THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: Employment Judge Truscott QC
Mrs S Dengate
Ms C Edwards

BETWEEN:

Mrs S Allington — Claimant

AND

Grange Rose Hill School Limited

Respondent

ON: 1, 2,3 September and 21 October 2020
In chambers 22 October and 26 November 2020

Appearances:

For the Claimant: Ms N Gyane of Counsel

For the Respondent: Ms P Leonard of Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

**JUDGMENT**

The unanimous judgment of the Tribunal is:

1. The claimant's claim of unfair dismissal is well founded.

2. The claimant's claim of indirect age discrimination is well founded

3. The respondent is ordered to pay the claimant compensation of £141334.64.

PRELIMINARY

1. The claimant bought a claim for unfair dismissal and indirect age discrimination. She was represented by Ms N Gyane barrister who led her in evidence along with Mr D Westcombe, her former Head Teacher, Ms C Long, her former line manager and Ms E Walshe, her daughter. The respondent was represented by Ms P Leonard barrister who led the evidence of Ms E Neville, Head Teacher, Mr N Powell Bursar and Mr N Phillips School Governor. There was one volume of documents to which reference will be made where necessary.

2. The parties were in dispute about who should lead in evidence. The Tribunal decided that the respondent should lead as the onus was on the respondent to establish the reason for dismissal in the unfair dismissal claim. As this was a case of indirect discrimination where the PCP was admitted, the respondent might have to establish a defence of justification, so it was considered appropriate to hear its evidence at the same time.

3. There was also a dispute between the parties as to the list of issues. In the end, the dispute revolved around the claimant's wish to include a PCP of "A policy of dismissing those who choose not to obtain a degree or QTS." The Tribunal considered that this was not an appropriately constructed PCP as it compacted a number of issues concerning the individual claimant and her ultimate dismissal in a summary manner.

4. The initials of the parents concerned are used throughout the judgment to protect the privacy of the pupils, their children.

ISSUES

1. The issues are as follows:

Unfair Dismissal
The issues for the Tribunal to determine are as follows:
1.1 What was the reason for the Claimant's dismissal? The Respondent avers that the Claimant was dismissed for refusing to accept a change to her employment contract namely the requirement to undertake study to obtain a Level 6 degree or QTS or, alternatively, accept a full time Teaching Assistant role.

In respect of the reason identified at 1.1:
Was the Respondent's reason for the dismissal sufficient to amount to "some other substantial reason" for the purposes of section 98(1) of the 1996 Act
1.2 In all the circumstances, was the decision to dismiss a fair sanction that was within the reasonable range of responses of a reasonable employer?

Indirect age Discrimination
The Claimant alleges that she was indirectly discriminated against contrary to s19(1) of the Equality Act 2010 because of her age.

Relevant Protected Characteristics
The Claimant's protected characteristic is age. It is agreed that the Claimant was 60 at the time her employment was terminated by the Respondent.

Provision, criterion or practice (the "PCP")
Introducing a requirement that all teaching staff be level 6 (degree) or QTS qualified is a PCP.
Introducing a requirement that all unqualified teachers must obtain a degree or QTS to continue employment as a Teacher.
The Respondent's accept the above amount to PCPs.

The Claimant's particular age group who are disadvantaged
The Claimant is 60 and alleges she fell within a teaching group of 60 to 65 who were put at a particular disadvantage compared to others who are under the age of 60.
Was there a particular disadvantage compared to others?
The Claimant alleges that she and others in a teaching group of 60 -65 were disadvantaged because of the PCP in the following ways:
she would have only gained the qualifications required after she could retire when she was 66 (the Claimant wished to retire at 65);
if she did not comply with the requirement regarding qualifications, she would be restricted to a teaching assistant role only, with a consequent impact upon her annual salary and employer pension contributions.

Did the PCP apply, or would it have applied, equally to persons who were under 60 years of age?

If so, did the PCP put the Claimant and others who share her protected characteristic (i.e. between 60 – 65y) at a particular disadvantage in comparison with people who were under 60?

If so, can the Respondent show it was a proportionate means of achieving a legitimate aim

Remedies

In respect of the Claimant's complaint of unfair dismissal:

If the dismissal was unfair what compensation (if any) would be just and equitable in all the circumstances?

What, if any, deductions should there be to any award in respect of the Claimant's attempts / failure to mitigate his loss?

Has the Claimant to any extent caused or contributed to her dismissal by her conduct?
If so, by what proportion would it be just and equitable to reduce the compensatory award?
If the Claimant's complaint of indirect discrimination on the grounds of age is upheld:

Is the Claimant entitled to any award of compensation for her losses, and if so at what level?

Is the Claimant entitled to an award for injury to feelings, and if so at what level?

FINDINGS OF FACT

1. The respondent is an independent co-educational prep school for children aged 3-13 in Tunbridge Wells, Kent. It has approximately 250 pupils and employs around 77 members of staff.

2. The claimant commenced employment with the respondent on 1 September 2002 as a girls' games teacher [B79-B81 and B76]. She had three A levels but she did not have a degree and did not have any teaching qualifications. After being offered the position of girls' games teacher, the then Head Teacher, Mr David Westcombe and the claimant agreed to include teaching assistant hours so that her salary would be in line with the position that she was leaving [B77- B78].

3. In October 2004, she was promoted to Head of Girls Games and received a Head of Department responsibility allowance [B82]. In December 2006, she was moved on to the unqualified teachers' pay scale as a full-time member of staff [B83].

4. In early 2012, Mrs Rosemary Froud resigned. She was a teacher who taught Year 2, two days a week which she job shared with the then Head of Pre-Prep, Mrs Caroline Long. The claimant approached Mrs Long to see if she could be considered for Mrs Froud's role. Mrs Long said that she would be very happy for her to take on the teaching role. The claimant approached Mr Westcombe and he appointed her as a teacher job-sharing with Mrs Long [B84]. The appointment letter stated that her role would incorporate "two days teaching cover" and that she would be" responsible as the class teacher in Caroline's absence and may be required to act as cover for other members of the teaching staff". By the time of Ms Neville's appointment, the claimant was taking responsibility for lesson planning, delivering lessons, assessing pupils and report writing.

5. Mr Westcombe announced that he was retiring as Head Teacher and Ms E Neville commenced in this post on 1 April 2017. At the time of her appointment, the respondent was operating in a difficult economic climate and was struggling to attract new pupils and retain existing pupils. A large part of her remit as the new Head Teacher was to explore new ways in which the respondent could improve its pupil admission and retention rates. There are a number of other independent prep schools nearby including Holmewood House, The Mead and the schools at Somerhill and, in light of this, the competition for pupils is fierce. In addition, there is competition with the state grammar system in Kent for students over the age of 11 years.

