EMPLOYMENT TRIBUNALS

Claimant: Ms Z Hilton-Webb

Respondent: Minis Childcare Ltd

Heard at: London South (Croydon**)** by CVP

On: 1-4 and 8-9 February 2021 and in chambers 17-19 February, 23 & 24 March and 8, 15 and 19 April 2021

Before:

Employment Judge Tsamados
With members:
Dr S Chacko
Mr S Townsend

Representation
Claimant: Mr J Cook Counsel
Respondent: Mr D Green, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) The Claimant's complaints of direct disability discrimination, discrimination arising from disability, indirect disability discrimination (save as set out in paragraph 2) below), failure to make reasonable adjustments, harassment and victimisation, are unfounded and are dismissed.

2) The Claimant was subjected to unlawful indirect disability discrimination by the Respondent in respect of paragraph 16.4 of the Agreed List of Issues.

3) We invite the parties to seek to resolve the issue of remedy between themselves and to let the Employment Tribunal know by 1 October 2021 if they require a remedy hearing. The matter will be listed for a one day remedy hearing if so required.

REASONS

This hearing

1. This hearing was conducted remotely using the HMCTS Cloud Video Platform (CVP). There were numerous occasions on which there were connectivity problems that led to some time being lost in resolving them. However, we were able to overcome these problems and proceed with the hearing.

2. The case was originally listed for 7 days but for reasons set out below we were only able to sit for 6. We heard evidence and submissions over 1-4 and 8-9 February 2021. We then deliberated in chambers on 17-19 February, 23 and 24 March, 8, 15, and 19 April 2021 in order to reach our Judgment. The reason for the amount of time we spent in chambers was the complexity of the complaints and issues and the number/types of claims as well as the extent of the written submissions provided by each party. The Claimant's submissions ran to 47 pages and the Respondent's to 71.

Claims and Issues

3. By a Claim Form received by the Employment Tribunal on 11 October 2019 following a period of Early Conciliation between 12 and 20 September 2019, Ms Hilton-Webb (the Claimant) brought complaints of disability discrimination against her ex-employer, Millennium Minis Ltd and Minis Childcare Ltd (the Respondents). In the Response received on 14 November 2019, the Respondents denied the Claim in its entirety.

4. A Preliminary Hearing on Case Management was held on 8 April 2020 and conducted by Employment Judge (EJ) Hyams-Parish. The Claimant was represented by Mr Cook and the Respondents by Mr O'Keefe, an HR consultant. EJ Hyams-Parish listed the case for hearing for 7 days from 1-9 February 2021, dealt with practical matters necessary for the hearing, identified that the correct Respondent was Minis Childcare Ltd, determined the claims and issues and set case management orders to prepare the case for the hearing.

5. Mr Cook had provided a list of issues for that hearing and this has been agreed between the parties and is at pages 62 to 74 of the bundle. In essence, the Claimant has brought complaints of direct disability discrimination under sections 13 and 39 of the Equality Act 2010 (EQA), discrimination arising from disability under section 15 EQA, indirect disability discrimination under section 19 EQA, failure to make reasonable adjustments under sections 20 and 21 EQA, harassment related to disability under section

26 EQA and victimisation under section 27 EQA.

Evidence

6. We were provided with electronic copies of all documents.

7. The Respondent provided us with a bundle of documents which contained 820 pages and a separate index. Where necessary we refer to this as "B" followed by the relevant page number(s). Unfortunately, the page numbers in the PDF file containing the bundle did not precisely tally with all of the page numbers set out in the index. This did cause some delay in navigating the electronic bundle, although some of the witnesses had hard copies of it.

8. We heard evidence from the Claimant and on her behalf from her mother, Dr Caroline Hilton, and from a family friend, Mr Venti Costantini. This was by way of witness statements and in oral testimony.

9. We heard evidence on behalf of the Respondent from Mrs Julie Coakley, the Nursery Director, Mrs Lorraine Smith, the then Nursery Manager, Mrs Tina Dellis, the current Nursery Manager, and from Mr Ben Hutchins, the "owner" and Director, by way of witness statements and in oral testimony.

10. The record of the Preliminary Hearing on Case Management held on 8 April 2020 made reference to a video recording which the Respondent wished to present in evidence. EJ Hyams-Parrish directed the Respondent to make arrangements to review this video at our hearing if it was still considered necessary for us to see it. Mr Green, representing the respondent, told us that whilst no formal arrangements had been made to present the video in evidence, it was available on You Tube. Mr Cook, representing the claimant, did not object to this but did ask us to view the whole of the clip and not a portion of it as had previously been suggested. We were subsequently sent the link to the video which is https://www.youtube.com/watch?v=t58mtaWDzos and we viewed it in its entirety.

Preliminary matters

Adjustments to the proceedings

11. On the first day of the hearing, we enquired as to whether there were any adjustments that the Tribunal needed to make to the proceedings in respect of the Claimant's disabilities. Mr Cook stated that the Claimant required the assistance of her father to navigate the electronic documents and to magnify them so that she could read them. He explained that as a result the Claimant would need more time to find the documents and have passages from them put to her. Mr Cook added that it had been made clear to the Claimant's father that he was not allowed to give any substantive input into the evidence beyond this. Mr Green did not object to this and added that he was cognisant of the Claimant's hearing impairment and that she was welcome to ask him if she needed him to repeat anything he said at any time. The Tribunal

accepted that these adjustments were reasonable.

12. On the second day of the hearing, we agreed that those present but not participating in the questioning and giving of evidence at any particular time should turn off their cameras so as to minimise the distraction caused to the Claimant by seeing numerous video images on screen.

Agreed List of Issues

13. The Agreed List of Issues are those discussed and agreed at the Preliminary Hearing held on 8 April 2020 at B62-74.

14. On the first day of the hearing, Mr Green advised us that the Respondent had already conceded that the Claimant is disabled for the purposes of the EQA in respect of Apert Syndrome and by reason of her impaired vision, impaired hearing, severe disfigurement and impaired manual dexterity/fine motor skills. In addition, he advised us that the Respondent had more recently conceded knowledge of disability but not knowledge of disadvantage.

15. Also on the first day of the hearing, Mr Green advised us that the Respondent had made an application for leave to amend the list of issues. I explained that we were unaware of this and given our remote access via CVP, we did not have the correspondence file in front of us. Both Counsel agreed to furnish us with the application and the response respectively.

16. We adjourned to await receipt of these documents by email and to read them. On our return both Counsel spoke to the application. We took their submissions fully into account and do not propose to reproduce them here.

17. Having discussed provisional timetabling of the proceedings, we then adjourned for the rest of the day to read the witness statements and referenced documents, and to reach a decision on the application for leave to amend.

18. On the morning of the second day of the hearing, we gave our decision. We allowed the application for leave to amend for the reasons given orally at the time. The amendments expand upon the Respondent's legitimate aims relied upon in defence of the complaints of discrimination arising from disability and indirect discrimination. These amendments are as follows:

    18.1 At paragraph 9 of the Agreed List of Issues, the Respondent seeks to rely upon the following legitimate aims regarding the section 15 EQA complaint:

        a) The performance management and professional development of members of staff, including the Claimant;
        b) The use of the probationary period to assess the suitability of members of staff (including the Claimant) for continued employment;
        c) The safeguarding of the children in the Respondent's care;

d) The need of the Respondent to investigate and respond to parental feedback and complaints.

18.2 At paragraph 24 of the Agreed List of Issues, the Respondent seeks to rely upon the following legitimate aims regarding the section 19 EQA complaint:

a) The performance management and professional development of members of staff, including the Claimant;
b) The use of the probationary period to assess the suitability of members of staff (including the Claimant) for continued employment;
c) The safeguarding of the children in the Respondent's care;
d) The need of the Respondent to investigate and respond to parental feedback and complaints;
e) The efficient management of the Respondent's workforce;
f) The Respondent's statutory duties to ensure particular ratios of trained adults to children under its care.

19. In addition on the first day of the hearing, Mr Green indicated that he had a number of concerns as to matters within the Agreed List of Issues.

20. We discussed these on the second day of the hearing. His concerns related to the section 15 complaint and whether paragraphs 4.2 and 4.3 were capable of amounting to things arising from the Claimant's disability and whether paragraph 4.2, and paragraph 17.4 of the section 20 complaint were sufficiently particularised. In response Mr Cook stated that whilst he could see the force of Mr Green's submission in respect of paragraph 4.3, he had no instructions to resile from it and that in any event these concerns were all matters which would be dealt with in evidence and could also be addressed in cross examination and submissions. After a short adjournment, we agreed with Mr Cook's analysis and on his assurance that these matters would be dealt with from the existing evidence, by way of cross-examination and in submissions, we allowed the paragraphs to remain in the Agreed List of Issues.

<u>Unavailability to sit on 5 February 2021</u>

21. On the morning of the third day of the hearing, I had to advise the parties that we were not able to sit on Friday 5 February 2021, because of a prearranged Employment Tribunal Regional Training Day in which I was participating as a facilitator. Unfortunately, this matter had been overlooked by the Tribunal's listing section and was only brought to my attention after we had finished sitting on the second day of the hearing.

22. Mr Green indicated that this would cause difficulties for certain of his witnesses who he had arranged to give evidence this week. He explained that Mrs Smith no longer works for the Respondent and is only available this week. Mrs Coackley is on maternity leave and has childcare arrangements she shares with her husband. Mrs Dellis is in charge of the Respondent Nursery. He indicated that he may have to write to the Regional Employment

Judge (REJ) requesting that I be made available to sit on Friday. I offered to approach the REJ directly, although I could not promise anything given the nature of the training and the numbers of people involved. But I advised Mr Green to take instructions on the availability of his witnesses for the remainder of the hearing.

23. The following morning, I advised the parties that having spoken to REJ Freer it was not possible for me to sit on Friday. I reminded the parties that the Employment Tribunal is never able to guarantee that an EJ would be available to sit for the entire hearing, that any number of things could have caused slippage and so we could never guarantee when a witness would be called to give evidence. I indicated that I did not believe the difficulties for the witnesses were insurmountable and that taking a pragmatic view, if we all work together, we would be able to accommodate hearing the evidence within the time available and with the witnesses being able to attend. I stated that I appreciated that Mrs Smith had the most difficulties, but the intention was to hear her evidence today, and to arrange a guaranteed time-slot for Mrs Coackley to attend, around her childcare commitments, and whilst I appreciated that Mrs Dellis is running the Nursery, she would be inconvenienced at any time she was required to give evidence and has to be flexible. I added that it was clear that the hearing was going to go part-heard in any event and that as long as we finish evidence and submissions, it would be easier to arrange extra days for the Tribunal panel to meet privately to deliberate and reach a decision. Both Counsel expressed their thanks and we then agreed a preliminary timetable for the remaining witnesses.

Findings

24. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal has, however, considered all the evidence provided and has borne it all in mind.

25. The Claimant was born with Apert Syndrome and as a result has several physical impairments. Namely, impaired vision, impaired hearing, severe disfigurement and impaired manual dexterity/fine motor skills. This is set out in more detail at paragraph 3 of her witness statement and we were also referred to documents at B708-746, in particular an assessment of her visual impairment made by RNIB in Haringey in October 2006 at B708-712.

26. The Respondent accepts that the Claimant is a disabled person for the purposes of the EQA by virtue of the above impairments but does not accept that it had knowledge of disadvantage.

