EMPLOYMENT TRIBUNALS

Claimant: Mrs D Taylor

Respondents: Astrea Academy Trust

Heard at: Sheffield (by video link) **On:** Thursday 15 October 2020
Friday 16 October 2020

Before: Employment Judge S Shore
Mr K Smith (non-legal member)
Mrs J Lee (non-legal member)

Appearances
For the claimant: Mr L Bronze, Counsel
For the respondent: Mr D Jones, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The claimant's claim of unfair dismissal was not well-founded. The respondent did not dismiss the claimant.

2. The respondent has not contravened section 39(2)(d) of the Equality Act 2010 by subjecting the claimant to detriment by discriminating against her for something arising from her disability.

3. The respondent has not contravened section 39(2)(d) of the Equality Act 2010 by subjecting the claimant to detriment by applying a provision, criteria or practice that placed her at a disadvantage in comparison with persons who are not disabled.

REASONS

Introduction

1. The claimant was employed as a Teaching Assistant by the respondent from 3 November 2003 to 6 September 2019, which was the effective date of termination of her employment following her resignation. The claimant started early conciliation with ACAS on 4 October 2019 and obtained a conciliation certificate dated 4 November 2019. The claimant's ET1 was presented on 3

December 2019. The respondent is a trust that operates over 20 schools in South Yorkshire and other locations. The claimant worked at Kingfisher Academy in Doncaster.

2. The claimant presented claims of:

    2.1. Constructive unfair dismissal (contrary to section 94 of the Employment Rights Act 1996);
    2.2. Discrimination arising from disability contrary to section 15 of the Equality Act 2010, and;
    2.3. Breach of the duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010).

3. A private preliminary hearing was held on 29 January 2020 when Employment Judge Jones noted that the claimant has arthritis, which was not admitted by the respondent as a disability at the date of the preliminary hearing. At the start of this hearing, Mr Jones (counsel for the respondent) advised the tribunal that the respondent conceded that the claimant had a diagnosis of arthritis dating back to 2017, but that it was not conceded that the physical impairment had a substantial adverse effect on her ability to carry out normal day to day activities or that the respondent knew or ought to have known that the claimant had the physical impairment before 21 June 2019, when the claimant handed the respondent a letter that informed it of her diagnosis. That is a potential defence to both claims of disability discrimination brought by the claimant.

4. Employment Judge Jones identified the following issues, which were agreed by the parties' representatives:

<u>Disability Discrimination</u>

    4.1. Does the claimant have a physical impairment?

    4.2. If so, does it, or did it have a substantial and long-term adverse effect on her ability to carry out normal day to day activities?

    4.3. Did the respondent know or ought it reasonably to have known that the claimant was a disabled person?

    4.4. If so, did the respondent subject the claimant to unfavourable treatment, namely by requiring her to work at Foundation Stage 1 ("FS1") from the term commencing in September 2019?

    4.5. If so, was this because of something arising, namely the inability and/or pain arising from activities such as bending, lifting, working at low levels, sitting and/or kneeling on the floor, and if so, did that arise from the claimant's disability?

    4.6. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

    4.7. Did the respondent apply a provision, criteria or practice ("PCP") whereby the claimant would be required to work at FS1 as a Teaching

Assistant from the term commencing in September 2019, and/or a requirement to be able to bend, lift, work at low levels, sitting and/or kneeling on the floor unaided?

4.8. If so, did that, or would it have placed the claimant at a substantial disadvantage in comparison to persons who were not disabled?

4.9. If so, did the respondent fail to make adjustments to avoid those disadvantages, namely by not requiring her to work on FS1 and/or not requiring her to work actively at low levels or bend and lift excessively and/or to permit the claimant to continue working at Key Stage 2 ("KS2")?

4.10. Did the respondent know, or ought it not reasonably to have known that the claimant was a disabled person and/or that the PCP placed her at that particular advantage?

Unfair Dismissal

4.11. Did the respondent act in the way set out in paragraphs 4 to 17 of the Grounds of Claim (appended to her ET1) and, if so, was that intended or likely to destroy of seriously undermine the relationship of trust and confidence between the parties?

4.12. If so, did the respondent act without reasonable and proper cause?

4.13. If so, did the claimant resign as a consequence?

4.14. Did the claimant otherwise affirm her contract by acting in a manner objectively to indicate that she wished to continue in employment?

Remedy

4.15. What losses has the claimant sustained as a consequence of any unlawful treatment either financially or, in respect of any discriminatory treatment, by way of injury to feelings?

