includes bringing proceedings under the EA, giving evidence or information in connection with proceedings under the EA, doing any other thing for the purposes of or in connection with the EA, or making an allegation (whether or not express) that A or another person has contravened this Act.

72. A victimisation claim does not require a comparator. The claimant must have been subjected to a detriment “because” of the protected act, rather than for another reason, which involves asking why the respondent acted as it did. This is not simply a “but for” causation test (***Chief Constable of West Yorkshire Police v Khan*** 2001 ICR 1065, HL). In accordance with other types of discrimination, detrimental treatment amounts to victimisation if a protected act is one of the reasons for the treatment, but it need not be the only reason (paragraph 9.10 EHRC Employment Statutory Code of Practice). Employers are potentially able to protect their position in litigation without committing victimisation, if they act ‘honestly and reasonably’ to preserve their position in pending discrimination proceedings (***Khan***, Lord Hoffman).

## Conclusions

73. This is a case about a recruitment process and its aftermath. We are mindful that our role is not to decide whether the employer made a fair recruitment decision, or even a rational decision. We also make no findings about the performance of the successful candidate after appointment. Our role is limited to deciding whether there has been any unlawful discrimination.

74. We start with **direct discrimination**.

**75. *Did the respondent subject the claimant to the following treatment and, if so, was this less favourable treatment than the treatment of Mr Crossley?***

- a. *The failure to require the claimant to submit a formal application form and/or written reference.* This did occur. It was less favourable treatment, as Mr Crossley was asked to submit an application form and written references.
- b. *The decision to forego any lesson observation as part of the selection criteria.* This did occur. However, there was no lesson observation for either candidate, and we find this was not less favourable treatment.
- c. *The Headmaster’s selection of the interview panel and, in particular, the exclusion from that panel of the Director of Education, Mrs Hall.* This did occur. We accept the respondent’s evidence that this was done because Mrs Hall was the claimant’s line manager, and she was replaced by Ms Lyon Taylor who would be the line manager of the successful candidate. There was no less favourable treatment of the claimant, as she and Mr

Crossley had the same interview panel.

- d. *The panel's scoring, which was based upon different criteria to those specified in the job advertisement and which skewed the weighting in favour of the successful applicant's sporting prowess, rather than in the claimant's favour as a result of her maths teaching.* We find that this did occur in relation to the questions asked by Mr Hoyland. These questions focused on specific games coaching of boys in rugby and cricket, whereas the internal advertisement (and the claimant's conversation with Mr Hoyland on 12 March) simply referred to a games responsibility. There were questions about minibus driving, which had not been specified in the internal advertisement. There were no specific questions about maths teaching.

Both candidates were asked the same questions. However, we find that this was less favourable treatment of the claimant. This is because a number of the questions were tailored to Mr Crossley's strengths and the claimant's weaknesses. The respondent submits that the scoring addresses the multi-dimensional aspects of the role, and the criteria are unremarkable. We do not agree, as the scoring process needs to be considered in the context of the questions used to assess those scores. The claimant specialised in teaching maths, Mr Crossley had never taught maths, and there were no specific questions about maths teaching. Mr Crossley was a games specialist who was Head of Boys' games and due to be in the UK on a school rugby tour, the claimant had no experience of coaching boys' games such as rugby and cricket, and there was a specific question about coaching boys' rugby and cricket. Mr Crossley held a category D1 driving license, the claimant was a nervous driver, and there was a specific question about minibus driving. The claimant was not asked any questions about other extra-curricular activities which might be areas of strength for her, such as drama, music or girls' sport. We also note that the claimant would have prepared for the interview based on the internal advertisement which was for a maths teacher with additional responsibilities, whereas Mr Crossley was invited to interview based on his CV which focused on sport.