27. The Claimant's impairments affect her in the following ways, as set out at paragraph 3 of her witness statement:

    "a. Impaired vision: I wear spectacles but even with corrective lenses my distance vision is only 6/18, not 20/20. This means that what someone with no visual

impairment can see at 18 metres, I need to be at 6 metres [B711]. I also have a convergent squint and divergent squint. This means that it takes me more time to focus when looking from one thing to another at varying distances. I also have no depth perception as I am only able to use one eye at a time therefore images can appear fuzzy [B713]. I cannot see well enough to be allowed to drive and I struggle to read standard size print and font size 20[1] is the easiest for me to read and the size that was recommended for me when I was at school [B711].

b. *Impaired hearing: I have significant ("mild to moderate") bilateral hearing loss. I have a bone conduction hearing aid which I wear as a band across my head. However, even with the hearing aid, I do not have perfect hearing. I often cannot hear what is said to me and this is made acutely worse if, for example, the person speaking is not looking at me or engaging directly with me when speaking. I find one-on-one interactions much easier to hear what someone is saying.*

c. *Reduced ability to perceive and react: A consequence of my visual and hearing impairment is that, particularly in noisy or busy environments, such as a classroom environment, I have a reduced ability to perceive and react to situations.*

d. *Facial disfigurement: I have a congenital deformity of my facial bones and this manifests as an obvious facial disfigurement. It is difficult to describe but is notably apparent when looking at my face. I have been advised by my doctor that I am eligible for facial surgery at any time should I decide I want to have it [B713].*

e. *Impaired manual dexterity/fine motor skills: My hands are disproportionately small, with no movement at my interphalangeal joints. This means that, for example, it is difficult for me to hold a pen to write, amongst other things, and it is hard for me to grasp large objects. I find it hard to manipulate small objects, because I do not have a proper pinch grip. I also find it hard to hold big objects such as a cup or a jar and often need to use two hands. For instance, when we moved into our current house, my family changed the doorknobs to handles because it is difficult for me to turn a doorknob without using both hands. This is because my hands are very small and my fingers don't bend. I find it hard to use knives to cut and prepare food, because it is difficult for me to grip the knife and cut accurately, due to my lack of fine motor skills. This doesn't mean that I can't do these things; it is just that it takes me longer."*

28. The Claimant has a Foundation Degree in Early Years (Early Years Foundation Stage or EYFS) and has achieved a Level 4 Certificate of Higher Education in Early Years Professional Practice. Prior to her employment with the Respondent, she had over 4 years' experience working as a Nursery Support Worker in a school and was working through an agency, Bretsa, initially as a Level 2 and later as a Level 3 Nursery Practitioner after receiving

[1] This was later clarified in evidence to be font size 18.

her Level 4 qualification in 2015. Through Bretsa, the Claimant worked in different long-term temporary roles, as well as in ad hoc roles with different private day and community nurseries for about 4 years.

29. The Claimant was employed by the Respondent from 10 December 2018 until her employment ended with effect from 14 June 2019. She was originally employed as a Nursery Practitioner but at the time of her dismissal she was employed as a Nursery Assistant.

30. The Respondent operates a nursery for children of pre-school age on two sites: the "Baby Hub", for children aged 3 months to 2 years, divided into rooms by age, "Teenies" (0-1 years old) where the Claimant started work, "Tinies" (1-2 years old); and the "2 Plus" site, for children aged between 2 to 4 years which included the "Tots" room, where the Claimant later worked.

31. Mr Hutchins is described as the "owner", but more properly is a Director of the Respondent limited company. Mrs Coackley is the Nursery Director. Mrs Smith was the, then, Nursery Manager of Baby Hub and 2 Plus and the Claimant's line manager. Mrs Dellis is the Maritime Nursery Manager. Ms Elisa Gaione is the Deputy Manager. Ms Alina Maftei is the Room Leader, Tots. Ms Lauren Whiffen and Ms Abigail Hinkley are Room Leaders, Tinies. Ms Claire Pavey is the Nursery Operations Manager.

32. The Claimant commenced employment with the Respondent following an interview with Mrs Coackley and Mrs Smith on 20 November 2018 having been introduced by the agency, Bretsa. We were referred to an email from Bretsa to the Respondent at B79 attaching the Claimant's CV (at B80-81). That email describes the Claimant as follows:

"Following on from our conversation yesterday I am enclosing the CV of Zoe Hilton-Webb who is Level 5 qualified but is currently working through Bretsa as a Level 3. Zoe has worked with Bretsa since June 2014 and has worked in long term temporary roles with Private Day Nurseries & Community Nurseries. Zoe is a bit of an unusual candidate to put in front of you as she does present as slightly autistic and enjoys a routine she does have some visual & hearing impairments as well as some facial disfigurement, but she has always been very good at her job and all the nurseries ask for her on a regular basis. She has done a mixture of long term temporary roles as well as ad-hoc work. Zoe now feels that would (sic) like a permanent role and be somewhere she can progress. Zoe has only been in L3 roles since September of this year so I would recommend her as a New Qualified L3 and this can be reflected in her salary.

I highly recommend Zoe for interview. If you need any further information please do not hesitate to contact me"

33. Apart from what was written in this email, we do not know what the Respondent knew of the Claimant's disabilities beyond what the various managers and members of staff observed and what the Claimant told them.

34. Following the interview, the Respondent wrote to the Claimant by letter dated 26 November 2019 offering her the position of Nursery Practitioner in the Teenies Room (B91) working 36 hours over 4 days and with a notice period of one month.

35. The Claimant's signed contract of employment is at B96-105. Her job title is Nursery Practitioner (also referred to as "level 3", which we assume is a reference to the pay scale) at the Millennium Minis Baby Hub and her start date was 10 December 2018.

36. This document contains a Probationary Period at B98 which states as follows:

"The first three months of your employment will be a probationary period during which time your performance and conduct will be monitored and appraised. The probationary period may be extended at the Company's discretion by up to three months and this is without prejudice to the Company's right to terminate your employment before or on the expiry of your probationary period if you are found for any reason whatsoever to be incapable of carrying out, or otherwise unsuitable for, your job. At the end of your probationary period, your employment will be reviewed within a reasonable time of its expiry and your probationary period will not be deemed to have been completed until the Company has carried out its review and formally confirmed the position in writing to you. During the probationary period the full disciplinary and grievance procedure will not apply."

37. There is also a clause headed Disability at B101 which states as follows:

"Should you have or develop a condition that could be described as a disability you have a duty to inform us so that we may undertake any reasonable adjustment necessary. Such information will be treated in strictest confidence and you will not be subjected to any form of discrimination because of your disclosure."

38. We were referred to the Claimant's Job Description as a Nursery Practitioner at B106-107. We note that under the heading Educational this states that part of the role is to *"plan activities that are engaging, fun and stimulating for the children"*.

39. We were also referred to the Claimant's Induction Pack at B108-165. This includes the following: a Care Plan for Management of Medical Needs and Health and Wellbeing Forms, at B116-120, subsequently completed by Mrs Dellis and the Claimant (which we will deal with in due course); and a Safeguarding children/child protection policy at B131-139, which includes the procedure for dealing with allegations against employees, students or volunteers or any other person working on the premises (at B138-139).

40. We were also referred to the Staff Handbook at B515-574. This includes the Respondent's grievance procedure at B553-554, its disciplinary procedure at B554-555 and its bullying and harassment procedure at B556.

41. On 10 December 2018, the Claimant started work in Teenies taking care of children aged between 3 and 15 months.

42. On 15 January 2019, the Claimant met with Mrs Smith, during which Mrs Smith asked if the Claimant required smaller gloves, having noticed she had small hands. The Claimant initially said no, but a few days later she asked Mrs Smith for smaller gloves. The gloves arrived towards the end of January, but the Claimant found that they were still too large for her. The Claimant alleges that she did not go back to Mrs Smith about the gloves, because Mrs Smith criticised her for changing her mind when she had subsequently requested them. Mrs Smith denied this in oral evidence.

43. On 29 January 2019, the Claimant had a meeting with Mrs Smith outside the Teenies Room. We were referred to the Communication Log of this discussion at B167. The Communication Log is signed by both Mrs Smith and the Claimant and in brief handwritten notes sets out the gist of informal observations undertaken of the Claimant's work and suggested action.

44. The Claimant's position is that this was the start of a practice of calling her into meetings at short notice without any companion. She states that because of her hearing and visual impairments she found such meetings stressful, it being difficult for her to hear and process the information given during them. However, she did not raise these concerns with the Respondent at the time.

45. In evidence, the Claimant explained her concerns as to the discussion during that meeting, as to her facial expression unsettling the children. This complaint forms one of the incidents of unfavourable treatment set out at paragraph 5.1 of the Agreed List of Issues. Her written evidence is that Mrs Smith observed that the children were unsettled by her facial expression in that she was not making any, and that she needed to. The Claimant further alleged that Mrs Smith suggested that the Claimant might have some difficulties making facial expressions. In addition, in her written evidence, the Claimant stated that whilst one of her disabilities is a visual facial difference and so she has different facial expressions, she was taken aback by this comment. She also stated that she always felt that she made a wide range of facial expressions and that this issue had never been mentioned to her in any of her previous employments.

46. Mrs Coackley stated in her written evidence in respect of this incident, that she observed the Claimant sitting with 3 babies, all of whom were crying. The Claimant was comforting one of the children but was staring across the room facing away from the babies. Mrs Coackley further stated that she explained to the Claimant the importance of eye contact and she demonstrated the impact of talking to children face to face and stayed with her for an hour sharing other techniques to support children who were upset.

47. Mrs Smith said in her written evidence that the issue she raised with the Claimant arose from what Mrs Coackley had observed. Namely, that the Claimant was failing to provide eye contact with 3 babies that she was sitting

with, all of whom were crying, and she stayed with the Claimant for an hour sharing distraction techniques. She further stated that the Communication Log reflects the feedback received and her conversation with the Claimant.

48. Mrs Smith was clear in oral evidence that this was not a reference to the Claimant's facial disfigurement and that this was not something that was discussed. She stated that the issue was about the Claimant not making eye contact and being given feedback on distraction techniques using a range of facial expressions to engage the children.

49. In oral evidence, the Claimant said that Mrs Smith did not tell her about the incident with Mrs Coackley and had said that she observed her herself. However, the Claimant accepted that there had been a previous incident with Mrs Coackley. Her position was that she was comforting a child who was crying, she was not looking away from the child, and that Mrs Coackley advised her as to a distraction technique in settling children, by allowing the child to explore toys in the Treasure Basket (as we understand it a basket where toys are kept) for themselves rather than handing toys to them. Mrs Coackley said in oral evidence that the Claimant was confusing this incident with another occasion.

50. The Claimant accepted that Mrs Coackley did not say anything about her facial disfigurement or facial expressions or of her unsettling the children herself.

51. On balance of probability, we find that Mrs Smith told the Claimant that it was her lack of eye contact that had unsettled the children and advised her of various techniques to adopt to settle them. This is supported by Mrs Coackley's evidence. The Claimant's facial disfigurement or any inability to make a range of different facial expressions were not mentioned. In any event, the Claimant does not accept that she had any inability to make facial expressions.

52. The Claimant's written evidence is also that she was asked to sign the Communication Log without being given the opportunity of first reading it or to make amendments and was given a copy without providing the document in a larger print format that she was able to read. However, this is not a matter that the Claimant expressly raised with the Respondent. It is a matter we will come to later on and is part of the Claimant's case that she required documents to be in a font size of a minimum of 18 point in order to read them.

53. On 11 February 2019, the Claimant was called to Mrs Smith's office for a meeting. The Claimant again alleged that this was without notice or a companion, although she did not raise it at the time. We were referred to the Communication Log at B169. This contains a summary of the discussion that took place. It records that the Claimant felt she had made progress, but this was not a view shared by staff and management. It goes on to set out an incident where the Claimant gave the wrong feedback to Mrs Smith about a parent who had telephoned the Nursery concerned about a child. The action recorded is that the Claimant needs to be *"open and honest if unsure of*

anything, management are to discuss her progress with team and observe practice to make a decision on probation". The date that the action was to be completed is recorded as by 14 February 2019.

54. On 14 February 2019, the Claimant was called into a further a meeting with Mrs Smith. The Claimant has again alleged that this was without notice or a companion, although again it is not a matter she raised with the Respondent at the time. At that meeting the Claimant was told that she had failed her probation.