5. EJ Jones listed the case for a three-day hearing to begin on 13 May 2020. That listing was vacated by order of the President of the Employment Tribunals when all hearings were suspended in the wake of the pandemic lockdown in March 2020. It was replaced by a telephone private preliminary hearing before Employment Judge Davies on 13 May 2020 at which the final hearing was listed for two days. This is that hearing.

Law

6. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

7. In the present case, the claimant says she resigned because she read the notes of a meeting that had taken place on 26 June 2019 on 7 August 2019 and believed that if she returned to work for the term that was due to start in September 2019, she would have been dismissed under the respondent's capability policy because of her disability.

8. The House of Lords established that there is an implied term of trust and confidence between employer and employee in ***Malik v Bank of Credit and Commerce International SA*** **[1997] ICR 606**.The term (often referred to as 'the T & C term') was held to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

9. The test was refined by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***. As Judge Burke put it:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

10. Section 136 of the Equality Act 2010 sets out the applicable burden of proof in discrimination claims. The protected characteristic of disability is defined in s.6 of the Equality Act 2010.

11. Section 15 of the Equality Act 2010 defines discrimination arising from disability as follows:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

12. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. In this case the something arising is the inability and/or pain arising from activities such as bending, lifting, working at low levels, sitting and/or kneeling on the floor.

13. The structure of the obligation upon an employer to make reasonable adjustments in relation to disabled employees is found in ss.20, 21, 39 and 136 and Schedule 8 of the Equality Act 2010.

14. By section 39(5) of the Equality Act 2010 the duty to make reasonable adjustments is applied to employers. By section 20(3) that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to her employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

15. By section 21 of the Equality Act 2010, a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

16. By section 39(2) of the Equality Act 2010, an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment because of a protected characteristic, such as disability.

17. By section 136 of the Equality Act 2010, if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The case of ***Project Management Institute v Latif [2007] IRLR 579 EAT*** in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

18. Schedule 8 paragraph 20 of the Equality Act 2010 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

19. It is clear from paragraph 4.5 of the EHRC Employment Code that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

20. "Practice" relates to something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.

21. The requirement on the employer is to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

22. We bear in mind that s.136 of the Equality Act 2010 applies to discrimination cases (its effect in claims of a breach of the duty to make reasonable adjustments is set out in paragraph 17 above). If we find that the claimant has proved facts from which we could conclude, in the absence of any other explanation, that the respondent discriminated against the claimant as alleged, then we must hold that the contravention occurred unless the respondent can show that they did not discriminate against the claimant.

23. We also bear in mind that there is rarely direct evidence of why a person acts in a particular way, particularly in discrimination cases. A person's subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence.

Housekeeping

24. The claimant gave evidence in support of her claim and adopted a witness statement that ran to 84 paragraphs upon which she was cross-examined. The only witness for the respondent was the Principal of Kingfisher Academy ("the School"), Catherine Skinn. The parties produced an agreed bundle of 339 pages. The witness statements and bundle had the names of any students at the School redacted.

25. At the end of the evidence, we heard closing submissions from Mr Jones and Mr Bronze. Mr Bronze produced a helpful skeleton argument, which we considered.

26. We ran through the claims and issues with the representatives. The hearing was conducted by video on the CVP application and ran without technical issues.

27. After we had announced that we would be making a reserved judgment, we listed a remedy hearing with the parties for one day on Friday 19 March 2021. That date can now be vacated.

28. The panel continued to discuss our decision after the parties had left the hearing and made the decision that is contained herein.

Findings of Fact

29. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over another. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made.

30. It was never disputed by the respondent that the claimant was good at her job. She had been at the school for approximately 16 years when her employment ended. She had spent almost the entirety of her career at the School working with KS2 students, who were in year 6, although she confirmed that after she returned from a period of ill health in early 2019, she had been utilised to support and cover for colleagues in in years 1, 2 and 4. That fact is relevant to our decision and reasons.

31. It was never disputed by the claimant that her original letter of appointment dated 3 November 2003 [page 89] described her role as a Learning Support Assistant or that her first statement of terms and conditions of employment dated 5 December 2003 [90] described her role as Classroom Support Assistant. It was not disputed by either party that the claimant had initially been located to work with students in KS1, or that she was soon moved to work with students in KS2.

32. The claimant did not dispute that her most recent contract dated 1 September 2016 [98 – 112] and job description described her role as Senior Phase Assistant or that she had ever had a contact that allocated to a particular student cohort.