- e. *The Headmaster's questions at interview, which were overtly biased against her as a female candidate, including:*
- *The implied lack of credibility for a female teacher to instruct year 8 boys in rugby and/or cricket.* The claimant was asked about coaching boys' rugby and cricket, but we do not agree that this question was overtly biased and/or included an implied lack of credibility. The written question specifically states that there is no reason boys' sport cannot be managed by a female teacher.
  - *Questions around matters that were not part of the job description (for example, a candidate's willingness to drive a minibus).* The claimant was asked this. As noted above, this was less favourable treatment as it was a strength of Mr Crossley and a weakness of the claimant. However, this was not overtly biased against her as a female candidate – there is no reason why women cannot drive a minibus.

- f. *The Headmaster's comments to the claimant on 27 March 2019, as set out in paragraphs 21-24 of the claim form.* We deal with this below under the claim for harassment. An act cannot be found to be both direct discrimination and harassment, and this is not an incident where there can be a comparison with the treatment of the comparator Mr Crossley.

**76. Are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?** The claimant's case is essentially that the selection process and interview questions were skewed in order to ensure that she did not succeed, this was done by Mr Hoyland, and was done because he preferred a male candidate for the role. We have therefore considered whether there is any evidence which shows that Mr Hoyland's treatment of the claimant could have been influenced by her sex. We have considered this carefully, and find that there is. We have looked in particular at comments made during and after the selection process. At this stage we are considering whether there are facts which *could* lead us to conclude that a difference in treatment was because of sex – not making a finding that there was sex discrimination. The relevant facts are as follows:

- a. The description of the claimant as, "*possibly a little gentle for upper school*" in Mr Hoyland's interview notes. The explanation for this was doubt over whether the claimant could handle difficult older children, but was not based on anything the claimant said or was asked about at interview. Although Mr Hoyland denied that this was his intention, we find that the word "gentle" is a stereotypically female characteristic, and was used to describe the claimant based on an assumption rather than evidence. This can be contrasted with the "*firm and strong*" handshake noted for Mr Crossley.
- b. The comparisons made with Mr Benbow at the interview and the discussion on 27 March, together with the comment about "*big characters*" used while making a comparison with 3 other male teachers. We accept that Mr Hoyland has interviewed and appointed women as well as men as Prep school teachers, but find it notable that he chose to use men only as examples of "big characters". This included a recent male hire who was not a maths teacher, without using the example of a female teacher hired at the same time.
- c. The repeated use of the word "schoolmaster", not only in describing the successful male candidate but also as a more general description of what Mr Hoyland was looking for in a "complete schoolmaster". This is a term that only applies to men, and indicates Mr Hoyland's view of what he was looking for to replace Mr Benbow.
- d. Repeated use of words such as "dynamism", "charisma" and "presence" when describing the successful male candidate, and when Mr Hoyland was explaining to the Tribunal what he looks for in a successful Prep school teacher. We accept that women may also possess these characteristics, and that Mr Hoyland has hired female teachers. However, we find that these are stereotypically male characteristics,

particularly the term “presence”.

77. In isolation, each one of these facts would not necessarily be sufficient on their own to show that the claimant’s treatment could have been influenced by her sex. However, taken together, we find that these facts could lead us to conclude that Mr Hoyland’s treatment of the claimant was because of sex. They indicate that Mr Hoyland had a male candidate in mind for the post, or alternatively someone with stereotypically male characteristics, in order to replace the “big character” of the male teacher Mr Benbow. These facts could lead us to conclude, properly and fairly, that the claimant was not regarded as a good candidate because she is a woman. This means that the burden of proof has shifted to the respondent to prove a non-discriminatory reason for the less favourable treatment of the claimant.

**78. *If so, what is the respondent’s explanation? Can it prove a non-discriminatory reason?*** We have considered the respondent’s explanations carefully and make the following findings in relation to the two incidents of unfavourable treatment that we found took place.

79. Firstly, the failure to require the claimant to submit a formal application form and/or written reference. We have found that this did occur and it was less favourable treatment. The respondent’s explanation is that an application form and written references were required for Mr Crossley for safeguarding purposes, as he was an external candidate. They were not necessary for the claimant as she was an internal candidate. The form and written references were seen by Mr Hoyland, but were not passed on to the interview panel. We accept the respondent’s explanation and find that this treatment was not because of sex.