6. At the start of 2018, Mrs Long announced she was retiring and left in July 2018. Mr Adrian Brindley was appointed to replace her as Head of Pre-Prep. The claimant continued to work with him teaching Year 2, two days a week.

7. From 2012 until 2019, there had not been any questions raised with the claimant in relation to her performance as a teacher, nor had any parent complained to her, Mrs Long, Mr Brindley, or the Head about her teaching or that she was not a qualified teacher, subject to two instances in relation to parents' comments spoken to

by Ms Neville and one other instance passed to Ms Neville on 7 June 2018. Ms Neville said that on two separate occasions, shortly after she had started working for the respondent, parents had requested meetings with her and the topic of the claimant's lack of qualifications came up in conversation. The parents in question were Mrs P whom she met with on 4 May 2018 and Mr and Mrs N whom she met with on 1 May 2018. Both sets of parents had children who would shortly be going into Year 2. They were interested in who would be teaching their children in Year 2 and were aware that the claimant was not a qualified teacher. They both expressed concern about the claimant's lack of qualification. During the meetings, Ms Neville tried to gloss over the claimant's lack of qualifications. No notes were taken of the meetings. The claimant disputes that these were complaints and added that Mrs N had sent her a thank you card in 2018. Ms Neville confirmed that the children were not moved class to avoid being taught by the claimant. They remained with the same class when they moved up to Year 2. Ms Neville also accepted that the children of these parents continued to be taught by the claimant in relation to Maths and the Creative Curriculum.

8. As a result of these conversations, Ms Neville formed the view that it was essential that, going forward, in order to improve pupil retention and admission rates, the respondent's strategy would be that all of its teaching staff who had sole charge of planning, delivery of teaching and assessment must be qualified teachers. She spoke about the conversations that she had with these parents to Mr Powell, the Bursar and Mr Charles Arthur, the respondent's Chair of Governors. She did not consult the claimant's line manager Ms Long or the claimant in forming that view.

9. With the exception of Mrs Carol Whatman, the claimant was the only teacher that the respondent employed who did not have a degree or a Level 6 NVQ qualification. Level 6 NVQ qualifications are at a level equivalent to a Batchelor's degree with honours, graduate certificate and graduate diplomas. Mrs Whatman works in the Kindergarten and has a Level 3 NVQ qualification. At the time of her employment Mrs Whatman had the necessary qualifications for her role; however, in 2015, the Department for Education changed this and she would need a Level 6 NVQ qualification if she were to re-apply for her current job. Ms Neville viewed Mrs Whatman's position in the Kindergarten as different from the claimant's position since she was overseeing children who were not yet of compulsory school age. In addition, Mrs Whatman is not in sole charge of the planning of teaching.

10. On Friday 8 June 2018, Ms Neville met with the claimant and informed her that she wanted to withdraw her Year 2 teaching role from her because she wanted a qualified teacher to do this instead. Ms Neville handed her a letter [B99] stating "…that going forward all classes, throughout the school, should be led by a qualified teacher". She said that "…government directive is that schools should only employ qualified teachers as a basic requirement". She said that there were two options available, either the claimant could gain the necessary QTS qualification with the encouragement and support of the respondent or she could become a full-time teaching assistant. The financial implications of the decision for the claimant were not addressed except that in the latter case, the reduction in salary would not take effect until January 2020. The letter did not address how the claimant would obtain a degree which it was necessary to hold prior to gaining the QTS. Her letter also stated that she would like to make the change from September 2019. As Ms Neville put it in evidence, she was simply

informing her of a business decision that the respondent had made and its implications for the claimant's continued employment.

11. There was no Government Directive applicable to the respondent that required schools to employ only qualified teachers. The guidance stated that independent schools have always been allowed to employ unqualified teachers and from 2012 this could be applied to the state sector [B85 to B88].

12. On 7 June 2018, Mr Adrian Brindley, Head of Later Years sent Ms Neville an email about a discussion that another member of staff, Helen Finch, had with a parent before school that morning concerning the claimant's lack of qualifications [B104].

13. On the 26 June 2018, the claimant emailed Ms Neville seeking clarification on a number of points, in particular, she sought clarification of what "support" meant. She also stated that she was not consenting to any proposed changes to her role [B101].

14. Ms Neville responded to the letter on 9 July 2018 [B102]. She stated the support she would be willing to offer "…would be to allow [her] the time to complete [her] qualifications and enable [her] to use our experienced staff as part of [her] CPD". There was no financial support offered in relation to tuition fees and ancillary costs.

15. The claimant did not respond further. She returned in September 2018 to work alongside Mr Brindley. At the end of the first half term, she spoke with him to ascertain if he was happy with her contribution in class. He confirmed that he was very happy with how they were working together and was pleased with how things were going.

16. In March 2019, the claimant was contacted by Ms Neville's secretary to arrange a meeting with Ms Neville and Mr Powell [B109]. The claimant emailed Ms Neville seeking clarification of the purpose of the meeting [B110]. Ms Neville responded confirming the meeting would cover the change in role. She stated she could be accompanied at the meeting [B111]. The claimant asked her line manager Mr Duncan Stacey to accompany her in the meeting and to take notes on her behalf.

17. The meeting took place on 21 March 2019 and lasted approximately 30 minutes. Mr Stacey took some notes of the meeting [B114-B120]. The claimant specifically asked for the impact on her salary and the support available if she took a degree. She pointed out that the onus is on the school to outline the financial impact on her salary [B118]. They agreed to do this. The claimant informed them that she did not believe it was necessary for her to be qualified to teach, a point she continued to make throughout the process. Because there were many different institutions at which the claimant could study for these qualifications and various options for studying part time and online or in person, Ms Neville suggested that the claimant go away and investigate these options further including identifying the cost of each of the different routes so that there could be a discussion about how the respondent could financially support her in obtaining the qualification.

18. Ms Neville sent the claimant a letter dated 1 April 2019 which was headed "Consultation in relation to changing your role" [B121-B122]. Ms Neville confirmed that there was no requirement for teachers in the independent sector to be qualified. She stated that instead it was considered best practice and it was an aspiration to have

staff teaching in the classroom environment fully qualified. She named the two parents who she said had asked her directly whether the claimant had the necessary teaching qualifications. Ms Neville also stated "all staff employed as a teacher with sole charge of planning, delivery of teaching and assessment have a level 6 or equivalent degree" and refered to the school website and the staff list. The letter highlighted the major implications this change of role would have on the claimant's finances. The letter did not address the preservation of the claimant's salary. The example in the letter showed that her salary would be cut from £30,723 plus pension contributions to £19,095 (a pay cut of £11,628 per annum, almost 40%). Her letter stated that should the claimant gain a HTLA then this salary would be increased to £23,771. At the end of her letter she stated "Please confirm by no later than 23 April 2019 whether or not you consent to these changes…. If we cannot reach an agreement by 23rd April 2019, we may have to give notice to terminate your current contract and offer to re-engage you on a new contract as a full time Teaching Assistant".