33. In November 2017, the claimant was diagnosed with osteoarthritis in both knees. She did not inform the respondent of this diagnosis and continued to work as she always had done. She was prescribed medication that she said was mainly painkillers and anti-inflammatory drugs. She accepts that the first time that she notified the respondent of her physical impairment was by a letter dated 20 June 2019 [62–63], which she handed to Ms Skinn on 21 June 2019.

34. We found the part of the claimant's witness statement that dealt with the impact of her physical impairment not to have been as detailed as we would have wished to see. Her entire evidence on impact was contained in five short paragraphs and can be summarised as follows:

    34.1. She has struggled for some years to pick things up off the floor on a daily basis;

    34.2. She does not kneel down unless absolutely necessary and struggles to sit on the floor;

    34.3. If she has to sit on the floor or kneel down, she requires an aid to sit down and get back up to a standing position, such as a chair;

    34.4. She struggles to sit on low chairs;

34.5. She cannot clean her home at low levels (the example she gave was being unable to clean skirting boards);

34.6. Her pain levels are variable, but with medication, she was able to work with KS2 students "without much issue";

34.7. Her pain was made worse if she had to bend down for long periods, sit or kneel on the floor, and;

34.8. If she did not take her medication, her joints would stiffen and she would struggle to walk without suffering intense pain. She would not be able to bend down or be able to work at lower levels.

35. The significant events in this case happened over a relatively short timescale, given her long service. On 5 June 2019, Ms Skinn invited the claimant to a Stage 1 Absence Meeting, because she had hit a trigger point in the respondent's absence policy. This was not in dispute. The claimant accepted she had hit the trigger point and that there was nothing untoward or problematic to her about being required to attend the meeting. The last incidence of absence that had triggered the meeting had been 16 days' absence beginning on 29 April 2019 following the death of the claimant's father.

36. On 10 June 2019, the claimant met with Ms Skinn about another matter; no minutes of this meeting were produced. It was not in dispute that in May 2019, the management team of the School had discussed reorganising its resources in the light of a forthcoming OFSTED inspection. Neither was it in dispute that the team produced a School Improvement Plan. It also produced a staffing list for the various academic year groups [297-302]. The Plan involved a number of staffing changes that the team felt were required to meet improvement targets that had been set by the previous OFSTED inspection. The perceived risk (which was not disputed by the claimant) was that if the changes were not made, the School may not maintain or improve its OFSTED rating, which could cause roll numbers to fall, loss of income and reputational damage.

37. We do not feel that it is necessary to record findings on the rationale of what the management team decided to do, as Ms Skinn was never challenged on her evidence in chief on the matter. It is enough to record a finding that there were issues concerning the cohort who would be moving to year 6 in September 2019 that required Teaching Assistants to have particular skill sets. The claimant was not one of the four assistants who was chosen as best demonstrating the required skills. It is important to record that it was never the claimant's case that the assessment of the Teaching Assistants came to the wrong conclusion, or should have included her for any other reason that she says she should not have been required to work in KS1.

38. The management team identified that it was important to nurture relationships with the families of students in Foundation Stage 1 ("FS1") in order to engage them in the education of their children. The claimant was identified as someone who had the required skill to do this as demonstrated in her time at the School and in her work before she joined the school. Whilst we appreciate that the claimant had been at the school since 2003 and that her previous experience was historical, we find that it

may still have been relevant. We also note that the claimant never suggested that she did not have the skills in nurturing relationships with families that the management team saw in her. We find that the claimant never disputed the need for a Teaching Assistant to nurture relationships with the families of FS1 students, but that she did think she should not have been chosen.

39. We therefore find that the respondent showed on the balance of probabilities that the School undertook a genuine review of its requirements and resources and made the reasonable decision to move the claimant from her work with KS2 students to FS1 students. We also find that this decision was made before the respondent had any knowledge, or could have been expected to have had any knowledge, of the claimant's osteoarthritis or her status as a disabled person, as the alternative was never suggested. We do not find that the fact that no consultation took place about the change to her role between the School and the claimant before 10 June 2019 to be outside the band of reasonable responses in the circumstances.

40. On 10 June 2019, Ms Skinn told the claimant about what was planned and that she would be required to move from working with Year 6 students (most of whom are aged 11) to FS1 students, who are aged 3 or 4 and are in pre-school/nursery.