55. We were referred to a letter to the Claimant from Mrs Smith dated 14 February 2019 at B170-171. This states that the Claimant has not yet reached a satisfactory standard in three areas: following children's routines; meeting basic needs of children; and organising and initiating activities. The letter goes onto offer the Claimant a position as Nursery Assistant (also referred to as "level 2") with a 3 month probationary period, at a reduced salary stated to be so that *"we can work together to improve your practice and raise the standards of care"*. The letter continued that the Claimant's probation would now end on 14 May 2019 (ie a further 3 months); she would be based in Tots but would not have any key children at this stage and may be asked to cover in other rooms. The letter gave the Claimant until 15 February to accept this offer and if she did not wish to do so, then her employment would be ended on one week's notice.

56. The Claimant portrays this as a demotion to a more junior role. We have considered the position and on balance of probability we find as follows. Whilst, yes, the offer was of a more junior role, it was intended to assist the Claimant. It was not used as a sanction but as an opportunity to develop the Claimant's abilities and retain her in employment given that the Respondent reached the conclusion that she had not passed her probationary period as a Nursery Practitioner.

57. At the meeting, Mrs Smith raised a number of examples in respect of each of the areas of concern.

    Following children's routines:

    1. This was a matter that Mrs Smith had already spoken to the Claimant about on 11 February 2019. The Claimant had been asked which child needed feeding at a particular time and was unable to answer. She was also unaware of the children's sleep routines. In her evidence the Claimant essentially accepted that she did not know the routines but that they were on a board on the wall of the room for all staff to refer to. The Respondent's concern was that the Claimant had by then been employed for 3 months but did not know the routines. There were nine children in the room, some of whom had particular routines.

    Meeting basic needs of children:

    2. This related to an incident involving a child's pull up nappy that had not

been pulled up properly. The Claimant's position is that there was a discussion of nappy changing and she stated that she had not done this in any of her previous roles. She alleged that Mrs Smith appeared annoyed that she had not told the Respondent this at interview and that she stated that she had heard that the Claimant was slow at nappy changing and not changing as many as her colleagues.

3. The Claimant accepted in oral evidence that her manual dexterity would not prevent her from putting on a nappy, it would simply take her longer, although tightening nappies and doing up buttons on a child's clothes was more of an issue.

4. In addition, the Claimant alleges that she was not told about this incident at the time it was said to have occurred, which child was involved or when, and she made the point that nappies do fall down over time because of a child's movement or because the nappy has been soiled. She further made the point that the nappy could have been put on by any of her colleagues in the room.

As to smaller gloves

5. The Claimant alleges that Mrs Smith brought this issue up again and Mrs Smith denies it was raised. The Claimant further alleges that because this came up on an earlier occasion there appears to be no reason for the Respondent to bring it up here. On balance of probability we are not sure that this happened or is the earlier occasion on which the Claimant alleges she was criticised for changing her mind. Given that there was no reason to raise this again we find it more probable that it did not occur at this date.

As to lifting a baby and not supporting its head

6. The Claimant accepted in oral evidence that she was seen doing this although she was not told at the time or at this meeting but at the meeting she later attended with Mrs Smith on 19 February 2019 and that she had corrected herself.

Organising and initiating activities

7. The Respondent's position is that the Claimant had not organised or initiated activities. The Claimant's position is that she was in the room at the time this happened but was not invited by her colleagues to join in their planning meetings. She did not accept that she knew where the planning was written down, or where the resources were kept. Although by contrast, she knew where the feeding and sleep activities information was kept. But she did not ask her colleagues. The point being made by Mrs Smith was that the Claimant was not proactive in organising and initiating activities. However, the Claimant said that she organised and initiated her own activities for the children on a daily basis. The significance of what was expected of the Claimant in this

regard only became apparent to us when we heard evidence as to the duties of a level 2 as opposed to a level 3 practitioner.

58. The Claimant alleges that Mrs Smith accused her at the meeting of lying and just digging a hole. Mrs Smith denied this. The Claimant's evidence is that this phrase was used in the earlier meeting on 11 February 2019 at which the Claimant was told to be open and honest. In cross examination, the Claimant admitted that Mrs Smith had not actually used the word lying on 14 February but she had perceived her to be accusing her of this because she had repeatedly told her that she did not accept what the Claimant said because she had not seen it happen. We therefore find that Mrs Smith did not accuse the Claimant of lying. On balance of probability, we further find, given Mrs Smith's categorical denial of using the words digging a hole and the Claimant's shift of evidence, that whilst those specific words were not used, this is the message that the Claimant took from what was said at the two meetings.

59. On 15 February 2019, the Claimant confirmed to Mrs Smith that she would accept the new job (at B171). She also expressed her upset about what happened the previous day and how things will work out in the future and asked for a meeting the following week to which she would like to bring a friend.

60. On 19 February 2019, there was a meeting between Mrs Smith, Elisa Gaioni, the Deputy Manager, the Claimant and her family friend, Mr Costantini.

61. The Respondent's notes are at B177. The gist of the meeting is as follows. The Respondent discussed the reasons why the Claimant had not passed her probation and the Claimant raised her concern that although there were conversations throughout the probation period to support her, she felt that no clear guidance and feedback had been given to her in a timely manner. There was discussion of instituting a Performance Improvement Plan (PIP) for the Claimant, made up of measurable targets and that she would be provided with support to improve and achieve the level required to see her succeed as a Nursery Practitioner. Mrs Smith would work closely with her. The Claimant would not be given any key children until she passed her probation and significant progress made, and until then she would be a float. Whilst support would be given, she needed to be more proactive in looking for help when needed, asking questions, etc. The Claimant indicated that she felt anxious about her new probation. Mrs Smith encouraged her to come and speak to the Respondent if she needed support and to share the best ways to communicate with her. Next steps were discussed, as to her starting in her new role in Tots, that she would receive an offer letter, be introduced to the team, to the room, and the senior team member would go through the routines with her. The Claimant asked for time to think about what to do and indicated that she would come back to the Respondent by Friday. In our view this came across as a positive meeting.

62. Mr Costantini's notes of the meeting are at B172-176. There is not a huge amount of difference between the two sets of notes and again in our view this

came across as a positive meeting.

63. Mr Costantini's witness statement sets out areas of dispute between the two sets of notes, but essentially he accepted that the Claimant was told she had not passed her probation, the reasons for this and that certain issues needed to be addressed, although the level of detail differs.

64. It does appear that the tone of the criticisms in this meeting was lighter than before, but then again the decision to end the Claimant's probation had already been made by the time of this meeting. We did note that this was part of the approach taken by the Respondent, to focus on the positive rather than the negative. But equally the Claimant was prone to seize on the positive and discount the negative feedback.

65. On 22 February 2019, the Claimant again confirmed to Mrs Smith her acceptance of the new job (at B178).

66. On 28 February 2019, the Claimant was sent her new contract of employment (at B179-191) to commence on 4 March, but in fact the Claimant continued to work in Teenies. The contract contains a probationary period of three months. Her new Job Description differs in a number of ways to her Job Description as Nursery Practitioner.

    67.1 Under the heading Educational:

        1. *To offer suggestions for activities and ask questions.*
        2. *To ensure the planning of activities are linked to the individual children's needs and interests, gain from daily observations, evaluations as well as child's tracking in line with the EYFS."*

    67.2 Under the heading Inspirational:

        - *Plan activities that are fun, exciting and inviting for the children, with the help of your team within an environment which is exciting and enabling."*

67. The contract appears to have been signed on 18 March 2019 (the date at B189 is unclear).

68. Mrs Smith's evidence is that the Claimant continued to receive ongoing informal observations, feedback and support in between their meetings, even if these were not documented.

69. At paragraph 5.5 of the Agreed List of Issues, the Claimant alleges that she was subjected to less favourable treatment by being placed on a PIP on around 11 March 2019. This was a meeting between the Claimant and Mrs Smith the notes of which are at B192-195. This comprises of two sets of the notes, those starting at B192 contain handwritten annotations made by the Claimant's parents and those starting at B194 contain handwritten annotation made by an unknown person.

70. The notes of the meeting indicate that the respondent set out the three areas of concern on which the Claimant had failed her probation, the action taken so far to get her performance back on track, the results of that action and what the Claimant was required to do now and over what timescale. Mrs Smith said in evidence that whilst the notes set out individual examples in the areas of concern, it was part of a bigger picture of the Claimant's performance.

71. The notes also make clear the consequences of not performing to acceptable levels within that timescale and the support that would be given to the Claimant to help to reach and maintain acceptable performance levels. The intention was that the Claimant carry on working in Teenies and that her probation would end on 4 June 2019 her new role having commenced on 4 March 2019. The PIP was intended to help the Claimant move back to the role of Nursery Practitioner.

72. The Claimant alleges that Mrs Smith and Ms Gaioni spoke to her in a public reception area and this made her feel very uncomfortable. However this was not something that was put to Mrs Smith in cross examination.

73. The Claimant's position is that the PIP was unnecessary and that she believes the issues raised had already been addressed, given the tone of the 19 February 2019 meeting. As we have said, we observed that the Claimant took away positive aspects of what was said but did not take on board the full consequences of any negative feedback that was given. Our view is that the PIP is comprehensive and that the actions suggested are positive and supportive.

74. One of the proposed forms of action within the PIP was that the Claimant was to plan an activity for Easter Focus, considering the next steps and age/stage of the children in Tots.

75. On 17 March 2019, the Claimant sent an email to Mrs Smith, at B196-197, setting out her understanding of what was discussed at the meeting on 11 March and the issues raised. In summary, her email raised the following points:

    75.1 That she believed she was following children's routines;

    75.2 That she was meeting the basic needs of children, and if it was felt she had not, could she be provided with some guidance as to what else needs to be done;

    75.3 That she believes that she has organised and initiated a number of activities on a regular basis, as well as organising a number of walks, including completing risk assessments. That in a previous setting she had gained experience of planning meetings and planning activities, many of which were related to her degree course;

75.4 She has not yet been involved in planning meetings in the Teenies Room, has asked Lauren (Whiffen, the Room Leader) for the plans but has not seen any;

75.5 She is confused about the new date on which her probation period would end, having been told previously this was 14 May 2019. She feels that by moving her probation date again she is being penalised;

75.6 Since starting work with the Respondent she has regularly been asked by Lauren how she is doing and has always been told that she is doing well and she is really good with the children;

75.7 She would really like to know the date of the next meeting, according to the schedule discussed on 19 February 2019, and also what support she can expect to receive in order to help her achieve her targets as quickly as possible.

76. We note that her email raised no concerns about the proposed Easter activity.

77. On 18 March 2019, a meeting was held between the Claimant, Mrs Smith and Ms Gaioni. The notes of this meeting are at B198. The Respondent discussed the Claimant's email, areas for improvement and why. In her witness statement, the Claimant complains that this is repetitive, but our view is that again the Claimant was not taking on board the totality of the feedback given and these matters were continuing areas for improvement. At the meeting the Claimant again queries why she needs to be on probation and also that she wants the period to be shorter.

78. In her witness statement, the Claimant denies that she was asked to let Mrs Smith know if there was any barrier that could stop her progressing and passing her probation period (as at B198 of the notes). In cross examination the Claimant said that she was invited to mention what she could or could not do and what she could see and hear, but she did not do so because she did not think there were any issues. However, in her witness statement the Claimant stated that there were some aspects of the work for which she needed support, but that she was not given this.

79. So whilst as she said in her witness statement (at paragraph 47) that it was more challenging to move to a new environment, she did not mention this to the Respondent in the meeting. The Claimant also stated that no one had reacted negatively to her facial disfigurement although it was a concern that she always had.

80. Our conclusion was that the Respondent could only go on what was said to them at the meeting.

81. At paragraph 5.7 of the Agreed List of Issues, the Claimant alleges that the Respondent failed to respond to her email as to her evidence that she had met the targets in the PIP. It appears to us that they did so in the meeting held on 18 March 2019 and that the Claimant simply does not agree with

what was discussed or accept the answers given.