19. The claimant wrote to Ms Neville on 22 April 2019 to inform her that she had contacted her Union and they would be in touch. She also stated in this letter that she was not accepting the changes to her job [B123]. Mark Rose from NASUWT Union sent a letter to the respondent on the 29 April 2019 [B124-B125] stating:

> "I understand it has been suggested by you that your only option in light of her lack of accreditation is to offer her a much diminished role at a much reduced rate of pay to allow her to seek, with your support, qualified teachers status…Clearly given her time of life & future retirement plans Susan does not consider this to be a viable option for her."

He went on to say that the claimant did not consent to the respondent's proposals in their current guise but wished to undertake a dialogue with them about how they might mitigate her change in role and her rate of pay.

20. Mr Rose did not receive a response to his letter, however, the claimant did. Ms Neville wrote on 8 May 2019 [B126] that:

> "Mark has indicated in his letter that you have chosen not to take up the schools offer of further training, either to achieve qualified teacher status or an HLTA qualification. With this in mind I would like to invite you to a formal meeting to discuss your continued employment at the school in light of your refusal to accept the variations to your contract we have proposed".

21. Ms Neville invited her to a formal meeting on 17 May 2019. Her letter also stated:

> "One consequence of our meeting is the school may give you notice to terminate your current contract of employment and offer to reengage you on a Teaching Assistant immediately upon the expiry of your current contract."

22. The claimant wrote to Ms Neville requesting this meeting be postponed to Wednesday 29 May 2019 as her union representative was unable to attend on 17 May but was able to on 29 May [B127]. The respondent said that the meeting would take place on 23 May 2019 [B128]. Mr Rose sent a letter to Ms Neville on 17 May 2019 expressing his concern around the school denying her entitlement to be accompanied to a meeting of this importance [B129]. Ms Neville replied that she was not prepared to reschedule the meeting [B130]. Ms Neville said that as the claimant could be

accompanied by a work colleague or another trade union representative the meeting on 23 May would go ahead and if she failed to attend the meeting it would continue in her absence. Her letter also repeated:

> "One consequence of our meeting is the school may give you notice to terminate your current contract of employment and offer to reengage you on a Teaching Assistant immediately upon the expiry of your current contract."

23. The claimant was left without a representative for the meeting. At the last minute, she received a phone call from Mr Neil Richards an NASUWT union representative who informed her that due to another meeting being cancelled, he would be representing her at the meeting on the 23 May 2019. Mr Richards suggested that they put forward three proposals during the meeting to which the claimant agreed. The proposals were as follows [132]:

> Option 1: retain her dual role whilst undertaking professional training (QTS/HTLA) plus support towards tuition fees and time off work to attend college.
> Option 2: salary protection
> Option 3: transitional reduction in salary, reducing overtime to her retirement.

24. Mr Powell and Ms Neville said they were surprised by the Option 1 proposal because Mr Rose's letter of 29 April 2019 had said that the claimant did not consider re-training to be a viable option for her. Mr Powell and Ms Neville decided not to re-open (as they saw it) the possibility of permitting the claimant to re-train whilst continuing in her current dual role so late in the day.

25. In the follow up meeting on the 5 June 2019, the claimant was informed that the respondent did not consider any of the three proposals put forward as acceptable to them, including the proposal to retain her dual role and receive financial support. Ms Neville informed the claimant that she was being given formal notice of termination of employment effective from 31 August 2019. The claimant was handed a letter of termination and re-engagement [B138-B139 and B140-B147].

26. The claimant lodged her appeal against the termination of her employment with the Chairman of the Board of Governors, Mr Charles Arthur on 19 June 2019 [B148-B153].

27. Mr Powell emailed Mr Richards on 5 August [B133] at the end of which he stated:

> "I would remind you that Sue's current contract terminates on 31st August and as such will not be required in school until this matter is resolved or she has signed the new contract".

28. The appeal meeting was rescheduled to take place on 2 September 2019 [B133]. It was confirmed that the governors convening the appeal panel where Charles Arthur and Nevil Phillips [B156].

29. On the 28 August 2019, the claimant wrote to Mr Arthur by email setting out some further information that she wanted the appeal panel to take into consideration. [B160 - B161] she also emailed him on the same day raising her concerns about Mr Powell being involved in the appeal as he had been actively involved in all meetings

and correspondence relating to her situation since her meeting with him and Ms Neville on 21 March 2019 [B162]. The claimant was assured by Mr Arthur that Mr Powell would only be taking minutes [163].

30. The claimant's employment with the respondent terminated on 31 August 2019.

31. Prior to the appeal meeting on 2 September 2019, Mr Powell met with Mr Arthur and Mr Phillips to go through the documents in their packs with them and answer any questions that they had about the process that had been followed to date. Mr Phillips asked Mr Powell about the possibility of the respondent supporting the claimant financially to obtain further qualification. Mr Powell explained to him that this offer had already been made to the claimant but that she had never properly explored it or reverted with a proposal to consider. They agreed that, had she raised this in her grounds of appeal or, were she to raise it at the hearing that day, then the option of re-engaging her and providing financial support whilst she obtained a further qualification would still have been on the table." The claimant was not informed of this discussion.

32. Mr Arthur and Mr Phillips requested a meeting with the claimant to ask various questions about the process that had been followed to date and about issues that the claimant had raised in her appeal. They did not ask her if she wished to remain in employment while being supported whilst obtaining further qualifications. They then met with Ms Neville to ask her some specific questions about matters that the claimant had raised in her grounds of appeal.

33. On the 7 November 2019, the claimant attended her rescheduled appeal meeting accompanied by Mrs Rosie Serpis, a friend. She set out each point raised within her appeal document and was asked questions by Mr Phillips and Mr Arthur [B175-B178]. A copy of Mr Powell's notes is at pages 179 to 183 of the bundle, a copy of the notes that Ms Serpis took at the hearing is at pages 188 to 193.

34. Mr Arthur and Mr Phillips then met with Ms Neville again to understand a little bit more about the parents who had asked about the claimant's qualifications and about the qualifications of Ms Carol Whatman who worked in the Kindergarten.

35. Mr Arthur and Mr Phillips discussed all of the documentary evidence that they had been presented with together with what had been said by the claimant at the appeal hearing and the subsequent meeting with Ms Neville. They decided to reject the appeal.

36. On Wednesday 11 December 2019, the claimant received the appeal outcome which was that her appeal was rejected [B195-B197].

37. The claimant has applied for a number of jobs which are set out in a schedule [C244-C246]. She did not secure a job until March 2020. She was offered a part time role at Sumner Pridham Estate agents assisting them with administration. She was only able to start working for Sumner Pridham on Thursday 18 June 2020 and not earlier due to the COVID19 lockdown and subsequent impact on the housing market.