41. The evidence in chief of the claimant and Ms Skinn about the 10 June meeting was brief and focussed on different parts of what happened. The claimant says that Ms Skinn told her that, in effect, if she did not accept the new role, there would be a redundancy situation. Ms Skinn's evidence about the meeting focused on the claimant's response to the proposal to move her, which was to express reservations about her ability to work in an FS1 setting; she felt that she did not have the skills or experience to undertake the role. Ms Skinn says that she offered the claimant the opportunity to spend some time in an FS1 setting to "upskill". Ms Skinn says that she asked the claimant to think about the proposed move and come back for a further discussion. She says that the claimant did not mention any concerns about any physical impact that she could foresee in working in an FS1 environment. We find that both sets of recollections are proven to the required standard. It is not unusual for two people to recall different highlights from meetings or for them to best remember the points that most impact on them from an individual or corporate basis. Further, neither witness really challenged the recollection of the other and their recollections are corroborated by the documents in the bundle.

42. The Stage 1 Absence Meeting took place on 13 June 2019. Minutes were taken [57-60]. The accuracy of any of the minutes of any meetings were unchallenged by the claimant. We therefore find that all such minutes are non-verbatim records of the meetings that they purport to record.

43. The claimant attended with her Trade Union representative, Daniel Simpson. In her first exchange with Ms Skinn, the claimant said that she had been feeling OK about being at work until the meeting on 10 June about moving to FS1. She had gone away and thought about it. She was concerned and worried "as I don't have the skills set to be in FS1 as I have spent 24 years in KS2. I am having panic attacks about it". Ms Skinn's response was to tell the claimant that this was not the correct forum to raise the issue of the planned reorganisation and that they should arrange a separate meeting to discuss the move to FS1.

44. The claimant asked if she "still had to go into FS1". Ms Skinn replied that the School would operate with 12 fewer staff in the academic year 2019/20, and one of the roles that was to go was a High Level Teaching Assistant and the alternative to the planned restructure was redundancy. It is not necessary for the purposes of these reasons to record any findings about the remainder of the meeting, as it dealt with the plan to review the claimant's attendance over the following 12 weeks. She confirmed at this hearing that she had no issue with the way the attendance review procedure was conducted.

45. On 17 June 2019, the claimant went to see Ms Skinn and asked for the further meeting about the proposed move to FS1 that had been offered. She asked that her trade union representative be allowed to attend the meeting. Ms Skinn refused the request.

46. The claimant wrote to Ms Skinn on 20 June 2019 [62-63] to request a meeting to discuss the move to FS1. We give weight to the fact that the letter is written ten days after the claimant was first told about the move, as she had had time for the proposal to sink in and to consider her response. We also give weight to the fact that she had taken the advice of her trade union representative and requested that he be allowed to accompany her at the meeting to discuss the proposal to move her to FS1: we find that she had given thought to, and taken advice on, her reaction to the move.

47. We therefore find it significant that the claimant's first comment about the proposed move is that she was dealing with her recent bereavement and was dealing with issues concerning her mental health. She goes on to state that the move was causing her to be stressed and that she was concerned that her mental health may deteriorate and cause further instances of absence.

48. The claimant then stated that:

> *"Additionally, I would like to make you aware that I suffer from arthritis and have some concerns that this may cause problems when working in the more active and smaller environment of the nursery. This may mean that adjustments may need to be considered to avoid this being an issue."*

49. She continued by stating that the change "would likely impact my ongoing health issues" and repeating that she did not think that her skill set was in KS2 and that she would not be best used in FS1.

50. The claimant then stated that she would be open to relocation in the future, as she understood that this may be needed in the future, but was anxious that undergoing such a change so shortly after her return from bereavement whilst managing its consequences would exacerbate the issues she was managing. She requested the adjustment of being allowed to remain in a year group that she felt "confident and comfortable" in.

51. The panel finds that having had advice from her union and time to consider her position, the letter of 20 June is a considered response from the claimant to the proposal to move her to FS1. We find that the thrust of her letter is very much about the impact that the move would have on her mental health, having just returned to work from a period of bereavement and her skills. We find that her mention of her

arthritis is somewhat of an afterthought and that the claimant sets out no specific issues other than "working in the more active and smaller environment of the nursery." She makes no mention of the matters that she cites in her evidence about bending, working at low levels, sitting on the floor and so on. We find that if these matters had been in her mind at the time, she could and would have mentioned them. We also find that given her evidence of the impact on her ability to carry out normal day to day activities was that she had not been able to do pick items up off the floor for "some years", these matters must have been in her mind. We therefore find that the claimant must have considered the impact that her arthritis would have on her work in FS1 and decided that it added relatively little to her reasons for not wishing to move. She also did not rule out the move and said she would consider it in future, once her mental health issues have improved, which strengthens the reasons for our finding.