82. The Respondent states that the Claimant commenced working in the Tots Room on Monday 22 March 2019. The Claimant states that this was a trial day but she was given no induction and that her first official day in Tots was on Friday 25 March 2019.

83. On 25 March 2019, Mrs Tina Dellis, the Nursery Manager, undertook an observation of the Claimant and the Tots room. The Claimant complains that this was her first day in Tots, she did not know the room or the room routines, did not know the children and had not been told that an observation was going to take place. The Respondent's position is that this was not her first day, that she had worked in Tots before and that agency staff often do the odd day in that room and so the children were used to seeing new people. The Claimant accepted in evidence that children do not react adversely to seeing new people in the room. On balance of probability we accept that this was not the Claimant's first day and so she was not placed at the disadvantage claimed.

84. We were referred to the notes of the observation at B200-201 (and assessment criteria at B208c onwards). Whilst this is headed Observation on Zoe, we note that it does not focus on the Claimant but is an observation of the whole team on that room. In her witness statement, Mrs Dellis said that this was her first observation of the Claimant, that she noticed she felt more comfortable being around single children rather than small or big groups, that she was gentle speaking at times, that some children took no lead from her and that there was no direction for the children to follow, and at times the children did not hear her. She stated that she was a little concerned with the Claimant's lack of interaction and empathy towards the children. She also stated that the feedback was constructive and included positives.

85. The Respondent's position is that no punitive action was taken against the Claimant in respect of this observation, it took place in a positive way and the Claimant was provided with feedback in order to improve. The Claimant agreed in cross examination that the observation was accurate but she felt it was unfair as it was her first day in the room. But as noted earlier, we do not agree it was her first day.

86. The observation note was provided to the team leader, but we see nothing untoward in this.

87. Whilst there is negative feedback within Mrs Dellis' observation this is in the context of a general observation of the room.

88. On 3 April 2019, Mrs Dellis created a care plan with the Claimant, having realised that she did not have one. This is at B210-211.

89. The Claimant alleges that this took place in the reception area which is a public place. In cross examination, Mrs Dellis stated that this took place in a private office with the door closed, and that she was sitting at a computer

typing into the form (the form is indeed typed). Whilst there is a glass panel in the office, she said that was closed. On balance of probability we accept Mrs Dellis' evidence in this regard.

90. Mrs Dellis said in her written evidence that this meeting with the Claimant, in which they together created the care plan, was one of the hardest meetings she had ever undertaken. She stated as follows. Having observed that the Claimant had difficulty holding a pen, she asked her if she had any medical conditions that the Respondent could help her with. The Claimant looked at her for a long time and then replied, "no none". She then asked the Claimant if she was on any medication and again the Claimant paused for a long time and replied "no". She asked if the Claimant had any medical conditions that the Respondent should be aware of or what it could do to support her, and again the Claimant paused, but longer, and replied "no". She noticed that the Claimant wore a hearing aid and asked questions on that, again the Claimant took a long time to answer, and again stated that she had no problems. She asked the Claimant, what if the batteries in her hearing were to die when she was at work, and the Claimant responded that she had spare batteries in her bag. She then asked about the Claimant's glasses, what if they got broken, and how would she cope, and the Claimant replied that she could see without them if needed. She again asked the Claimant if there was anything else that she needed to inform the Respondent about, and the Claimant replied, no. Mrs Dellis also noticed that during the meeting the Claimant had trouble holding the pen when signing her name.

91. In cross examination, the Claimant denied that this conversation occurred, beyond accepting that Mrs Dellis asked her about what the Respondent would need to tell an ambulance if she collapsed, her response being she has a seeing and hearing impairment, and also as to the spare batteries for her hearing aid. At our hearing, it was put to her that on a number of occasions the Respondent asked her in fairly broad terms what adjustments she required to do her job because of her impairments and that the Claimant either did not respond or said that she did not need anything. The Claimant replied that she did not need any adjustments, but she was given meeting notes in small print, and she did not feel it was part of her job to read meeting notes. On further questioning she stated that she was always asked questions on a medical model of disability, if she had medical conditions, and she said no. She accepted that she was putting forward responses based on a medical model of disability rather than on a social model. However, she stated that had she been asked questions on a societal model she would not have answered the questions differently. When pressed further on the point, the Claimant's focus was that the Respondent should have asked her about her disabilities at the start of her employment and what she needed to do her job, that she was offered no support, that she did not expect to constantly have to read small font notes and be dragged into meetings. She just wanted to be allowed to get on with her job.

92. The Claimant was on annual leave from 9 to 16 April 2019.

93. The 18 April 2019 Easter activity. The Claimant's position is that she could

not carry out the activity she had planned because Ms Maftei, the Tots Room Leader, was not working that day and had not set out the necessary resources for the activity. So she had to deliver a different activity. Further, her position is that Marianne, the Nursery Practitioner who planned the activity, said the Claimant had done well in delivering the activity.

94. The Respondent's position is that the Claimant was given 6 weeks' notice of the activity, she had been in Tots Room for nearly a month, and it was bad planning on her part by not checking that Alina was going to be in that day or that the resources were available in advance. We also refer to paragraphs 19 and 20 of Mrs Dellis's witness statement in which she states that it was very clear that the activity was not planned, and that the Claimant had not prepared for it as asked. She further states that it was also very clear to see right from the very first observation that the Claimant only focused on positives rather than taking into account negative feedback when given. On balance of probability we accept the Respondent's evidence.

95. On 23 April 2019, the Claimant met with Mrs Dellis and Ms Gaioni, in what she refers to as another unscheduled meeting. In that meeting the Claimant was told that her Easter activity could not be counted as meeting the criteria for her PIP because she had not planned it or been observed carrying it out. The Claimant states that this was really unfair. She had planned an activity but had to change to a completely different activity when the templates were not available for that activity. Ms Gaioni told her to carry out an activity later that day that would be observed.

96. The 23 April 2019 Dragon Wings activity. In evidence the Claimant states that Ms Maftei had planned an activity making dragon wings for St George's Day. She told the Claimant to get the resources ready and then she could do what she wanted with the materials. However, she gave these instructions in a busy and noisy classroom and due to her hearing impairment, the Claimant misheard her when she said dragon wings and thought she had said bat wings, which made sense to her because the materials looked like bat wings in any event. She was then required to start the observation with very short notice.

97. We were referred to the notes of the observation of the Tots Room undertaken by Mrs Dellis that day at B216-224 and B225-226 with the Claimant's comments. We note that Mrs Dellis records positives as well as actions for improvement. She later explained to the Claimant how the activity should have gone. Mrs Dellis also tells the Claimant that she will be observed carrying out another activity that Friday (26 April 2019) and she needs to think about this, explain the learning intentions, set it up and follow it through using lots of open-ended language and extending the children's learning. There is no suggestion that she has been punished or penalised for what happened.

98. In cross examination the Claimant accepted that she took the suggested actions as criticisms. She also accepted that she was not punished for the activity and that she was just given feedback. While she would not accept that Mrs Dellis had shown her how to undertake the activity later that day, it

was clear from the Respondent's evidence that she did, but that the Claimant simply did not accept that this was the case because Mrs Dellis did not tell her what she should be looking out for.

99. On either 24 or 25 April 2019, the Claimant had a meeting with Mrs Dellis and Claire. The notes of the meeting are dated 25 April 2019 (at B228). However, the Claimant states that she was off on 25 April and her recollection is that it took place on 24 April.

100. We were referred to the notes at B228 and Mrs Dellis' witness statement evidence.

101. The Claimant's position is that she had gone to ask Mrs Dellis to try to provide some positive feedback, as she felt all the feedback, she had been given so far was negative. She states in evidence that she found this very depressing and felt that the nursery managers refused to say anything positive about her. She told them that she did not want to come into work, that she spent an hour crying at home being supported by family before she could leave for work in the mornings. She states that Mrs Dellis asked if she had been "confused" by her demonstration, that she responded she had not although it had been unclear what she expected her to see. Mrs Dellis promised her that after the next observation she would meet with her and would share everything with her.

102. On balance of probability we find that the Claimant was upset by the previous feedback which she perceived to be entirely negative, and that Mrs Dellis tried to reassure her.

103. The 26 April 2019 AB matching bears/patterns activity. The Claimant's position is as follows. On 26 April 2019, Mrs Dellis came into the Tots Room at 9 am and asked Ms Maftei, and not the Claimant, if the Claimant could do the activity. The Claimant thought the activity would start at 9:30 am and so became more anxious and stressed to discover it was to start 30 minutes early because she was not yet prepared to start. The room routine at 9 am was to help the children tidy up and this is what the Claimant was doing when Mrs Dellis arrived. However, she was able to carry out the activity that she had planned which was an activity on AB patterns (mathematics skills). She had planned this on a day off, had spent a lot of time thinking about it and planning a good activity for the children. She had brought her own resources because she had never seen counting bears in the Tots Room. She also brought from home a range of other sorting animals to support the children's understanding that AB patterns could apply to wide-ranging things and to make it more exciting. She explained to Mrs Dellis that the learning activity was to understand AB patterns, that the children enjoyed the activity and there were others who wanted to join in after the first group. Immediately afterwards, Mrs Dellis told her it had been a really good activity and the children were asking very good questions. She said that she would meet the Claimant that afternoon.

104. We were referred to the observation notes made by Mrs Dellis at B229-230

and at B238-239 which contain the Claimant's comments.

105. We would note that the issue for the Claimant here is not so much the feedback, but whether the Claimant had seen this activity before and whether she was accused of lying (as we come onto below).

106. The 26 April PIP meeting. Later that day, the Claimant attended her second PIP meeting with Mrs Smith and Mrs Dellis. We were referred to the notes of this meeting at B245-249.

107. At the start of the meeting Mrs Smith gave the Claimant a Health and Well-being form to complete. It would appear that this was completed during the meeting and that the Claimant signed it. The notes indicated that the Claimant signed the form without reading it.

108. This was a form that was contained within the Claimant's Induction Pack (at B118) but was not completed at the time that the Claimant commenced employment. In cross examination Mrs Smith said that she was not aware that the form had not been completed until then. However, Mr Green did not explore with Mrs Smith why it was important to have completed the form sooner beyond putting to her that she knew the Claimant had disabilities, had trouble changing nappies and had ordered gloves for her.

109. We note the following from the form which is at B118-120 & B253-255. This has been completed by the Claimant. At B118, she does not declare anything about any conditions or illnesses. Her explanation in cross examination was that Mrs Smith instructed her to cross out two sections (commencing with *). This is at odds with the Claimant's witness statement at paragraphs 74-76 which in essence states that she crossed it out, not that she was told to cross it out.

110. The meeting then moved onto the PIP and a discussion of the Easter - Dragon Wings and AB Patterns activities.

111. The Claimant alleges that Mrs Smith accused her of not planning the AB Patterns activity herself having seen a similar activity before and that she accused her of lying. This forms the alleged detriment at paragraph 5.9 of the Agreed List of Issues.

112. Mrs Smith denied accusing the Claimant of lying and the meeting notes do not support the Claimant's allegation. Mrs Smith's evidence is that she told the Claimant that the activity had been done in the room previously and the Claimant confirmed this was true (at B246 of the notes). However, in her witness statement the Claimant states that in the meeting she said that at the time of planning her activity she had seen no sorting bears in any part of the Nursery. It was at this point that she alleges that Mrs Smith accused her of lying and that the activity was not going to be counted.

113. It was not disputed that the counting bears activity had been carried out before. Mrs Smith's evidence was that it was frequently used in matching

and counting activities similar to the one that the Claimant had presented. What was in dispute is whether the Claimant had seen this and simply copied it or whether she independently presented the activity, which was similar to one presented before. Further, it was in dispute whether Mrs Smith accused the Claimant of lying.

114. On two previous occasions the Claimant has accused Mrs Smith of stating that she was "lying" when it was not the word used but rather that she felt in those circumstances that she had been accused of lying. This was not put to her in cross examination on this occasion. On balance of probability we find that Mrs Smith questioned the originality of the exercise given that the Claimant had seen it before in the room, she did not expressly accuse the Claimant of lying but that was what the Claimant took as being implicit from her line of questioning.