Submissions

38. The Tribunal received written and oral submissions from both counsel and updated schedules of loss with further arguments from both parties.

LAW

Reason for dismissal

39. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

40. The list of potentially fair reasons is set out in section 98 of the Employment Rights Act. Some other substantial reason is a potentially fair reason.

41. In this first stage of determining the reason for the dismissal, the burden of proof is on the employer. But the employer does not at this point have to establish that the principal reason did justify the dismissal, merely that it was the reason the employer in fact relied upon and that it was capable of justifying the dismissal.

42. In **West Midlands Co-operative Society Ltd v. Tipton** [1986] ICR 192 HL in a passage of the judgment of Lord Bridge, with whom Lords Roskill, Brandon, Brightman and Mackay concurred, confirmed this approach:

> "Under [s 98 of the Act of 1996] there are three questions which must be answered in determining whether a dismissal was fair or unfair:
> (1) What was the reason (or principal reason) for the dismissal?
> (2) Was that reason a reason falling within [subsection (2) of s 98] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held?
> (3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?"

43. As to question (1), Cairns LJ said in **Abernethy v. Mott, Hay and Anderson** [1974] ICR 323 CA in a passage approved by Viscount Dilhorne in **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL:

> ''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness …''

44. In **Kent County Council v. Gilham** [1985] ICR 233, CA, Griffiths LJ summed up the position:

> 'The hurdle over which the employer has to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial

> reason, and the enquiry moves on to [ERA 1996 s 98(4)–(6)], and the question of reasonableness'.

SOSR

45. The case of **R S Components Ltd v. Irwin** [1973] ICR 535 NIRC concerns itself with whether some other substantial reason is *ejusdem generis* with the other valid reasons for dismissal. It held it was not. It also suggested that there must be a pressing business need in order for dismissal of this nature to be justified. This was also the view expressed in **Ellis v. Brighton Co-operative Society** [1976] IRLR 419 EAT where it was pointed out that the reorganisation was necessary in order to prevent the business being brought to a standstill.

46. The Court of Appeal held that the threshold for justifying such dismissals is not so high as suggested by earlier authorities. In **Hollister v. National Farmers' Union** [1979] ICR 542 CA, a reorganisation was introduced at the instance of, and for the benefit of, the employees. But Mr Hollister refused to accept it because although it improved his remuneration, it diminished his previous rights. The Court of Appeal held that he was fairly dismissed (and that a failure to consult him over the reorganisation did not render the dismissal unfair). The Court endorsed the judgment in Ellis v. Brighton Co-operative Society Ltd [1976] IRLR 419 CA where it said:

> 'Where there has been a properly consulted-upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well — it is not bound to put it may well — constitute "some other substantial reason".'

Lord Denning added:

> "Certainly, I think, everyone would agree with that. But in the present case Mr Justice Arnold expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation. I must say I see no reason to differ from Mr Justice Arnold's view on that. It must depend in all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement."

47. The need for a sound, good business reason has since been applied in **Bowater Containers Ltd v. McCormack** [1980] IRLR 50 EAT where a reorganisation effected with the agreement of a union led to a supervisor being made responsible for more staff and **Genower v. Ealing Hammersmith and Hounslow Area Health Authority** [1980] IRLR 297 EAT where a reorganisation resulted in a change of job duties and place of work and the employee resigned. Although this constituted a constructive dismissal, it was nevertheless fair. In the case of **Catamaran Cruisers Ltd v. Williams** [1994] IRLR 386 EAT it was held that it is an error of law to say that significant changes can be made only if the survival of the business is threatened.

48. In **Evans v. Elemeta Holdings Ltd** [1982] ICR 323 EAT, the employee was dismissed for refusing to accept new terms imposing mandatory and unlimited overtime obligations. There was no evidence that employer had an immediate need to increase overtime, so the reason was not substantial. If the employer seeks to rely upon the need to implement the reorganisation as constituting a substantial reason, it

is for him to demonstrate that it has discernible advantages. A mere statement that this is so is insufficient according to **Banerjee v. City and East London Area Health Authority** [1979] IRLR 147 EAT. The finding of unfair dismissal of an employee arising out of a decision to rationalise was upheld because there was no evidence on these matters. This Tribunal notes in passing that at that time the onus was on the employer to establish the reasonableness of the dismissal.

49. In **Kerry Foods Ltd v. Lynch** [2005] IRLR 680 EAT, the Employment Appeal Tribunal held that although an employer was not required to show the "quantum of improvement achieved", the employer must nevertheless show the advantages to the respondent of the new policy (paragraphs 12 – 14). "That was sufficient to pass the low hurdle of showing some other substantial reason for dismissal. See in this connection Scott & Co v Richardson [2005] All ER D 87 (Jun) Burton P presiding." If such advantage is shown, the Tribunal should then consider whether dismissal was justified pursuant to section 98(4) ERA 1996.

50. The Tribunal applied the foregoing and the case analysis set out in **Scott & Co** at paragraphs 14-18 which is not repeated here.

Reasonableness

51. The determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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.

52. In **Chubb Fire Security Ltd v. Harper** [1983] IRLR 311 EAT, it was suggested that the correct approach is to balance the advantages to the employer of a re-organisation and the disadvantages to the employee, ultimately, however, the former factor is dominant but this was said to be only guidance for a Tribunal in applying the 'range of reasonable responses' test to this class of case in **Richmond Precision Engineering Ltd v. Pearce** [1985] IRLR 179 EAT. Where the change being insisted upon by the employer consists of a pay cut, **Garside & Laycock Ltd v. Booth** [2011] IRLR 735 EAT gave guidance at para 23, particularly in relation to how the cuts fall (e.g. whether on management too) and how the employer went about persuading the workforce. This case also reaffirmed that the fact that the employee behaved reasonably in refusing the change does not mean that the employer was unreasonable in dismissing.

53. In considering procedural fairness the Employment Appeal Tribunal in **Clark v. Civil Aviation Authority** [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a

dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: **Fuller v. Lloyd's Bank plc** [1991] IRLR 336.

54. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see **Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust** UKEAT/0081/16 dated 17 October 2016.

55. Whilst there was some suggestion that the 'range of reasonable responses' test applies only to the decision to dismiss, not to the procedure adopted, this was rejected by the Court of Appeal in **Sainsbury's Supermarkets Ltd v. Hitt** [2003] ICR 111 CA. The Court of Appeal held in this case (at paragraph 30) that the 'range of reasonable responses' – or the need to apply the objective standards of the reasonable employer – applies:

> "…as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

56. Procedure is part of the overall fairness to be considered by the tribunal and not a separate act of fairness – see Langstaff J in **Sharkey v. Lloyds Bank plc** UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

57. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v. OCS Group Ltd** [2006] IRLR 613.