52. We remind ourselves that the claimant is not claiming that the disability that is at the centre of her discrimination allegations is any form of mental impairment. We find that her real concerns are the fact of the change to working with a cohort of students that she felt she did not have the skill set to cope with and the effect of the change on her mental health.

53. The claimant handed her letter of 20 June 2019 to Ms Skinn on 21 June. On the same date, her union representative, Mr Simpson, sent Ms Skinn and email [64]. In his letter, Mr Simpson asks to be allowed to accompany the claimant at the next meeting to discuss the proposed move to FS1 and noted that whilst he was aware that the School could insist on the move, he was concerned at the effect the move could have on the claimant's "ongoing health issues". Whilst we accept that this could encompass the claimant's arthritis, we find that it does not because of what Mr Simpson wrote next:

> "*I am worried that at this difficult time – Debbie's mental health issues may become exacerbated by a change in the working environment…"*

54. Mr Simpson focused only on the mental health impact, which we find to be a significant indication of the weight that he and the claimant gave to her mental health as compared with her arthritis.

55. Ms Skinn emailed a colleague in HR on 21 June 2019 [64.1-64.2]. In the email, she notes that the claimant had not previously raised the issue of arthritis, but committed to carrying out a workplace assessment to ascertain any reasonable adjustments that needed to be made. On 25 June 2019, the Business Manager of the school asked for a workplace assessment for the claimant in respect of her arthritis.

56. Ms Skinn met with the claimant on 26 June 2019 with the School's Business Manager in attendance. The notes of the meeting [191-196] were not disputed, so we find them to be an accurate non-verbatim summary of what was said. After Ms Skinn had set out the rationale for moving the claimant to FS1, the claimant said that her diagnosis of arthritis had been in 2017, but had not been an issue in KS2. She felt it would be an issue in the nursery setting. She had spoken to her union and believed that arthritis was covered by the DDA (sic) and a referral to occupational health would be needed. The first action point from the meeting was that the

workplace assessment was to be arranged during Autumn Half Term 1 (i.e. between September and the end of October)

57. For the first time, the claimant said that she believed that working in the nursery would involve bending down, working at a low level etc. Ms Skinn responded by saying that the workplace assessment would inform and identify any specific equipment that the claimant might need and provide advice.

58. At this point, we should say that there was a long exchange during the hearing about workplace assessments and occupational health assessments. The claimant's position was that she should have had an occupational health assessment, which would have looked at her condition and any adjustments that may be needed *before* she started work in FS1. Ms Skinn's position was that the claimant would be assessed in situ in the workplace in FS1. We find Ms Skinn's position to be one that is within a reasonable band of responses.

59. During the meeting, the claimant said that she had always had good performance management and was a key member of the KS2 team, so she didn't understand why she was being moved. Ms Skinn's response is the key exchange in the case, so I reproduce the minute of that part of the meeting in full [193]:

> *"CS reiterated that forming relationships with parents in the Nursery is a key area of school development and this has been identified as one of [the claimant's] skill sets. An inability to fulfil the role would be a capability issue and therefore this would be dealt with under the Capability Procedures."*

60. Messrs Bronze and Jones were at polar opposites in their interpretation of what the paragraph above meant. This was important, as the claimant based her decision to resign on her understanding of the meaning of the paragraph. Mr Bronze submitted that the only logical interpretation of the paragraph, given what was said before it, was that "capability" referred to the claimant's capability to do the FS1 job as a person with arthritis. Mr Jones submitted that, as the preceding part of the meeting had dealt with the issue of arthritis and agreed that a workplace assessment would be arranged, the question of disability was closed. Further, Mr Jones Submitted that in light of the claimant's concerns about the relevance of her skill set to the new role, 'capability' could only mean the claimant's skill set as her capability to do the job. On balance, we find Mr Jones' argument prevails. A plan to address the impact of the claimant's medical position had been resolved. Her doubts about her ability to do the job had not.