80. Secondly, the panel’s scoring. We have found that this was less favourable treatment because a number of the questions were tailored to Mr Crossley’s strengths and the claimant’s weaknesses, and did differ from the internal advertisement and the information provided to the claimant during her conversation with Mr Hoyland on 12 March. As noted above, it is not for the Tribunal to decide whether the process was generally fair, or whether we agree with the decision on who to appoint. The respondent can also decide to recruit a sports specialist to a maths teaching role if they wish to do so. However, the less favourable treatment of the claimant requires explanation.

81. Having considered the issue carefully, we do not accept the respondent’s explanation as to why the claimant was treated as she was in relation to the questions and scoring on wider contribution to extra-curricular activities.

- a. A specific question about coaching boys’ rugby and cricket, as opposed to a more general question about games teaching, would obviously favour Mr Crossley - a male teacher who was a sports specialist. The respondent put forward a case that they were looking to replace Mr Benbow’s exact responsibilities, but this was not borne out by the evidence – the claimant was marked down on her general contribution, not just on this specific issue, and Mr Hoyland later told her that they could have swapped the games responsibilities around. We do not accept the respondent’s explanation that this question was included in order to ensure an exact replacement for Mr Benbow.

- b. A question about driving a minibus was added by Mr Hoyland to the list provided by Ms Ranstead. This was not mentioned in the internal advertisement, and we did not have a clear explanation from the respondent as to why this very specific question was added twice to the list of interview questions, when other wider aspects of Saturday duties had been removed.
- c. The claimant was asked narrow, limited questions on the topic of wider contribution. She was not asked any general questions about other things she could contribute, and a wider question about Thursday activities in the list provided by Ms Ranstead was removed by Mr Hoyland. The explanation for this is that the claimant was expected to show initiative and use the opportunity to ask questions at the end of the interview to sell what else she could do. We do not accept this explanation. The claimant was heavily marked down for answers to narrow questions that favoured Mr Crossley's skills and CV, and there was no attempt to ask her further questions which would bring out her skills and enthusiasms. Reliance on the ability to ask questions at the end of an interview is an implausible explanation for this treatment.

82. We therefore find that the respondent has failed to prove a non-discriminatory reason for the claimant's treatment in relation to the interview panel's scoring. The very specific questions on extra-curricular activities were put together and asked by Mr Hoyland. These questions very clearly favoured Mr Crossley and disadvantaged the claimant, and led to her obtaining low scores from all of the interview panel. We reject the respondent's explanations for this treatment. We find that the questions which led to the panel's scores were designed and asked in this way in order to favour Mr Crossley and disadvantage the claimant, and draw the inference that this was because of the claimant's sex. Her claim of direct discrimination succeeds on this point.

83. Next the claim for **harassment**.

84. We are considering the comments made to the claimant on 27 March 2019. As already noted, an incident cannot be both direct discrimination and harassment. The claimant provided a list of incidents which she said were both direct discrimination and harassment. We have considered the direct discrimination claims first. We have found one incident of direct discrimination. The incidents which we found were not less favourable treatment would also not meet the test for harassment, and we have accepted a non-discriminatory explanation for not asking the claimant for an application form and written references. From the list of issues, this leaves "*The Headmaster's comments to the claimant on 27 March 2019, as set out in paragraphs 21-24 of the claim form*".

85. ***Did the respondent engage in unwanted conduct?*** The actual comments alleged to have been made are in paragraphs 21b and 24 in the claim form, as follows: "*He illustrated this by comparing me to three people who he felt did meet the standard, all of whom were men. He said "the thing is Van, let's look at the Maths department. You have Sam Dawne, and Mark Smith. They are big characters. You've got people like Alex Newcome .. ,"* and tailed off." (para 21b);

*"Philip Hoyland acknowledged during this conversation that I had said that I would coach the specific games he had mentioned in the interview. He also said that he "could have swapped the games responsibilities around, Van, but ... [and then tailed off]" (para 24).*

86. We have found that these comments were made. We also find that they were unwanted conduct. Although Mr Hoyland may have regarded this as providing interview feedback, the claimant was clearly upset by the comments made and, in particular, the comparison with a list of male teachers.