Age discrimination

58. Section 19 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's. Subsection (2) goes on to explain that a PCP 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.

59. Lady Hale has addressed the key difference between direct and indirect discrimination in a number of significant judgments of the Supreme Court. In **R (On**

**the application of E) v Governing Body of JFS** [2010] 2 AC 728 SC she said at [56]– [57]:

> 'The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence[2006] EWCA 1293*, *[2006] 1 WLR 3213, para 119*. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.
>
> Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.'

60. In **Homer v Chief Constable of West Yorkshire Police** [2012] ICR 707 SC, she said at [17]:

> 'The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified '

61. In the cases of **Essop v. Home Office; Naeem v. Secretary of State for Justice** [2017] ICR 640 SC, at [25] she held:

> 'Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'

62. The PCP being complained of must be one which the alleged discriminator 'applies or would apply equally' to persons who do not have the protected characteristic in question. As Lady Hale stated in **Rutherford v. Secretary of State for Trade and Industry** [2006] ICR 785 SC:

> 'It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups.'

63. In **British Airways Plc v Starmer** [2005] IRLR 862 EAT, it was confirmed that it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its affect would have been if it had been applied. Therefore, the argument in that case that a management discretion applied only to one individual was incapable of amounting to a PCP was rejected.

64. In relation to particular disadvantage, **London Underground v. Edwards (No.2)** [1999] ICR 494 CA, it was acknowledged that Tribunals 'do not sit in blinkers'. In that instance, it was held that the Tribunal was entitled to take into account, for the purposes of finding discrimination, its knowledge about the proportionately larger number of women than men who work and who have primary childcare responsibilities, and also the fact that there are a high proportion of single mothers having care of a child.

65. In **Homer**, Lady Hale said:

> 'Put simply, the reason for the disadvantage was the people in this age group [60 – 65] did not have time to acquire a law degree. And the reason why they did not have time to acquire a law degree was that they were soon to reach the age of retirement. (paragraph 17).

Lord Hope agreeing stated:

> 'The time available to complete the law degree and get the benefits that would flow from it was inevitably linked to the age of the person concerned…the number of years that he had left to him before he could reasonably expect to retire meant that his age had a direct bearing on whether he would be disadvantaged by the requirement. He was, in effect, being forced to work on beyond the normal retirement age so that he could obtain the benefit. This was, in itself, indirectly discriminatory.' (Paragraph 29)

66. Elias J (as he then was) in **MacCulloch v. ICI** [2008] IRLR 846 EAT set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in **Lockwood v. DWP** [2014] ICR 1257 CA:

> "(1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways [2005] IRLR 862* at [31].
>
> (2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) *[1984] IRLR 317* in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) *[1987] IRLR 26* per Lord Keith of Kinkel at pp.30–31.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax [2005] IRLR 726* per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: *Hardys & Hansons plc v Lax [2005] IRLR 726, CA*."

67. The Tribunal also considered the judgment in **Ryan v. South West Ambulance Services NHS Trust** UKEAT/02/13/19/VP dated 6 October 2020.

Discussion and decision

The reason for dismissal

68. The reason for dismissal was because the claimant refused the offer of a demoted post which was offered because she did not hold the teaching qualification that was deemed necessary for her to continue in her existing employment by the respondent. The question was whether this constituted a substantial reason. The reasons put forward by the respondent were:

1. To maintain its competitive edge and to meet the ever-increasing levels of parental expectation.
2. Government directive is that schools should employ only qualified teachers as a basic requirement [B89 – 90]. Further, in English State Schools, the law on employing unqualified teachers was relaxed [B85].
3. There is an overriding factor that qualified teachers have had the training to understand and demonstrate a deeper knowledge of pedagogy. The respondent does not only employ teachers with QTS but also teachers with relevant Level 6 degrees. These latter teachers have a command of the subject but not necessarily the training to teach.
4. That Ms Neville had to demonstrate a number of times the qualifications of the staff. It was Ms Neville's assertion that she has had to demonstrate the qualifications of staff a number of times. The respondent places specific reliance on queries raised by Mrs P and Mr and Mrs N.

69. In relation to 1, other than stating the viewpoint, the respondent did not show that it had undertaken even the basic research to conclude that having all qualified teachers would maintain a competitive edge or that it would meet ever-increasing parental expectation. The respondent did not show any parents left the school due to unqualified teachers, or that pupils left in Year 2 as a result of the claimant being an unqualified teacher or evidence of prospective pupils going elsewhere due to the presence of 2 unqualified teachers out of 77 teachers. Mr Phillips confirmed that a 'very significant proportion of exits are due to moves to Grammar Schools… episodes of rival fee-paying schools seeking to attract by making offers to entice, bursaries, fee matching service'. Ms Neville accepted that despite terminating the claimant's employment in order to further this objective, the respondent does not market the fact that they only have qualified teachers teaching. In relation to 2, there is no obligation on the respondent for teachers to have qualified teacher status or equivalent, see paragraph 10 hereof [B112]. In relation to 3, Mr Westcombe said that he had met well qualified teachers whose capabilities fell far short of the claimant's. There was no dispute that the claimant was an excellent teacher. Mr Westcombe's evidence was that despite the claimant not having a formal qualification she was the best person for

the job. He 'respected her pedagogy and her judgment enormously'. In relation to 4, the claimant accepted the evidence of Ms Neville on parental comment. Ms Long confirmed she has no recollection in the 20 years she was at the respondent of parents querying the claimant's qualifications.

70. The reasons put forward by the respondent were sufficient to persuade it that it believed it had a sound business reason in its mind which was to impose the requirement for a qualification on the one relevant employee who did not have the qualification. The Tribunal considered that this barely passed the low hurdle of establishing a valid reason for dismissal.

Reasonableness

71. In considering reasonableness, the Tribunal was not satisfied that there was any merit in the reasons for dismissal advanced by the respondent and when weighed against the consequences for the claimant in terms of loss of status and the loss of the salary attaching to the teaching element of her post decided that the respondent had not acted reasonably in dismissing the claimant.

72. The Tribunal examined the evidence of Ms Neville in relation to her initial approach to the claimant which was "I wished to offer the claimant several options in relation to her ongoing employment with the respondent. The first option being that she would continue in her current dual role as a teaching assistant and cover teacher whilst obtaining the necessary Qualified Teacher Status (QTS) qualification which the respondent would support her with. The second would be that she would agree a variation of her current terms and conditions of employment and move to a full-time teaching assistant role in September 2019." The submission for the respondent was that "it was never suggested she would have to become a TA while studying: [99] 'second option is for you to move over to a TA only role'. Clearly delineated; she would remain in her current role and train and only if she did not want to undertake qualifications would she move to a full time TA role." The Tribunal does not accept that the first option was clearly offered to the claimant and the submission does not square with the evidence of what was actually said to the claimant. Had option 1 been offered, while the claimant still disagreed that there was a requirement for a formal teaching qualification, there would have been no loss of status and no loss of pay provided the respondent met the tuition and other fees. Discussion about the cost of obtaining the qualification might have taken place.