115. The meeting then went on to discuss planning linked this to the EYFS framework. The notes record that whilst the Claimant stated that she was very familiar with the EYFS framework she was unable to explain as learning goals in children using the climbing frame and whilst she was able to explain what was involved in free flow, Mrs Smith told her that whilst her answer was brilliant, that was not what they saw her do whilst in the room with the children.

116. Mrs Smith told the Claimant in conclusion that given their discussion, the Claimant would have to perform another activity on 3 May 2019. She asked her to think of an activity by herself and link it to the learning goals. She then provided the Claimant with guidance as to how to proceed and emphasised support available to her.

117. In her witness statement, the Claimant states that at the end of the meeting Mrs Smith said that she had said she had no medical needs and there was nothing else the Respondent could offer. The Claimant's further evidence is that there was no discussion about visual or hearing impairments nor any discussion about adjustments that might be needed outside of her role as a Nursery Assistant. In addition the Claimant states that at no stage did the Respondent suggest it might be beneficial to refer her to occupational health for an assessment of how she could best be supported in the light of her disabilities.

118. The Respondent's position is very much set out in the last large paragraph at B244 of the meeting notes. Mrs Smith sets out support that the Respondent was offering the Claimant. Mrs Smith then states that given that the Claimant has clearly stated she has no medical needs, there is nothing else that the Respondent can offer. Mrs Smith then indicates to the Claimant that there needs to be a significant improvement in order for her to pass her probation. Mrs Smith then asks the Claimant if she understands and is there anything else that the Respondent can offer to support her more. The Claimant replies that she feels that she has met what she had to do from her activity today. Mrs Smith responds, we have spoken to you about this earlier and you said you understood, and she then goes over the previous conversation again with the Claimant.

119. On balance of probability, given the number of occasions we have found that the Claimant has accused Mrs Smith of accusing her of lying and her tendency to be selective in what she takes from meetings, we accept that the meeting took place as alleged by the Respondent.

120. On 28 April 2019, the Claimant sent an email to Mrs Smith, which is at B256. In this email she expressed her concerns that she was required to perform another activity on the basis that the one she did on 26 April was one that she had seen done before. She denied that this was the case and stressed that she had spent her own time planning the activity and had brought in her own resources. She stated that Mrs Dellis had given her good feedback on the day and that the children had enjoyed the activity. She further stated that she felt that she had passed this target. She also stated that she had found the process of undertaking activities on a number of occasions and one at very short notice to be very stressful. She stated that she believed that she had successfully completed all of the items identified under the section of the PIP entitled "What the employee is required to do now" and she wanted to know what the next steps are.

121. By email dated 29 April 2019, Mrs Smith responded to the Claimant's email (at B257-258). In this email she expressed regret that the claimant had found the process stressful and assured her that they were working to support her to improve her practice and meet the standards required of all of the team. She said she was pleased that the Claimant had used her initiative and ordinary resources but had not made this clear during the subsequent observation meeting. She stated Mrs Dellis' comments describing the activity as really good was a reference to the progress made over the course of the week. However, the activity was still below the standards expected. She attached a blank team observation form for information, stating that we expect our team to be working to the "good" standards or above and that the activity observed did not meet this standard. The email reminded the Claimant that the next step in her improvement plan will be an activity observation on 3 May and she would then meet with her to review the improvement plan on 10 May. The email enclosed the observations from the previous week.

122. The Claimant responded by email dated 30 April 2019 at B257. In essence, she accepted that the activity was not the best, but did not have the opportunity to discuss these matters with Mrs Dellis at the time and did not have the opportunity of having the observation feedback form. She then made some observations about the nature of the AB patterns activity. Finally, she stated that having had two observations last week and feeling that she is been put under a lot of pressure, she would appreciate it if the observation currently scheduled for this Friday (3 May) could be postponed until next week.

123. On 1 May 2019, the Claimant attended a catch-up meeting with Mrs Smith and Mrs Dellis. The notes of the meeting are at B261-262.

124. At that meeting there was a discussion about the Claimant's email of 30 April 2019. In cross examination Mrs Smith said she asked the Claimant to explain what she wrote in her email and the Claimant did not seem to know what was in it and could not explain it. As a result, she wanted to know if the Claimant had in fact written the email herself. We note that Mrs Smith was not asked the question as to why she asked the Claimant this in the first place.

125. In response, the Claimant stated that she had written the email. Mrs Smith said that she was a little confused because all she was trying to do was to support the Claimant and that she was sorry if the Claimant felt that she was causing her problems. The Claimant said that she felt that she had passed her targets and that the Respondent wanted her to do it again. Mrs Smith explained to the Claimant that her first observation was rated low, the second one was better than the first, but was still low, and that the Respondent needed to see improvements bringing her activities to a high rating. The Claimant stated that it was too much being observed again, it was too much pressure. Mrs Smith explained that it was her job to observe all of her team and that she needs to observe her undertaking an activity and that in order for her to pass a probation there must be improvements. The Claimant asked to put her observation back. Mrs Smith stated that the Claimant was running out of time given that her probation ends very soon (in June 2019). She added that everything was taking so much time and that the five minute catch up with the Claimant had taken an hour and a half. She further stated that the Claimant kept saying she understood but then kept coming back to the same questions. Mrs Smith asked the Claimant to sign that the minutes of the last meeting which had already been sent to her were accurate. The Claimant said she had not read them. The Claimant then asked to bring a union representative to a meeting. Mrs Smith replied that it is not a disciplinary meeting, so why should she require a union representative? The Claimant responded she wanted one with her. Mrs Dellis replied asking the Claimant to confirm when she is bringing a union representative to a meeting so that she and Mrs Smith can make themselves available.

126. Later that day, there was an incident involving a child climbing on a chair. We were referred to the notes of an observation made by Mrs Smith and Mrs Dellis of the Claimant at B265. Whilst walking through the room to another room, they observed the Claimant sitting with approximately seven children, having a conversation with a child to her left, whilst a child to her right started to move around in his chair and eventually climbed on it. This went on for approximately one minute without the Claimant noticing. Just as Mrs Dellis went back into the room to ask the Claimant to manage the child before he fell, another member of staff left what she was doing and settled the child in his seat.

127. In her witness statement, the Claimant explained that she noticed Mrs Smith and Mrs Dellis watching her through a glass partition and was determined to show Mrs Smith that she interacted during mealtimes and continued talking to a child to her left keeping her face turned towards that child. However, her peripheral vision is not very good and she was focused at this point on that child and only subsequently became aware that a child had climbed on a

chair behind her. She further explained that another member of the team noticed the child and dealt with the situation and that this was one of the many times when one member of a team noticed something unseen by another team member and dealt with it. She further stated that this sort of teamwork situation is why there are set child to adult ratios within the EYFS statutory framework.

128. The Claimant does not deny that this incident happened but puts a different emphasis on what she was doing. She was not observing all of the children but focusing on the child in front of her.

129. The Claimant sent an email to Mrs Smith that evening at 10:10 pm (at B259). The email asked for a copy of the minutes of the meeting held on 26 April 2019, attached the observation notes comments, attached the EYFS framework setting out more information about the repeated pattern activity as requested and ended with the words:

"As I said, I am trying really hard and would just like to be given the opportunity to get on with my job without the added stress that the repeated observations are causing me. Thank you for postponing the next observation. Please confirm the exact time and date, so that I can plan for it."

130. Mrs Smith replied to the Claimant's email the following day, 2 May 2019, at 5:43 pm (at B263). In her email she stated that there seems to be some confusion as we stated the observation would not be moved due to the timescales of your probation which you agreed. The email further stated that the Respondent was expecting an activity tomorrow as explained in the meeting with Mrs Smith and Mrs Dellis on 1 May 2019.

131. The notes of the meeting held on 1 May 2019 do not record any postponement of the activity set for 3 May 2019. Indeed they indicate the exact opposite. We refer to the handwritten notes at B260. These would appear to be written by the Claimant having used her handwriting at B118 as a comparison. These notes do not mention a postponement of the observation.

132. On balance of probability, this does appear to be part of the pattern that the Claimant hears what she wants to hear rather than what actually happened. And so on balance of probability we find that the Respondent did not agree to a postponement of the 3 May 2019 observation as alleged by the Claimant.

133. On 2 May 2019 there was an incident involving a knife. This is referred to at paragraph 5.10 of the Agreed List of Issues as Mrs Smith interfering with the Claimant's work on 2 May 2019 and accusing her of leaving a knife unattended.

134. The Claimant alleges Mrs Smith told her that she was cutting fruit into pieces that were too small for the children to eat and was chopping fruits too slowly. Mrs Smith accepted that she told the Claimant that she was cutting fruit into pieces that were too small but she denied making any comment regarding

the Claimant preparing the food too slowly. The Claimant submits that the documentary evidence supports her account of the incident in that the observation report at B266 contained references that imply that she was carrying out tasks too slowly, including chopping the fruit, ie "ZHW had been chopping fruits for some time in the kitchen area".

135. In her witness statement, the Claimant explains that having small hands, being unable to bend her fingers at the interphalangeal joints and having limited manual dexterity impairs her ability to perform tasks such as chopping and the speed which she can perform such tasks. Indeed, Mrs Dellis said in evidence that she had noticed that the Claimant had difficulty holding a pen. Further, in her witness statement, the Claimant states that Mrs Smith criticised her for cutting the fruit too small and that she needed to be quicker.

136. We note that the note of the observation at B266 does mention that the Claimant has been chopping the fruit for some time, but nothing more is made of this. There is no express criticism that the Claimant is taking too long, it is purely as to the size of sections of fruit. And any feedback only deals with this as to not promoting children being able to serve themselves. If the time being taken had been an issue, it would have been mentioned in the feedback. On balance of probability we therefore find that the only criticism raised was as to the size of the fruit pieces.

137. With regard to the unattended knife. In her written evidence the Claimant states that she was cutting fruit in the kitchen area away from the children but facing into the room so that she could see them. Ms Maftei called the Claimant over to tell her to cut the fruit at the table. She moved over to the table with a bowl of pears, the chopping board and the knife, sitting with her back to the kitchen island. She realised that she had left the apples on the kitchen island and as she stood up to get them, Mrs Smith appeared behind her and said that she should never leave a knife unattended. However, she had not stepped away from the table. She was not intending on leaving the knife there unattended and no children were sitting within reach of the table.

138. We were referred to Mrs Smith's observation notes at B266 which stated in essence that the Claimant left the chopping board and the knife unattended at a table and went to the kitchen area, that there were no other staff with the children at the table, but several children played with resources at other tables nearby. The notes also state the Claimant understood that this was not acceptable and that Mrs Smith said that she would be discussing it with her later on. The Claimant signed these notes at the time.

139. In cross-examination, the Claimant accepted that at the time Mrs Smith had to move to the other side of the room to take the knife from her and that it must have taken her some time to do so. However, in her witness statement the Claimant states that as she stood up to get the apples, Mrs Smith appeared behind her before she had even stepped away from the table. The Claimant then accepted that Mrs Smith must already have crossed the room before she left the table.

140. On balance of probability, taking into account that her evidence is contradictory and that she signed the notes accepting the account at the time, we accept the Respondent's evidence. With regard to paragraph 5.10 of the Agreed List of Issues, we find that Mrs Smith was interfering with the Claimant's work in the sense that she was told that she was cutting the fruit too small and she was accused of leaving a knife unattended.

141. At paragraph 5.11 of the Agreed List of Issues, the Claimant alleges that she was treated unfavourably by Mrs Smith emailing her on 2 May 2019 to indicate that she would be expected to deliver a focused activity planned by her on the following day in a room where she was not familiar with the children or staff, notwithstanding the Claimant previously informing Mrs Smith that she understood that it would not be necessary for her to deliver an activity the following day.