87. ***Was the conduct related to the claimant's sex?*** We find that these comments were related to the claimant's sex. In particular, we find that the claimant was compared specifically to three male teachers who were named as "big characters", in the context of a discussion which had started with the comment "you know Ed Benbow...". Mr Hoyland did not name any female teachers. The respondent submits that this was logical. However, we do not accept Mr Hoyland's explanation that he was simply naming the main maths teachers and his most recent hire. He failed to name a female teacher who had also been hired most recently. The claimant was being told that it was her "character" that meant she was not appointed, not her inability to teach boys' games. We have noted that the main thing Mr Hoyland said he was looking for was "presence", which is a stereotypically male characteristic. We find that the claimant, as a female teacher, was being compared to male "characters" as an explanation of why she was not appointed to the role.

88. ***Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?*** We do not find that Mr Hoyland had this purpose when he made these comments. However, we do find that the comments had this effect on the claimant. This is not the most serious example of harassment, but we have accepted the claimant's evidence that she felt belittled and unworthy of having the job because she was not a man. Although this was a one-off incident, we find that this would have violated her dignity and created the proscribed environment for her. We have also considered whether it was reasonable for the conduct to have this effect, having taken into account the circumstances of the case. In isolation, it may not have been objectively reasonable to regard these comments as having this effect. However, the comments were made in the context of an interview process that we have found was directly discriminatory. The claimant was already disappointed and upset by her treatment during the interview, and the comments were made during feedback about that interview. We therefore find it was reasonable for the comments to have this effect, in all the circumstances.

89. Next the claim for **indirect discrimination**

90. ***Did the respondent apply the following PCP generally? The manner in which the job specification and/or description for the role included the following unconnected, severable responsibilities and tasks – the requirement to undertake duties in connection with boarders at the School which may have necessitated work until 10.30pm.*** We find that this PCP was

applied generally – although it would only necessitate work until 9.45pm. The internal advertisement stated that the job would involve boarding duty. The letter from Ms McAvoy of 2 May specifically states that, “*an ability to complete a boarding duty was still part of the requirement for the Prep Teacher role...I understand from your letter that Philip Hoyland indicated to you that the boarding duty was open to negotiation, but the ability to commit to this duty was still taken into account when the selection panel made their final decision*”. This letter was seen by Mr Hoyland before it was sent to the claimant. Mr Hoyland did tell the claimant before the interview that they could be flexible about boarding, but this was not communicated to the interview panel. The claimant’s inability to commit to boarding at present was noted by Ms Lyon Taylor, and the panellists all noted a willingness to do boarding duty as a positive for Mr Crossley. The respondent has argued that boarding duty was not a requirement for the role. However, based on this evidence, and in particular the categorical statements in the letter of 2 May, we find that it was a PCP that was specified in the internal advertisement for the role and was applied generally.

**91. Did the application of the PCP put other women at a particular disadvantage when compared with men in that fewer women with childcare responsibilities would be able to fulfil such functions in addition to those responsibilities?** It is difficult to assess this from the limited statistics available from the respondent, as by definition every boarding duty must involve 2 male and 2 female teachers. The evidence indicated that 2 out of the 6 female teachers who did boarding duty at the relevant time had young children below boarding age. This is out of 9 female staff members who did boarding duty, compared to 10 men. The respondent submits that this disproves group disadvantage, but we do not agree, as only 2 of the female teachers had young children. In addition, this post was open to external applicants who had sent in speculative CVs, so it is not appropriate to limit the pool to the respondent’s existing workforce. We are able to take judicial notice of the fact that, in today’s society, women are still more likely than men to have childcare responsibilities, and this would mean that women are less likely than men to be able to work after school hours and into the evening. Although participation by men in childcare has been increasing over time, as a Tribunal we are still entitled to rely on common knowledge that women continue to have greater childcare responsibilities than men (see for example *London Underground Ltd v Edwards (No.2)* 1999 ICR 494, CA; *Chief Constable of West Midlands Police v Blackburn and anor* 2008 ICR 505, EAT). We therefore find that the application of the PCP of boarding duty which necessitated work until 9.45pm would put women at a particular disadvantage when compared with men.