73. There was a dispute about whether Mr Powell attended the meeting on 8 June 2018. The Tribunal did not find it necessary to resolve this dispute although it was inclined to accept the evidence of the claimant that he did not. The meeting on 8 June 2018 was not a consultation meeting. The claimant was told the respondent's position. The claimant was handed the letter [ B99 – B100] which was followed by a brief period of correspondence by way of clarification. The letter of 8 June 2018 is stark in its terms. The reference to a Government Directive was potentially misleading as there was none applicable to the respondent. The claimant is being pointed firmly in the direction of becoming a full-time teaching assistant which would be consistent with Ms Neville's opinion. The letter of 9 July 2018 does not clearly set out the dual role option. The only information the claimant was provided with by Ms Neville and Mr Powell in respect of support in gaining qualifications "…would be to allow you the time to complete your

qualifications and enable you to use our experienced staff as part of your CPD" [B103]. There is no reference to financial support with regard to tuition fees or that the claimant could continue in her existing role throughout any period the qualification was undertaken. Given the potential expense of such an offer, the Tribunal was doubtful that the respondent ever intended to make it.

74. The first consultation meeting did not occur until 21 March 2019. This meeting was not a genuine consultation meeting. If Ms Neville or Mr Powell envisaged a role whereby the claimant might study with financial support with tuition fees while working as a teacher, they did not say so. The meeting was to 'discuss downgrade of Sue Allington's post to TA' [B113]. The letter of 1 April 2019 [B121-122] from Ms Neville did not outline what financial support would be provided in respect of tuition fees or otherwise. Notwithstanding what is said in the particulars of response at paragraph 10 [A36], the claimant was not offered the role of continuing in her present position whilst seeking to gain the qualification. Even if she was, she needed to know the extent of the costs she would incur and the extent that these costs would be reimbursed by the respondent.

75. It is noted at paragraph 22 hereof that Ms Neville caused the claimant to have a problem obtaining representation at the meeting on 23 May 2019 for no reason. It is hard to understand why the claimant and her representative should have been treated in this way unless it was to disadvantage the claimant.

76. At the meeting on 23 May 2019, Mr Richards set out the three proposals for the respondent to consider. Mr Powell's notes of this meeting [B132] although brief, set out the three proposals outlined by Mr Richards. Mr Powell's notes suggest his dissatisfaction with the first proposal which was for the claimant to retain her dual role whilst undertaking professional training (QTS/HTLA) plus support towards tuition fees and time off work to attend college, as this was ''In contradiction to a previous letter received from the Union''. What should have been identified at the beginning by the respondent as the only reasonable option if the requirement of qualification was to be insisted upon, option 1 was dismissed without further consideration as Mr Rose was being taken as categorically having stated that the claimant did not wish to retrain but this is not correct. Mr Rose's letter did not state that she was confirming that she did not wish to retrain either to obtain QT status or an HTLA [B124]. The evidence of Ms Neville and Mr Powell was that option 1 was one that that had first been suggested to the claimant in June 2018 but that is not correct. The proposal which was put forward by Mr Richard's was the first time retaining the dual role and receiving financial support had been clearly identified and it is the last time this was mentioned. If the claimant's representative had misunderstood the position and that Option 1 was and always had been on the table this could have been said. The respondent agreed to review their offer and a further meeting was arranged for 5 June 2019.

77. On 5 June 2019. instead of discussing the matter further, the respondent read from a script and terminated the claimant's employment [B137 – B139].

78. The Tribunal consider that had the consultation been genuine, the respondent would have opened a dialogue following receipt of Mr Rose's letter of 29 April 2019 [B124 & B125] and tried to reach an agreement with her. It did not do so and

proceeded to dismiss her on the most disadvantageous terms although the claimant's salary was preserved for a short period.

79. The grounds of appeal submitted on behalf of the claimant have a legalistic formulation and do not specifically identify the failure to offer option 1. In relation to the appeal itself, the Tribunal was concerned at the involvement of Mr Arthur in approving Ms Neville's proposal to require all teachers to have teaching qualifications at the beginning of the process and then sitting on the appeal. His involvement might not have been considered appropriate but this is not a matter which is before us in the ET1 or issues. In any event. the other member of the appeal panel, Mr Phillips was unbiased. One of the claimant's grounds of Appeal was that the respondent, 'failed in any attempt to find alternative positions for the [claimant]' [B151]. Whilst not quite the same point as the appeal point, he identified that the financial implications of carrying out the dual role might be the solution to the problem. Mr Powell said to the Appeal panel that the claimant had already been offered support but she had not appeared remotely interested. This is not an accurate representation of what had taken place and caused Mr Phillips not to raise it as a possible option unless it was raised by the claimant. The conversation between Mr Powell and Mr Phillips denied the claimant of the opportunity to address the assertion made about her and to repeat her earlier proposal for financial support whilst continuing in her dual role. Mr Philips was content to see if the claimant raised the issue. It was not focussed in her grounds of appeal. If Mr Phillips had persisted in seeking to find out what the claimant's position on the dual role was from the claimant, he would have found that it was acceptable to her subject to financial support. The respondent must have known the extent to which it was prepared to support the claimant's tuition fees and other expenses and the matter might have concluded satisfactorily for both parties. Mr Powell's comments were taken as determinative notwithstanding the assurance by Mr Arthur that Mr Powell would only be taking minutes [B163].

80. The claimant complains that the respondent failed to provide notes of the meetings with Ms Neville to the claimant and prior to them deciding whether to uphold the dismissal [B169 – B170 and B178 – B179]. The claimant's evidence was that if she had these notes, she would have asked what financial support was available. The claimant's challenge to Ms Neville's interview is unlikely to have changed the outcome of the Appeal but knowledge of the exchange between Mr Powell and Mr Phillips might well have changed the outcome.

81. The Tribunal considered the procedure adopted by the respondent in effecting the dismissal to be procedurally unfair. It was incumbent on the respondent to set out its proposals in a clear manner. The claimant worked as a Teacher in one Year group for 2 days a week, the remaining 3 days were taught by a qualified teacher. The change to a teaching assistant would result in a 38% reduction in salary, a demotion and if required to retrain additional financial burden [B105, B201]. This it failed to do and continued to fail to do throughout the process including the appeal. The respondent is critical of the claimant for not bringing it suggestions for courses she was interested in but the underlying concern of the claimant was clear, she did not want to lose her teaching job or suffer a reduction in pay. If the respondent was truly committed to retaining her salary and status, the issue was the extent it would meet the additional fees and expenses. It must have had its own financial parameters.