61. We find that the claimant was given the information that was set out in the notes of the meeting on 26 June 2019 at the meeting. We make that finding because Ms Skinn's evidence was firm on the point of what the claimant had been told, and the claimant herself confirmed that the words had been used at paragraph 20 of her witness statement. Of course, the claimant says that the words we have quoted in paragraph 59 above were the reason she resigned when she read them on 7 August 2019. However, we find that the words were said to her on 26 June and that her evidence in cross examination did not meet the standard of proof to show that she had not understand what she had been told.

62. The meeting ended with the claimant accepting an offer to spend 3 days in the School's FS1 nursery and a day in another of the respondent's schools at FS1 level to observe practice. We find that she left the meeting having agreed to a workplace assessment in the new term that was to take place in the working environment and that she would have four sessions with FS1 students before the end of term. We find that there was no written communication from the claimant to Ms Skinn between 26 June 2019 and her resignation latter.

63. We find that the claimant made absolutely no mention of her mental health or the issues she was having following the death of her father at the meeting on 26 June 2019.

64. Ms Skinn sent the claimant a letter dated 3 July 2019 [67] that confirmed the points discussed at the meeting on 26 June: the claimant's new role, her arthritis, the differences in curriculum and learning between KS2 and FS1 and the timings of the setting and how it would work. The letter also recorded that once the claimant was in the nursery, a workplace assessment would be actioned. A copy of the notes of the meeting were enclosed. The claimant says she was given these notes on 8 July 2019, but we prefer the evidence of Ms Skinn that the notes were enclosed in the letter of 3 July 2019 because the letter says that they were.

65. There was a conflict of evidence about the trial sessions that the claimant spent in the nursery of the School and its sister school. The claimant's evidence in chief on the trial sessions was:

> *"I agreed to working three days in the nursery on a trial basis which was completed in July 2019. I was in extreme pain throughout the trial from my arthritis. Catherine Skinn did ask how my first day had gone in nursery and I told her it had caused a lot of pain. Catherine's response to this was 'oh'. She then walked away from me."*

66. She returned to the issue of the trail sessions in the part of her witness statement that addressed the documents that had been produced by the respondent. One of these documents was an extract from a diary kept by Ms Skinn that covered the period 10 June 2019 to 17 July 2019. Part of the diary was typed and Ms Skinn said it was cut and pasted from a document describing the chronology of the process with the claimant. We find that to be a plausible explanation and find that the respondent can rely on the diary entries as corroboration of her written and oral evidence.

67. The claimant's rebuttal of Ms Skinn's account was at paragraphs 49 to 53 of her statement, but only dealt with the meetings on 10 June 2019, 17 June 2019, 24 June 2019 and 10 July 2019. She accepts that she met with Ms Skinn on 10 July and agrees that she said that the nursery at the sister school was a good one. She says that Ms Skinn did not ask her how it had affected her arthritis.

68. Ms Skinn's evidence gave the date of the first trial session (3 July 2019), but made no mention of any conversation with the claimant. She said the next session was on 8 July at the sister school. She said she spoke to the claimant on 10 July about that session and that the claimant had said she had enjoyed it; it had been very busy

and she liked how the FS1 and FS2 children were together. Importantly, Ms Skinn said that the claimant did not mention being in any sort of pain.

69. On 11 July 2019, the claimant undertook a session with FS1 at the School. Ms Skinn says that the claimant undertook no physical working at low level. It was school sports day and Ms Skinn said she spoke to the claimant, who said that it had gone great, but that it was a bit tiring.

70. The claimant's final session was a whole day of observation on 17 July 2019. After school, the claimant attended the year 6 leavers' prom and "was seen dancing and sitting on low-level PE benches." She was also seen carrying pizzas into the room.

71. The panel preferred Ms Skinn's evidence to that of the claimant on the events of the trial days. We make this finding because the claimant's evidence in chief was brief, vague and inconsistent, whereas Ms Skinn's evidence was detailed and coherent. We find it unlikely that the claimant was accurate in her account under cross-examination that she only spoke to Ms Skinn about the trail sessions once – on the first day, and then did not speak to her again because Ms Skinn was avoiding her. At that point, the claimant had indicated that she was going to give the new role a trial (even if she was privately concerned) and we see no credible reason why Ms Skinn would seek to avoid the claimant. We therefore find that the claimant did not complain about being in pain after the first trial session on 3 July.

72. We also find that the claimant said she was enjoying the trial on 10 July and 17 July. We find that Ms Skinn's notes [210-212] are reliable.

73. We therefore find that at the end of the Summer 2018/19 school year, the respondent had no reason at all to believe anything other than that the claimant would be coming back to work in FS1 in Autumn 2019 and would have a workplace assessment during the first half term.