**92. Did the application of the PCP put the claimant at that disadvantage in that she has 2 children, the youngest of whom was 7 at that stage?** We find that the PCP did put the claimant at that disadvantage. We accept her evidence that she was unable to work after school hours into the evening until her youngest child was eligible to board, because her husband worked away in the week and she was responsible for childcare.

93. The respondent has not argued justification. This means that the claim for indirect discrimination succeeds.

94. Finally, the claim for **victimisation**.

95. **Did the claimant carry out a protected act?** She relies on her grievance of 13 May 2019. The respondent does not dispute that this was a protected act.

96. **Did the respondent carry out the following treatment because of the protected act? Denying the claimant the chance to teach full time in the Pre-Prep as punishment for having raised a grievance.** We have considered this carefully in light of the oral evidence provided at the hearing. The claimant made two written requests to increase her hours. An increase to full-time hours in Pre-Prep was offered to the claimant as part of a without prejudice negotiation on 10 May 2019. This must mean that an increase to full-time hours was available at that point. The claimant's requests were not addressed until August, after she had submitted her claim to the Tribunal. The explanation for this is that the respondent was waiting for the outcome of the grievance and appeal process, as it would be inconvenient to replace the claimant if she had increased her hours but was then given a role in Prep because her grievance was upheld.

97. We do not find this explanation to be plausible. This reason for not addressing the claimant's request to increase her hours was not explained to her at the time. The Tribunal does not understand why an increase from 4 to 5 days would make it significantly more difficult to replace the claimant if her grievance was upheld and she was given a role in Prep. The respondent submitted that this is equivalent to the situation in *Khan*, and they were simply seeking to preserve their position pending the outcome of the grievance. We do not agree. The respondent was not preserving its position in litigation. Giving the claimant additional Pre-Prep hours would not affect its defence to her complaints. We also do not find that the respondent was acting "honestly and reasonably" in this situation. The explanation does not make sense and so is not reasonable, it was only advanced for the first time in oral evidence at the hearing, and was not explained to the claimant at the time.

98. In accordance with the guidance in *Khan*, we are looking for the real reason the claimant was treated as she was. We find that the real reason was because the claimant had submitted a grievance, and did not wish to withdraw it and enter into a settlement agreement. Full-time teaching in Pre-Prep was available to the claimant in May if she did not pursue her grievance. When the claimant did not want to enter into a settlement agreement, the respondent no longer pursued this opportunity for the claimant – even when she asked again in June. The opportunity to increase hours was no longer available when the respondent finally looked into this again in August. The respondent was not willing to address the claimant's request while her grievance process was ongoing. The claimant's decision to continue to pursue her grievance was a significant influence on the respondent's behaviour. We find that the respondent did fail to deal with the claimant's requests to teach full-time in Pre-Prep because of her grievance, and her claim for victimisation succeeds.

### **Next steps**

99. These findings mean that the claims for direct discrimination and harassment succeed in part, and the claims for indirect discrimination and victimisation succeed.



100. A remedy hearing was provisionally listed for 4 December 2020, to be heard by CVP. The Tribunal will send separate case management orders to the parties for preparation for this hearing. These will include an order for a new Schedule of Loss from the claimant.

101. The Tribunal notes that the claimant's current schedule of loss places injury to feelings in the upper band, which is for the most serious acts of discrimination which have a particularly severe effect on the victim. The claimant may find it helpful to consider the EHRC guidance on how to work out the value of a discrimination claim:

<https://www.equalityhumanrights.com/sites/default/files/quantification-of-claims-guidance.pdf>

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Employment Judge Oliver

Date 5 October 2020