142. The Claimant was told at the meeting on 26 April 2019 that she will be observed again on 3 May 2019.

143. But there is no indication that it will be in a different room she was not familiar with. It is not dealt with at paragraph 83 of the Claimant's witness statement, at paragraph 18 of Mrs Smith's witness statement, or within the notes of the meeting at B249. The Claimant raised this in cross-examination and it was put to Mrs Smith in cross-examination that the Claimant was rostered for the Tiddlers Room that day and Mrs Smith accepted that whilst this was not a room that the Claimant was familiar with, she had worked there before.

144. Mrs Smith then emailed the Claimant on 29 April 2019 reminding her of her next observation, at B264. The Claimant emailed Mrs Smith on 30 April 2019, at B257, asking for a postponement. At the meeting on 1 May 2019, the Claimant asked for the observed activity to be put back and the Respondent said no. The Claimant then emailed Mrs Smith again on 1 May 2019 at 10:10 pm, at B264, thanking her for agreeing to postpone the observation. Mrs Smith emailed the Claimant on 2 May 2019 at 5:43 pm, at B263, in reply to Claimant's email about there being some confusion as to cancellation of the observation and that it is going ahead on 3 May 2019. There is no evidence that the observation was postponed by the Respondent and it appears that this was a misunderstanding on the Claimant's part.

145. In cross-examination, Mrs Smith explained that she did not see the Claimant's email of 1 May 2019 until late on 2 May 2019 and that when she did she sent her reply. We accept her evidence.

146. The Claimant's position is that the delay deprived her of the opportunity to prepare. The Respondent's position is that the Claimant knew that the observation was going ahead at the meeting on 26 April 2019, which was confirmed in the email of 29 April and so the email on 2 May was not new news.

147. On balance of probability, we find there is no indication that the Respondent had given any indication that it had agreed that the observation had been

postponed. The Claimant was told clearly at the meeting on 1 May at B261 that it was not being postponed. The Claimant had time to prepare the observation and whilst it was in a different room there was little evidence on this and as the Claimant had been an agency worker for 5 years she would be used to working in new environments (as she refers to at paragraph 4 of her witness statement). In any event the activity did not go ahead.

148. On the morning of 3 May 2019, the Claimant's mother, Dr Hilton, telephoned the Respondent to speak to Mrs Coackley.

149. Dr Hilton has been a qualified teacher of mathematics since 1985, teaching children and adults of all ages. Since 2008, she has worked at UCL Institute of Education as a Lecturer in Mathematics Education. She currently teaches a mathematics education course for students training to teach in the EYFS, KS 1 and KS2. Her own PhD explored mathematical development in children with Apert syndrome.

150. In Mrs Coackley's absence, Dr Hilton spoke to Mrs Smith. We were referred to a note of the conversation at B267. Dr Hilton expressed her concern about the stress that had been put on her daughter which was making her ill. She expressed her shock about what was going on and said she had seen Mrs Smith's email at 5.45 pm telling her she had to do an activity when she knew that the Claimant felt this way. Mrs Smith said she was very sorry and explained that there had been a meeting and the Claimant was told that the activity was going ahead on 3 May. Dr Hilton said that she was amazed how well the Claimant had done in the activity last week, and yet the same day Mrs Smith tore her apart. Mrs Smith explained that they have a process that they need to follow during probation, they are trying to support the Claimant as much as they can, she has been given clear guidelines. Dr Hilton stated that the report that had been sent was quite positive, as were her team in the room, but it seems that everything that Mrs Smith says is negative. Dr Hilton asked if the Claimant could be given one target at a time to complete. Mrs Smith stated that the reason for the observations is to support the Claimant on her targets and that her probation runs out on 4 June 2019 and so they do not have a lot of time. Mrs Smith also explained that they are all trying to support the Claimant, but she thinks they are working against her as she always puts a wall up. The note ends with Mrs Smith stating that she did observe something, regarding which she will be meeting the Claimant, but could not go into detail with Dr Hilton as to what this was about, and that the Claimant was aware that a meeting was going to happen.

151. Dr Hilton's witness statement details much the same conversation save that she sets out more detail of the level of distress and anxiety that the Claimant was experiencing, that she left for and returned from work each day in tears and that she did not recognise the Respondent's approach as very supportive and that the Claimant's extreme distress was a good indicator of this.

152. In the event, the activity scheduled for 3 May 2019 did not go ahead and instead there was a meeting between the Claimant, Mrs Smith and Mrs Dellis that morning.

153. In her written evidence, the Claimant states that Mrs Smith approached her before the start of the working day and asked if she had planned an activity. The Claimant said she had not, because she had been so stressed from being constantly observed and had not been told where and when the observation would take place. Until she received her email the day before, she thought she had until 10 May to plan her activity. Her further evidence is that Mrs Smith took her to her office where Mrs Dellis was waiting and told her that she should have planned an activity. The Claimant states that she said that she preferred to do the activity the following week and repeated how stressed she was from the observations. Mrs Smith told her that she always observes and that is how nurseries are run and that she would now be observed on the following Tuesday, 7 May 2019 (she was initially told 6 May, but this was corrected because this was a bank holiday) but without confirming what time or within which room. The Claimant further states that she told Mrs Smith that she would do the activity, but please could it be the last one. Mrs Smith replied that she did not know how many more would be needed.

154. That afternoon, the Claimant was called to a further meeting with Mrs Smith and Mrs Dellis. We were referred to the notes of this meeting at B272-273.

155. The meeting discussed two observations that week. One was where it was observed that a team member was playing with 17 children whereas the Claimant only had one child and the other was of the child climbing on the chair (at B265). The meeting notes recorded that the Claimant read the observation and agreed with what happened and signed both observations. We have already dealt with the second observation above and would note that this was about the position of her chair rather than the Claimant's visual impairment or field of vision.

156. The meeting then discussed the knife incident, which is described as a "serious safeguarding matter". We have already dealt with this above. We would note that this was about the size that the Claimant was cutting fruit and not about her ability to cut fruit or the speed at which she did it.

157. The notes record that Mrs Smith mentioned some positive things that the Claimant had done but explained that she was still at a low level although she could see that the Claimant had tried. But Mrs Smith added that the Claimant needed to raise the bar much higher to pass her probation. The notes record that the Claimant agreed and said she understands.

158. The meeting then discussed an incident relating to a nappy that the Claimant had changed. This is recorded in the Concerns Log and diary entries at B268-271. Mrs Smith told the Claimant that it had just come to her attention that the Claimant had changed a child's nappy at 9 am, and at 11 am another team member changed the child's nappy, as the child was wet, and she noticed that he had not been cleaned properly and still had "poo" dried to him. The Claimant explained how she had changed the child's nappy step by step.

159. Mrs Smith said that they have had this conversation many times before, that the Claimant has told her that she was more than capable of changing a nappy, but these are significant incidents, and she cannot say after this that the Claimant can pass her probation.

160. In her witness statement, the Claimant deals with each incident. We have already dealt with the first two above. With regard to the nappy incident, the Claimant sets out her reasons for doubting her responsibility for the state of the child's nappy at paragraph 110. On balance of probability, we accept the Respondent's evidence. In any event this was not to do with manual dexterity but a failure to change a nappy properly.

161. The Claimant further states in her witness statement that at the end of the meeting, Mrs Smith said that there was no point her carrying out a further activity on 6 May 2019 because it would not count towards her PIP and that she would be reporting the three safeguarding issues to Mrs Coackley. The notes of the meeting records as much but in slightly different terms, at B272. There is then a very circular conversation recorded at the bottom of B272 and over to B273 as to whether the Claimant would pass her probation and as to the need to carry out a further activity. Ultimately, the Claimant decided that she did not wish to undertake a further activity.

162. On 6 May 2019, the Claimant sent an email to Mrs Coackley attaching a letter in which she complained about the way in which Mrs Smith had treated her and she asked Mrs Coackley to take over her supervision from Mrs Smith. This is at B274-276. The letter referred to the Claimant feeling that she had been bullied and more and more harassed by Mrs Smith throughout her probation period.

163. In evidence the Claimant stated that she discussed the wording of this letter carefully with her family and chose the term "harassment" specifically because she felt that Mrs Smith's attitude towards her was a response to her disability. She said that she had used it in the sense applied to the word under the Equality Act 2010. The letter sets out in some detail her concerns about the way in which Mrs Smith treated her and the effect that it has had on her well-being. The letter does not mention her disability or link the treatment complained of to her disability or explain how the treatment amounted to harassment under the Equality Act. Despite her witness evidence that she intended the letter to refer to her disability and the legal definition of harassment, we do not accept that the letter does this.

164. Mrs Coackley said in evidence that whilst the grievance procedure did not apply to probationers, she sought to treat the matter in the first instance in an informal manner. Whilst she did not share the letter with Mrs Smith, she said that she did discuss the issues raised with her, as the first step is to raise the matter with the person in question, in order to seek a remedy. She also explained to Mrs Smith that she would be taking over as the Claimant's line manager, as requested, for the final weeks of her probation. Mrs Coackley further stated in evidence that this action was intended to support both the Claimant and Mrs Smith.

165. On 7 May 2019 the Claimant met with Mrs Coackley and Mrs Dellis to discuss the Claimant's email. We were referred to the notes of this meeting at B280-281. The notes indicate that whilst Mrs Coackley acknowledged receipt of the email and advised the Claimant she would step in for Mrs Smith, although Mrs Smith still remained her line manager, the bulk of the meeting discussed the Claimant's performance issues and put in place an action plan, including targets.

166. We were also referred to the action plan drawn up for the Claimant on 7 May 2019 at B279. This sets out a list of events scheduled to take place between that date and the end of the Claimant's probation period. Namely: observed activities on 7 and 21 May 2019; and review meetings 21 May and 4 June 2019. In addition the targets and areas of improvement that the Claimant was required to achieve are detailed in the notes. During that period it was stated that both Ms Maftei and Mrs Smith would review the Claimant's progress and that Mrs Coackley would then meet with them at the review meetings, to be updated on the Claimant's progress. The document made it clear that if the Claimant was not making the overall progress expected of her then she could be dismissed with one week's notice.

167. The Claimant's position in evidence was that Mrs Coakley did not discuss or ask any questions and told her that Mrs Smith would continue to be her line manager, making her feel vulnerable and unprotected.

168. Mrs Coackley's position is that she did not understand the Claimant to be complaining of harassment under the Equality Act or of disability discrimination. Rather she took it that her complaint of harassment was linked to the ongoing demands of her role and meeting the requirements of her PIP, which resulted in three observed activities, which the Claimant found stressful. She further stated that she did not recall that the Claimant made an express allegation of disability discrimination at their meeting, and if the Claimant had she would have noted it down and taken appropriate action. She stated that she was dealing with the matter informally to achieve a resolution and as such there was no need for her to investigate anything. Her understanding was that by taking over as line manager and putting in place an action plan, the Claimant was happy with the outcome.

169. In her witness statement Mrs Coackley also stated that having worked with both Mrs Smith and Mrs Dellis during the period in question, she found the Claimant's complaint to be very cruel and unkind. She was aware how hard Mrs Smith was working to support the Claimant and that her conduct had been nothing but professional. Furthermore, she stated all the meetings with the Claimant had another person present and all the meeting notes were signed by all attendees, including the Claimant, as accurate. She further stated that throughout the meetings, there was no cause for concern in regard to Mrs Smith's treatment of the Claimant.

170. The Claimant has raised her concern about the lack of confidentiality in dealing with her complaint. Mrs Coackley did not tell the Claimant she had

spoken to Mrs Smith about her email. But we accept that part of investigating a complaint is to share it with the person accused.

171. We were concerned about the degree of investigation of the Claimant's complaint. The Respondent's handbook deals with the procedure for dealing with cases of bullying and harassment at B556. There is an informal stage which involves the victim approaching the offender and asking them to stop, and if this is unsuccessful or not appropriate, then the matter should be raised formally with a line manager and the complaint investigated.