74. The claimant's evidence that she did not read the notes of the 26 June 2019 meeting until 7 August 2019 was not challenged. Neither was it challenged that she composed a resignation letter dated 7 August 2019 [69-70] addressed to Ms Skinn and a letter addressed to the governors of the School of the same date [68]. The claimant says that the final straw that made her resign was because "in the notes [of the meeting on 26 June 2019] Catherine Skinn insisted that I move to the nursery despite the concerns I had raised…I believed that if I moved to the nursery and I was unable to fulfil the role due to my arthritis the Capability Procedure would be started against me." That evidence hardened under cross-examination to a point where the claimant said she would have been sacked under the capability policy.

75. The resignation letter to Ms Skinn states that the claimant's position was untenable and that this was due to the decision to relocate her to FS1 after over 20 years of experience in KS2 "despite [her] making it consistently clear in person and in writing the impact that this will have on [her] disability (arthritis) and mental health." The claimant stated that there had been a failure to make reasonable adjustments which, together with other matters, had led to a breach of mutual trust and confidence.

76. The claimant alleged that her disability had been ignored and that "conscious decisions had been made to make continuing in [her] current position untenable." It had been "made clear" to her that she would be instructed to work in FS1.

77. She complained that despite working in KS2 for 20 years and having a worsening arthritic condition…resulting in pain when stooping and lifting in particular, she had been placed in FS1.

78. The claimant the raised an issue that her start time (9:32am) would mean she would have little contact time with parents because students enter the School at 8:45am. She also said that adjustments would not be in place by the start of term and that she would suffer pain by working at the children's level. She said she had made it clear that she did not foresee any circumstance where …foundation stage could be her place of work without impacting heavily on her disability.

79. She stated that she felt intimidated and undertook three (sic) trial days in excruciating pain in order to get to the end of the academic year without further intimidation. It was clear to the claimant that, with her disability, working in foundation stage would be untenable. She regarded herself as having been constructively dismissed.

80. With regard to the resignation letter, the panel finds:

    80.1. The claimant mentions the rationale for the move from KS2 to FS1 before she mentions any alleged disability discrimination on two occasions in her letter;

    80.2. The letter refers to the claimant's mental health, which she had totally failed to mention at the meeting on 26 June. It was therefore not accurate to say she had consistently raised the issues of arthritis *and* mental health;

    80.3. The claimant had not mentioned her arthritis in the first meeting on 10 June, so it was not accurate for her to say that she had consistently raised the issues of arthritis *and* mental health;

    80.4. Ms Skinn was the decision maker in the restructure programme, but it was never put to her in cross examination that she had made conscious decisions to make the possibility of the claimant continuing in KS2 role untenable, so we find this allegation does not meet the required standard of proof;

    80.5. The issue of the start time had never been raised by the claimant before her resignation letter, and;

    80.6. She did not mention in her resignation letter that she had told Ms Skinn that she had been in a lot of pain after the first trial session, but had been brushed off. That is a vital piece of evidence that undermines the claimant's account.

81. The letter addressed to the governors is much shorter than the resignation letter, but states that she does not accept that her skills in nurturing parental relationships

was the true reason that she was relocated. Again, this was never put to Ms Skinn and we find that the allegation does not meet the required standard of proof. She ends the letter by anticipating a response from the governors before she escalated the matter further.

82. The claimant says she emailed the respondent's HR department on 19 August 2019 with a copy of the two letters of 7 August 2019. She said she never received a response. Ms Skinn gave unchallenged evidence that the address that the claimant had used was not one she recognised as one used by the respondent's HR department. We find that the claimant did not meet the standard of proof to show that she sent the email to the correct address.

83. Ms Skinn did not receive the original letter of 7 August that was addressed to her. As it was sent to the school during the summer holidays, we do not find this implausible. The claimant resubmitted her resignation letter on 3 September 2019. We note that the covering email of 3 September 2019 [72] stated that she had posted the original to Ms Skinn at school on "the week commencing 12 August 2019". That document undermines the claimant's written evidence that she resigned on 7 August 2019 "with immediate effect".

84. Mr Bronze was critical of Ms Skinn's acknowledgement of the resignation letter dated 10 September 2019 [73], but we find that in the circumstances of the case, a bare rebuttal of the allegations in the resignation letter and instructions to return the School's property and refer any further matters to the respondent's HR team was sufficient, given that Ms Skinn may have been a respondent in any Tribunal proceedings alleging discrimination.