82. The dismissal was substantively unfair and procedurally unfair. The decision to dismiss the claimant fell far outside the range of reasonable responses.

83. Although the claimant repeatedly sought to draw a comparison with the position of Ms Carol Whatman, the Tribunal accepted Ms Neville's explanation for the retention of this unqualified teacher on the basis she was employed to cover a Kindergarten class whose pupils were not yet of compulsory school age.

Age discrimination.

84. The was no dispute about the PCPs.

85. The Tribunal held that those in the claimant's age group of 60 – 65 are at a particular disadvantage in having to comply with the respondent's requirement because they do not have time available to complete the qualifications and get the benefits that would flow from it before retirement.

86. There were no statistics provided to the Tribunal and it was reticent to proceed on the basis of "judicial knowledge" as submitted by the claimant, however it seemed obvious that people between 60-65 are less likely to enrol in undergraduate courses compared to younger age groups. The Tribunal examined the HESA statistics for student enrolments by personal characteristics 2014/15 to 2018/19 which showed a very substantial drop in numbers after the age of 30. The figures are not broken down into age ranges after 30 but the Tribunal extrapolated from these figures the substantial reduction increasing up the age ranges to 60-65. The Tribunal found that this age group would be at a particular disadvantage, compared to people who do not share the protected characteristic, in complying with the requirement to undertake undergraduate study, because of their age.

87. The PCP would have applied to persons under the age of 60 who were employed as teachers by the respondent but the PCP put the claimant and others who shared her protected characteristic (age between 60-65) at a particular disadvantage in comparison with people who were under 60. The claimant was put at a disadvantage compared to others in the following respects:

she would not enjoy the benefit of the new qualification until close to retirement if not after.

she would suffer a significant cost, the extent of which she could not calculate.

if she failed to comply with the PCP, she would suffer a reduction in pay and status.

88. In relation to justification, the Tribunal reviewed the evidence relating to the reason for dismissal. There was considerable debate about whether the objective of having all teachers qualified in the respondent was sufficiently important to justify limiting the claimant's right not to be discriminated against. The Tribunal noted that the test here was quite different to that for the reason for dismissal in unfair dismissal. The Tribunal concluded that the respondent believed it had a legitimate aim which is not the same as actually having one. The measure was rationally connected to the objective in the respondent's mind. However, the Tribunal did not consider that the means chosen were no more than is necessary to accomplish the objective. The respondent has failed to show the disadvantages experienced by the claimant were a

proportionate means of achieving a legitimate aim. The respondent's reasons for implementing this policy while the claimant was in its employ was disproportionate to its stated aim. The demotion and dismissal of the claimant was not reasonably necessary in order for the respondent to achieve its aim. The Tribunal was satisfied that there was no need for the claimant to be dismissed.

Compensation

89. Parties provided updated schedules of loss. The evidence of the efforts of the claimant to obtain work was accepted as was her evidence of the upset caused to her by the actions of the respondent.

Polkey

90. The dismissal of the claimant was substantively unfair. If the respondent had carried out a fair procedure, she would not have been dismissed.

Contributory fault:

91. The Tribunal did not consider that the claimant caused or contributed to her own dismissal such that any award of compensation should be reduced. The Tribunal noted her stance up to the meeting on 21 March 2019 and the position change thereafter but that did not constitute causative or contributory conduct.

Indirect age discrimination

92. Where the Tribunal has found indirect discrimination under section 19 and where the Tribunal is satisfied that the provision, criteria or practice was not applied with the intention of discriminating against the claimant, the Tribunal must consider making either a declaration or a recommendation before it awards compensation (see sections124(4) and (5) Equality Act 2010).

93. The Tribunal decided that a declaration was not a sufficient remedy in this case and awarded compensation for financial loss and injury to feelings. The claimant was the only employee to suffer from the application of the PCP. The Tribunal does not repeat the anguish suffered by the claimant and corroborated by her daughter by the actions of the respondent.

Compensation
Basic award

94. The claimant is awarded a basic award of £13387.50. This calculation was agreed between the parties.

Loss of statutory rights

95. The Tribunal awarded £500 loss of statutory rights

Compensatory award

Past loss of earnings

96. The Tribunal's aim, in awarding compensation, must be to, 'as best as money can do it, "... put [the applicant] into the position she would have been in but for the unlawful conduct" (**Ministry of Defence v. Cannock and ors** 1994 ICR 918 EAT).

97. The claimant's complaint relates to a dismissal which we found to be both unfair and discriminatory, so the heads of compensation largely overlap and we must guard against awarding the same compensation twice (section 126 Employment Rights Act 1996). Following **D'Souza v. London Borough of Lambeth** 1997 IRLR 677 EAT, we therefore award compensation for past and future loss of earnings under the discrimination legislation alone.

Mitigation

98. In **Singh v. Glass Express Midlands Limited** UKEAT/0071/18, the Employment Appeal Tribunal emphasised that it is for the wrongdoer to show that the claimant acted unreasonably. HHJ Eadie QC's (as she then was) summarised the guidance in that decision, given by Langstaff P in **Cooper Contracting Ltd v. Lindsey** UKEAT/0184/15, on the correct approach to the question of mitigation:

> (1) The burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
> (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
> (3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
> (4) There is a difference between acting reasonably and not acting unreasonably.
> (5) What is reasonable or unreasonable is a matter of fact.
> (6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.
> (7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
> (9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

99. The evidence for the respondent from Mr Powell was that it had undertaken "an assessment of the impact of the changes on her and considered alternatives to the changes where possible. Had the claimant accepted the respondent's offer of re-engagement as a full time Teaching Assistant she would have been its highest paid Teaching Assistant." The Tribunal did not accept this evidence. Even if it did, it fails to

understand that she would still have suffered a financial loss. The only way for her to avoid financial loss was to continue in her dual role. However, the claimant would still have suffered a financial loss if she had had to contribute to her tuition fees. The respondent has submitted that it was for her to tell it what the fees were but the Tribunal considers that it was for the respondent to be open with the claimant and state the extent, if any, it would financially support the claimant. The respondent did not have any understanding of the loss of status the claimant would suffer. The respondent could have allowed her to continue teaching under a teacher manager until she retired.

100. The Tribunal rejected the respondent's submission that the claimant had failed to mitigate her loss by reusing the offer of re-employment. The claimant had lost trust in the current management of the respondent because of its treatment of her. She could not be expected to remain in its employ unless her position was restored. The Tribunal also rejected the other submissions for the respondent which suggested that the compensation be reduced. The claimant has made reasonable efforts to find new employment in circumstances which the Tribunal recognised as being difficult, i.e. her age and having been dismissed.

101. The claimant is awarded financial loss to the date of the hearing less the sums earned in that period. The claimant's calculations are set out in her updated schedule of loss. The Tribunal agreed with the figures at paragraphs 1 2 3 4 5 which total £40,275.97.