172. It is clear from Mrs Coackley's evidence that there was no investigation of the Claimant's complaints about Mrs Smith. All that Mrs Coackley did was to apply her own knowledge and observations of what had gone previously. She did not look at the complaints afresh but looked at them from the perception that they arose purely from the Claimant feeling under pressure.

173. There was a duty on Mrs Coackley/the Respondent to look into the complaints whether they were legal complaints of harassment or not and there was a clear policy stating that complaints will be investigated. Despite the grievance procedure not applying to probationers as claimed, it must be implicit that the bullying and harassment policy should apply to staff from day one.

174. Whilst Mrs Coackley's evidence expressed her understanding of what the Claimant's complaint of harassment was linked to, stepping in as line manager and taking over the PIP and probation did not address the underlying complaints about Mrs Smith.

175. We therefore find that the first sentence of paragraph 5.13 of the Agreed List of Issues is made out: that in the meeting on 7 May 2019, Mrs Coackley failed to address the Claimant's 6 May 2019 grievance about bullying and harassment by Mrs Smith and the ongoing failure to investigate that grievance.

176. However, we do not find the second sentence of paragraph 5.13 made out: that Mrs Coackley failed to follow the Respondent's policy by discussing the grievance with Mrs Smith. Firstly, the grievance procedure did not apply and secondly, it does not contain any such restriction, although the bullying and harassment policy talks about dealing with allegations "seriously and confidentially". However, this would seem to make it almost impossible for a grievance of this kind to be investigated. It must be reasonable to discuss the grievance with the person accused.

177. Mrs Smith said in evidence that when Mrs Coackley was on annual leave at some point in May 2019, she became aware of the complaint against her in the Claimant's file. Having seen the complaint, she drafted a written response to it and asked for it to be added to her HR file. This is at B276a-c. Mrs Smith denies the allegations made against her in the complaint.

178. The Claimant was observed by Mrs Dellis undertaking an activity later that

day (7 May 2019). We were referred to the observation notes taken by Mrs Dellis at B282-289.

179. This was a story reading activity in which the Claimant read two stories to two groups of 10 children sitting on the carpet whilst the Claimant sat on a bench. Mrs Dellis' notes indicate that whilst the Claimant was reading the first story, her voice became gradually quieter and quieter, the children became disinterested, and several got up and moved away.

180. At one point a child wanted to get up from the carpet and the Claimant placed her hand on his shoulder and sat him back down. Whilst the Claimant was reading the second story, Mrs Dellis' notes state that from the very beginning the Claimant's voice was very low, only two of the children seemed interested and as she continued reading got up and went elsewhere. Two children sitting at the front had tried to get up from the carpet, but the Claimant put her hand on their shoulders and sat them back down.

181. The end of the note sets out positives from the observation and the actions required. One of the actions was as follows: *"It's okay if a child wants to move from an activity. Please don't make a child sit down when they are not interested."*

182. The Claimant's evidence essentially accepts the observation notes although offers explanation for what happened. However, the Claimant is quite clear that she gently put her hands on the shoulders of the children to encourage them to sit down.

183. Later that day, the Claimant sent an email to Mrs Dellis thanking her for her feedback, acknowledging that her voice may sometimes be too quiet and agreeing that the children got distracted during the second of the two stories and putting forward possible explanations for this. This is at B302. The email does not mention the issue of the Claimant placing her hand on the shoulders of three of the children.

184. Mrs Smith said in evidence that after a discussion with Mrs Coackley and advice from the Respondent's HR adviser, it was decided to issue the Claimant with a written warning with regard to the knife incident. She further stated that if any formal procedure was not followed, this was not something that arose from the Claimant's disability. Her position was that the Claimant admitted that she had left the knife unattended, and this raised safeguarding issues and it was important that the issue was documented and dealt with swiftly.

185. On 8 May 2019, Mrs Smith wrote to the Claimant advising her that she had been issued with a written warning in respect of the incident involving the knife as raised with her at their meeting on 3 May 2019. The letter advised of the steps required to achieve improved practice and ensure that the children remain safe in her care. Namely, to ensure that she is vigilant in her duties and that she risk assesses her practice to ensure she does not put children in danger. The letter also advised the Claimant of her right of appeal. This

letter is at B293. The Claimant did not appeal against the written warning.

186. The Claimant's position is that she was never told at the time that the knife issue would be a disciplinary matter, she was pressurised to sign the note and had difficulty reading them because of the size of the font.

187. We note that the Respondent was not obliged to deal with this matter under its disciplinary procedure and so there would appear to be no obligation to have given the Claimant prior notification of the issuing of a warning.

188. The warning letter was handed to the Claimant in a sealed envelope in the staff room whilst other members of staff were present. The Respondent said there was a general practice of handing letters to staff in this manner, so it would not appear significant and in any event, it was in a sealed envelope.

189. Whilst we understand that the Claimant found the handing of the letter to her in this way to be distressing in itself, we do not see anything untoward in this practice given that the letter was in a sealed envelope. But we did feel that generally it cannot be regarded as best practice to hand communications to staff in this way.

190. At paragraph 5.14 of the Agreed List of Issues we therefore find that on 8 May 2019, Mrs Smith did hand the Claimant a written warning and that the Claimant was not informed of any disciplinary proceedings being commenced, but there was no obligation to follow the disciplinary procedure because the Claimant was on probation. With regard to the second sentence of paragraph 5.14, we do find that it was inappropriate to hand communications to staff in front of colleagues, but we do not take anything untoward from this.

191. On 8 May 2019, the Respondent received an email letter of complaint. This is at B294-295. This raised a parent's concerns about the way in which her child had been treated by a member of staff during a settling in session which she had attended with her child the previous day.

192. The gist of the complaint was that the parent did not feel that she was made welcome by staff generally and that one member of staff in particular was constantly dragging the children to force them to sit down, snatching from them in an aggressive way and had pushed her child off her lap in an unpleasant manner on two occasions. The parent indicated that she would not be returning with her child.

193. Mrs Smith said in evidence that she met with the parent concerned on 13 May and we were referred to her notes of that meeting at B305. This note states that the parent's complaint was that a member of staff pulled the children's arms to get them to sit down when reading a story and that this same person had pushed her daughter off her lap on two occasions. After the meeting, Mrs Smith asked the parent to point out the member of staff on the staff noticeboard and she pointed to the Claimant's photograph.

194. We were also referred to a statement written by an agency worker at B298 in which he stated that he witnessed the Claimant grab a child by the arm the previous week, on 7 May 2019, and he had seen her do this several times. Whilst the statement was not clearly worded, this is the gist of what the agency worker said.

195. On 13 May 2019, the Claimant was called to a meeting with Mrs Smith and Mrs Dellis to discuss the matter. We were referred to the notes of the meeting at B306-307 and of the continued meeting at B308.

196. The notes of the first meeting indicate that the Claimant was asked what happened on 7 May 2019 and was advised of the parent's complaint that the children were not allowed to go and play and in fact she pulled their arms to sit them back down without using any words. The Claimant was asked by Mrs Dellis on two occasions whether she had pulled the parent's child down by her arm and she replied yes. Mrs Smith indicated that they would carry out an investigation with the other members of the team present at the time and meet with the Claimant later. At the end of the meeting Mrs Smith asked the Claimant if she understood what was being said because they did not want her going home not understanding the purpose of the meeting, so that she did not feel the need to then write an email. The Claimant replied that she did understand. The notes of this meeting are signed by the Claimant as well as Mrs Smith and Mrs Dellis.

197. The Claimant's position in cross examination was that she understood the allegations, was given the time to put her case, given the document in the meeting, given the opportunity to read it, but did not read it, although she signed it, and that she did not agree with the contents. She stated that she was put under pressure and stress.

198. Mrs Smith's evidence is that having taken advice from Mrs Coackley and the Respondent's HR adviser a decision was made to suspend the Claimant from work.

199. The notes of the continued meeting are at B308. They indicate that Mrs Dellis showed the Claimant a copy of the observation notes that she made on 7 May 2019 and asked if it was true and that she had agreed to what they contained. The Claimant responded yes. Mrs Dellis asked her if there was anything she wished to add, and the Claimant said that it was a true account of the observation. Mrs Smith then stated that having looked at the overall picture, the Respondent had been left with no choice but to suspend the Claimant on full pay. Mrs Smith then read a pre-prepared letter to the Claimant setting out the reasons why she was suspended, and she reminded the Claimant that she had already agreed with what the parent had said. The Claimant was asked if she understood that she was suspended until the outcome of the investigation and she said yes. It was confirmed that the meeting planned for 21 May would go ahead with Mrs Coackley.

200. We were referred to the suspension letter dated 13 May 2019 which is at B309. This letter advises the Claimant of her suspension pending disciplinary

investigation and sets out three allegations: failure to follow the Nursery's safeguarding procedure; not acting in accordance with the Behaviour Management Policy; and not making sufficient progress as stated in the action plan issued to her on 7 May 2019. It does not specifically refer to the parent's complaint although broadly speaking that is a safeguarding or behaviour management policy issue. Performance issues in themselves do not normally give rise to grounds to suspend.

201. By email dated 14 May 2019 sent at 8:56 am, the Claimant's parents wrote to Mrs Smith, at B316. In this email they expressed their concern that the Claimant had returned from work once again distraught and in tears, and that given she had told the Claimant that she did not want any more emails from her, they had taken it upon themselves to write on her behalf. They expressed their concern that Mrs Smith had made the decision to suspend the Claimant on the first day that Mrs Coackley was away on holiday. They noted that should the suspension stand, the meeting planned for 21 May 2019 would have to deal with it, at the cost of discussing the Claimant's progress, and that further, the timing of the suspension would prevent the Claimant from undertaking her next observed activity. They also expressed their concern that the Claimant was once again pressured to sign minutes of meetings without adequate time to digest them or to consider any implications they might have for her. With regard to the allegations that the Claimant had failed to follow the Respondent's safeguarding procedure or acted in accordance with the behaviour management policy, they asked for her to be provided all necessary information by 10 am that morning so as to defend herself. Finally they stated that the Respondent needs to let the Claimant know what it is doing in order to ensure that it is complying with its duty of care to her.

202. Dr Hilton sent a further email to Mr Hutchings later that day, at B317, very much repeating the concerns raised in her previous email to Mrs Smith, having become aware that she was not in work that day. Mr Hutchings telephoned Dr Hilton in response.

203. We were referred to an investigation report dated 16 May 2019 at B 318-321. This was authorised by Mr Hutchings and undertaken by Mrs Smith, the investigation beginning on 8 May 2019.

204. The report sets out the background to the Claimant's probation, the written warning regarding the unattended knife, the placing of her hand on children's shoulders to encourage them to sit down and the parent's complaint. The report then sets out the process of the investigation in date order, the evidence collected, persons interviewed and not interviewed and the investigation findings. It further sets out the rationale of the decision to suspend the Claimant, a summary of the witness evidence (and later on supporting documents) and the facts established. The focus is very much on the parent's complaint and that the Claimant admitted pulling children by the arm in an aggressive manner. The report ends with Mrs Smith's recommendation, which was one of dismissal, and the further details of the recommendation are as follows:

"Due to the previous written warning where Zoe failed to safeguard children, failure to make significant progress in her personal improvement plan and Zoe being on probation we feel we are left with no option after this incident of acting in an unprofessional mannor (sic) and not following our behaviour management policy but to recommend dismissal."

205. The investigation was undertaken by Mrs Smith. The Claimant had already made a complaint about Mrs Smith. Mrs Coackley had already discussed the complaint with Mrs Smith. Mrs Smith said she was unaware that there was a complaint against her, otherwise she would not have conducted the investigation.

206. We note that at B316 where Mrs Smith sets out the gist of her discussion with the parent on 13 May 2019, she states that the parent explained that the Claimant had been pulling children by the arm to sit down in an *"aggressive"* manner. This was not a word that was used by the parent or in Mrs Smith's note of the meeting.