85. The claimant replied to Ms Skinn by a letter dated 12 September 2019, and there were further exchanges which we do not find to be of much evidential value. The claimant cannot claim that post-termination conduct can be relevant to constructive dismissal and makes no claim that she was discriminated against after her employment ended.

Assessment and Conclusions

86. We make the following findings on the issues by applying our findings of fact and the law:

Disability Discrimination

86.1. The claimant has the physical impairment of arthritis and did so throughout the entire period of time that this claim is about.

86.2. The claimant's arthritis had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. We make this finding on her evidence of impact and her GP notes.

86.3. The respondent knew or ought it reasonably to have known that the claimant was a disabled person from 21 June 2019, but did not know and ought not to have reasonably known that the claimant was a disabled person before 21 June 2019. We make this finding largely on the evidence of the claimant herself.

86.4. We find that the respondent did not subject the claimant to unfavourable treatment, namely by requiring her to work at Foundation Stage 1 ("FS1") from the term commencing in September 2019. We are critical of the respondent for not explaining in writing exactly what the role in FS1 entailed, but we find that from the notes, the respondent told the claimant enough about the role to enable her to get a picture of what she was to do: involve parents of FS1 children to engage with their education. It was explained that the stage was overstaffed to allow for the claimant's role. We find that the claimant did not make as much of an issue of her arthritis as she said she did at the hearing of this case. We reject her allegations of intimidation. The claimant did not give the impression of being easily intimidated. She left the School in July 2019 having not raised any issue of arthritic pain during the trial days on our findings. She had agreed that she would return to the FS1 role in September 2019 and would have a workplace assessment. The claimant was advised by a trade union and used the language of disability discrimination in her correspondence and in meetings. She could have raised a grievance and failed to do so until after her employment had ended. She was not "required to work in FS1", she had agreed to do so. She did not suffer a detriment.

86.5. We do not need to consider whether there was 'something arising because there was no detriment.

86.6. If we had found that there was something arising from the claimant's disability, we would have found that the unfavourable treatment was a proportionate means of achieving the legitimate aim of staffing the new role with someone who was qualified to undertake it.

86.7. We find that the respondent did not apply a provision, criteria or practice ("PCP") whereby the claimant would be required to work at FS1 as a Teaching Assistant from the term commencing in September 2019 because there was no 'requirement' – she had agreed to do so as set out in our findings. We find that the respondent did not apply a PCP whereby the claimant, was required to be able to bend, lift, work at low levels, sitting and/or kneeling on the floor unaided because she had agreed to start the role and had trialed it without complaint. The respondent was to arrange a workplace assessment that would address any issues that did arise. On our findings, there was no reason for the respondent to suspect that the claimant would be at any risk when she started work in September.

86.8. We do not need to consider whether the PCP would have placed the claimant at a substantial disadvantage in comparison to persons who were not disabled.

86.9. If we had been required to make a finding, we would not have found that the respondent failed to make adjustments to avoid the alleged disadvantages, as the claimant had not raised them as a live issue by accepting the job to start in September and the workplace assessment.

86.10. The respondent knew, or ought reasonably to have known that the claimant was a disabled person after 21 June 2019, but on our findings, could not have known that the PCPs placed her at particular advantage.

Unfair Dismissal

86.11. The respondent did not act in the way set out in paragraphs 4 to 17 of the Grounds of Claim on our findings of fact set out above. We find that no act or omission by the respondent was intended or likely to destroy or seriously undermine the relationship of trust and confidence between the parties.

86.12. The respondent did not act without reasonable and proper cause.

86.13. We do not need to make a finding as to whether the claimant resigned as a consequence of any act or omission of the respondent.

86.14. Although we do not need to make a finding on the point, we find that the claimant affirmed her contract by acting in a manner objectively to indicate that she wished to continue in employment. We would have made this finding on the basis that the claimant did not indicate anything other than that she was prepared to start the new role in September 2019 and had not complained about pain from her arthritis during the trial days. Nothing had changed from the meeting of 26 June 2019 to 7 August 2019. The respondent had done nothing and had not omitted to do anything. Its position was exactly the same. It was the claimant who decided to resign on reading the notes of the meeting, which only contained what she had already heard. The last straw has to be an act or omission by the respondent.

Remedy

86.15. We did not consider remedy. The hearing listed to consider remedy is vacated.

86.16.

Employment Judge Shore
19 October 2020