Future loss of earnings

102. The Tribunal concluded that it was highly unlikely that the claimant would get a job which paid as much as the job she was dismissed from and consequently made an award of further loss to her retirement age. The Tribunal was in no doubt she would have remained in the employ of the respondent and a continue to be a valuable asset in teaching classes. The Tribunal agreed with the period for future losses from 22.10.20 – 31.8.24 and the ongoing loss of earnings figures in para 6, 7 and 8 of the updated schedule of loss with a subtotal £103,546.

103. However, the Tribunal did not agree with the way paragraph 9 was calculated because it considered that the claimant was unduly pessimistic about her future prospects. Trying to tell the future can be problematic at the best of times and the pandemic and consequent economic damage make the task even more problematic but the Tribunal considered the following calculation reasonable: The paragraph 9 calculation is replaced as follows based on the decision that claimant's worked hours would increase to 2 days per week plus leave cover from 1.4.21 and not as in the schedule of loss from 1.1.22.

a) 22.10.20 – 31.3.21 = is a period of 161 days = 161/7 = 23 weeks.
During this period, the claimant is working 1 day per week plus holiday cover. Using the period June – Sept worked hours and the average worked hours are 80.5 pm (see table on page 2 of Schedule of Loss) 60+54+104+104 = 322 / 4mths = 80.5 hours pm
To convert 23 weeks to months: 52.143 weeks / 12 months = 4.35 weeks in a month.

23 weeks / 4.35 = 5.287 (5.3) months in the period 22.10.20 – 31.3.21.

5.3 months x 80.5 hours per month = 426.65 hours worked in period
Paid at £12 per hour 426.65 x £12 = £5,119.80

b) Pension contributions on above period using the figure of 3% (reference page 2 of schedule of loss)
£5,119.80 x 3% = £153.59

Sum of a) and b) = £5,273.39

c) Mitigation for period 1.4.21 – 31.8.24
This equates to 3 years and 154 days.
154 days / 365 = 0.422 of a year so the period was 3.422 years

Increased hours per week = 15.5 hours.
15.5 x 52.143 = 808.22 hours in a year paid at £12 per hour = £9,698.64 per annum.
Plus 8 weeks cover equates to 340 hours p.a. and paid at £12 per hour = £4,080. Total salary per year therefore is £9,698.64 + £4,080 = £13,778.64 p.a.

£13,778.64 x 3.422 years = £47,150.51

d) Pension on above period at 3% £47,150.51 x 3% = £1,414.52
Sum of c) and d) = £48,565.03

Sum of a) and b) + c) and d = £5,273.39 + £48,565.03 = £53,838.42

Deduct mitigation total £53,838.42 from para 8 subtotal £103,546 = £ 49,707.58

Non-pecuniary loss

Injury to feelings

104. Section 124 EQA states that the amount of compensation which may be awarded for discrimination corresponds to the amount which could be awarded by a County Court in England & Wales or a Sheriff in Scotland. Section 119 Equality Act 2010 provides that an award of damages may include compensation for injured feelings.

105. In **Prison Service & Ors v. Johnson** [1997] ICR 275, the EAT summarised the general principles that underlie awards for injury to feelings. They are not repeated in full here, but the Tribunal have taken them into account.

106. Three bands of injury to feelings awards were set out by the Court of Appeal in **Vento v. Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318. Injury to a claimant's feelings is subjectively, rather than objectively measurable, echoing the words of Lord Justice Mummery in that case: injury to feelings

encompasses “subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms”.

107. The **Vento** bands were subsequently uprated to reflect inflation (**Da’Bell v**. **NSPCC** [2010] IRLR 19 EAT and **AA Solicitors Ltd t/a AA Solicitors and anor v. Majid** EAT 0217/15) and the decisions reached in **Simmons v. Castle** 2012 EWCA Civ 1288 and **De Souza v. Vinci Construction (UK) Ltd** [2018] ICR 433.

108. The Presidential Guidance for Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury (and subsequent annual updates) provides guidance on further uprated bands, taking into account inflation and the **Simmons** uplift.

109. The Tribunal did not agree with either parties’ submissions and determined that on facts of this case as set out in the documentation and the effect it has had on the claimant as set out in her witness statement justify an injury to feelings award within the middle of the updated **Vento** band of £14,000.00.

Interest

110. Interest is calculated differently as between the awards for injury to feelings and past financial loss. In relation to injury to feelings interest is calculated to the date of the act of discrimination, the date of dismissal, 31 August 2019 and the date the Tribunal calculated the award which was 15 December 2020. This is 471 days x 0.08 x1/365 = £1445.26. In relation to past loss this is calculated to the mid point on £40,275.97 which is £2078.90. Total interest is £3524.16.

Taxation

111. Following the **Gourley** principle, the Tribunal must take care that its approach to tax does not put the claimant in either a better or worse financial position that if the dismissal had not occurred. Where the award will be taxed under section 401 ITEPA 2003, the Tribunal must gross up that part of the award which will fall to be taxed.

112. Section 401 applies to payments in connection with the termination of a person’s employment. The first £30,000 are tax free in any tax year, and tax will be paid on sums in excess of that amount. Neither is subject to employee national insurance. The relevant year for consideration of the tax burden is the year in which the claimant will receive the payment. In this case we make the assumption that will be the tax year 2020/21.

113. The amounts to be included in the calculation for section 401 purposes are loss of statutory rights, past financial loss, future financial loss and interest.

114. Following the decision in **Moorthy v. Revenue & Customs** [2016] UKUT 13 (TC) and the amendment to section 406 ITEPA 2003 with effect from 6 April 2018, compensation for injury to feelings related to termination of employment is also taxable to the extent that the £30,000 tax free allowance is exceeded. In this case, the injury to the claimant's feelings resulted from her discriminatory dismissal.

115. The Tribunal grossed up the awards assuming a 20% marginal rate and a £30,000 tax free allowance. The Tribunal did not have sufficient information to work through the claimant's earnings for the tax year to date and then to work through the personal allowance and different tax bandings.

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|---|---|---|
| Loss to date of hearing | £40,725.97 | |
| Future Loss | £49,707.58 | |
| Injury to feelings | £14,000.00 | |
| Interest | £3524.16 | |
| Total | | £107957.71 |
| Deduct tax free £30,000 | | £77957.71 |
| Grossed up amount | £19489.43 | |

116. Total award is as follows:

| | |
|---|---|
| Basic award | £13387.50. |
| Loss of statutory rights | £500.00 |
| Loss to date of hearing | £40,725.97 |
| Future Loss | £49,707.58 |
| Injury to feelings | £14,000.00 |
| Interest | £3524.16 |
| Grossing up amount | £19489.43 |
| Total compensatory award | £141334.64 |

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Employment Judge Truscott QC

Date 15 December 2020