207. We would also note that there is a reference to the previous incident on 7 May 2019 (although this is stated erroneously in the report as being 07/08/2019) as to the use of the hand in touching to make a child sit down and not as to pulling children on 8 May 2019.

208. We also note that Mrs Smith recommended dismissal rather than there being a case to answer (or not, as the case may be), as is the more usual recommendation from an investigation report.

209. We heard evidence from Mrs Smith and Mrs Coackley as to the Respondent's obligations to refer safeguarding issues to an officer at the local authority, the Local Authority Designated Officer (LADO).

210. The policy relating to allegations against employees, students or volunteers of the Nursery or any other person working on the premises is at B138. This states that the LADO, Ofsted and LSCB will be informed immediately in order for allegations to be investigated by the appropriate bodies promptly. The first bullet point of the procedure states that "the LADO will be informed immediately for advice and guidance".

211. At the time of the parent complaint, Mrs Coackley was on annual leave. In evidence both Mrs Smith and Mrs Coackley were unclear as to whether they each held the obligation to report the matter. Mrs Smith did not know why the matter was not referred to the LADO. Mrs Coackley stated that this last incident was an accumulation of a number of smaller issues, and these did not amount to enough to justify a referral to the LADO. We would express our surprise that if this incident involving the pulling of children was so serious to justify the recommendation to dismiss the Claimant, that it was not referred to the LADO.

212. At paragraph 5.16 of the Agreed List of Issues the Claimant alleges less favourable treatment in terms of Mrs Smith's approach to investigating the

child handling incident on 7 May 2019 and a parent complaint which demonstrated a lack of impartiality and objectivity.

213. Having considered the matter and the evidence before us, it is hard not to be influenced by the fact that Mrs Smith should not have conducted the investigation in the first place, even if she was only aware of the issues arising from the complaint, given that they were about her and given the other matters that we have noted above as to the use of the word *"aggressive"*, the previous hand on shoulder issue, the recommendation of dismissal as opposed to a case to answer and the failure to refer the matter to the LADO. This all-leaves Mrs Smith open to accusations that her approach demonstrated a lack of impartiality and objectivity which then taints the recommendation to dismiss, ie it could not be seen to be impartial.

214. On 16 May 2019 the Respondent sent a copy of the Investigation Report to the Claimant by email, at B324.

215. There is further email correspondence between Dr Hilton and the Claimant with Mr Hutchings and Mrs Smith in which Dr Hilton and the Claimant seek supporting documentation which they state has so far not been provided (at B325-328). It would appear that ultimately these documents were provided to the Claimant.

216. There is also further voluminous email correspondence between the Claimant, her parents and her union representative with the Respondent which we have read but we do not believe is relevant to our findings.

217. By letter dated 20 May 2019, the Respondent wrote to the Claimant requesting her to attend a disciplinary hearing on 28 May. This letter is at B345. The purpose of the hearing was specified to be to allow the Claimant to respond to the following:

"Allegations, following a compliant (sic) from parents, that you acted in an unprofessional manner when dealing with the child in the nursery."

218. The disciplinary hearing took place on 28 May 2019 and was conducted by Mrs Coackley accompanied by Bernie O'Keeffe, the Respondent's HR adviser. The Claimant was accompanied by her union representative and her mother Dr Hilton. The notes of the hearing are at B369-370.

219. The Claimant provided written representations for the meeting which are at B359-368. This document raises the complaint of disability discrimination at B367. In cross examination, Mrs Coackley said she received the written representations, but they were given a lot of information verbally and in writing and she did not appreciate that this complaint was raised at the time.

220. The focus of the discussion at the meeting is clearly about the incident on 7 May 2019. The Claimant was given the opportunity to explain her position and she made it clear that she could not bend her fingers and so she could not have pulled a child's arm. The Claimant also explained that she was

unaware of the importance of the meeting about the incident, that she did not have time to read the meeting notes properly before signing them, and that there were elements of the notes that were not accurate. Her union representative added that the font size of the notes was too small for the Claimant to read. The Claimant added that she did not feel that Mrs Smith took her seriously and that the notes she signed were not the ones from the actual meeting.

221. The Claimant's union representative also raised concerns that Mrs Smith had conducted the investigation after the Claimant had made a complaint about her. Mrs Coackley said it was a small leadership team and that Mrs Smith had taken on line management in her absence on annual leave. She added that it was a safeguarding complaint from a parent and it needed to be acted upon promptly and as the Nursery Manager, Mrs Smith led the investigation. The union representative and the Claimant raised their concerns about the fairness of the process. The Claimant raised her concerns that the feedback from Mrs Smith and Mrs Dellis was not fair. The union representative at one point stated that the Claimant needed adjustments to make her job easier and the Claimant at a later point stated that she did not need any adjustments and that she could do her job. Mrs Coackley indicated that the Claimant would receive the outcome of her investigation in 5 working days and that her probation would be discussed on 4 June 2019.

222. We would comment that on a reading of the notes, it is not clear to us what the allegation was that the claimant was accused of. Was it pulling children by the arm or pushing a child off her lap or both as were alleged by the parent? We note that the pushing off the lap allegation was not raised by Mrs Smith in her meeting with the Claimant on 13 May 2019 although it is in the parent's complaint and the meeting between the parent and Mrs Smith on 13 May 2019. Or is it the allegation as set out in the investigation report?

223. Indeed, the Claimant's union representative does state at paragraph three of the notes of the meeting at B369, that the allegation is not very clear and references are made to the Claimant stating that she would never push a child and that if she did she was sorry but she did not think she had done.

224. The significance of this is that the Claimant states quite categorically that as a result of her disability she could not pull a child by the arm. We were invited to watch a You Tube video of a television programme featuring the Claimant, and the Respondent's Counsel submitted that this indicated that the Claimant was able to use her hands to grip and to pull. However, we find that the video is inconclusive evidence.

225. By email dated 31 May 2019, Mrs Coackley wrote to the Claimant advising her of the outcome of the disciplinary hearing at B371-372. The outcome letter states that based on the evidence provided, there was reason to believe that the Claimant did in some way mishandle the child, albeit that there was not any malicious intent on her part. As a result, the Claimant was not issued with a formal sanction but was reminded that she must always exercise due restraint when children are in her care. The covering email states that the

Claimant was invited to return to work on 3 June 2019 and her end of probation meeting will take place on 4 to which she was invited to bring her union representative and her mother.

226. We would again express concern as to what allegation the disciplinary outcome letter is referring to. Is it referring to the pulling by the arm or the pushing off the lap? The pulling by the arm was of children and the pushing off the lap was of the parent's child. The letter refers to "child", not "children".

227. Indeed, the Claimant's union representative requested more detail regarding which child the allegation referred to, what exactly the Claimant is supposed to have done, as well as the notes of the meeting, in an email of 31 May 2019 to Mrs Coackley at B373-374. In addition, the union representative advises that the Claimant does not feel able to return to work on 3 June 2019 because she has not yet received a response regarding her complaint about Mrs Smith. However, the union representative indicated that the Claimant was willing to attend the probationary review meeting on 4 June 2019 and suggested that the meeting could also be used as an opportunity to provide an update regarding how her complaint has been dealt with.

228. The union representative sent a further email to Mrs Coackley later that day on 31 May 2019, at B375, stating that Mrs Coakley had indicated that the notes of the meeting would follow, but had not responded regarding the specifics of the allegation. We were unable to locate any response to this request within the bundle.

229. The notes of the meeting were ultimately sent to the Claimant on 6 June 2019, at B376.

230. The end of probation meeting took place on 7 June 2019 (rescheduled from 4 June due to the union representative's ill-health). At that meeting the Claimant was told that she had failed her probation and that she was dismissed on a week's notice.

231. The notes of the meeting are at B378-380 and the Claimant's mother's amended notes are at B381-385. The Claimant attended the meeting with another union representative and her mother. Mrs Coackley attended with Mr O'Keefe.

232. In the meeting Mrs Coackley told the Claimant that she had not passed her probation and handed her a letter which is at B386-387. Mrs Coakley began to explain the reasons why and Dr Hilton asked for specific examples. There is a disparity as to the degree of detail of the notes of the meeting between those provided by the Respondent and the lengthier notes provided by Dr Hilton.

233. The probationary review outcome letter sets out the reasons that the Claimant had failed her probation as follows:

- *Failing to demonstrate consistent initiative in the daily running of the*

room, which in turn left your team unsupported.

- *Failure to meet the requirements of the EYFS with regards to parent partnership as you do not approach parents and talk to them at the start and end of the day to inform them about their child's day or to complete the register.*

- *Failure to meet the requirements of the EYFS with regards to Learning and Development, you struggled to engage large groups of children and seemed to prefer working one to one or with very small groups, furthermore you failed to communicate effectively with the children to support their learning.*

- *Failure to consistently meet the individual care needs of the children and ensure they are safeguarded against harm.*

- *Failure to keep children's records up to date using Connect."*

234. The letter ended by expressing sincere regret in confirming that the Claimant's probationary period will end on 14 June 2019 and that her employment would therefore be terminated on that date.

235. We have dealt with the specifics of the decision to terminate the Claimant's employment and the examples given at the meeting in as far as they are relevant to the issues before us.

236. The 1 May incident involving a child climbing on a chair. The Claimant states this arose from her visual and/or hearing impairment. The Respondent states that the Claimant was not positioned properly ie not looking. We accept the Respondent's evidence in this regard.

237. The Claimant's lack of facial expressions and/eye contact. We found lack of eye contact and not engaging the children through a range of facial expressions but that this was not related to the Claimant's disability.

238. That the Claimant was better suited to smaller settings of children and groups of children. The Claimant alleges that this is a broad reference to her difficulty in processing verbal instructions in a busy and noisy environment and occasional difficulties perceiving and reacting to issues in the classroom environment due to her visual and hearing impairment. In Mrs Coackley's handwritten notes of the meeting at B370j, she refers to the Claimant not being able to handle or engage large groups of children, prefers one-to-one/small groups and in large groups she still focuses on one-to-one. Further, in cross examination she stated that this criticism was more to do with the Claimant struggling with large groups of children by which she meant 15 rather than 32 children. On balance of probability we disagree with the Claimant's assertion of the nature of this criticism.

239. Failure to keep records up to date using Connect. The criticism here is that this is not something that the Respondent had raised before and is in effect

padding. We note that it was an issue that was raised on 29 January 2019 at B167 to a slight extent but not much was made of it. In cross examination, Mrs Coackley stated that it was raised in the Claimant's PIP as to her not recording an incident in her name, having never set up her Connect account. However, we could not find a reference to this in the PIP at B194-195.

240. Failure to interact with parents or take the register. Again the criticism of this is that it was not something that the Respondent had raised before and is in effect padding. In evidence the Respondent's position was that each member of staff was required to take the register. Whilst we accept this, there was no evidence of this being raised before or of any specifics.

241. The notes make it clear that the parental complaint and the knife incident played no part in the decision to terminate the Claimant's employment.

242. At paragraph 21 of the notes of the meeting, the Claimant's union representative requested an extension of the probationary period. By letter dated 10 June 2019 at B390, Mrs Coackley refused this request reiterating the reasons stated in her previous letter and that she believed that the Claimant was better suited in an environment where there are a smaller number of children to work with or on a one-to-one basis.

243. For the avoidance of doubt we would state that we make no comment or findings of fact on the You Tube video given to us to view beyond it not providing any conclusive evidence as to the Claimant's ability to grab, grip and pull by use of her hands and we make no findings of fact based upon its contents.

<u>General themes</u>

244. We would make the following findings, observations and comments divided into a number of general themes which we find from the evidence before us.

The Claimant's disclosure of her disabilities and required adjustments

245. Ideally, the Respondent should have asked the Claimant at the start of her employment about her disabilities and any adjustments that she might require to the work environment or processes. However, the Respondent did belatedly make enquiries of the Claimant on a number of occasions.

246. Unfortunately, the Claimant did not provide any information at all in response to these enquiries. She said in evidence that she was being asked if she had any medical requirements and so she answered "no" because she did not have any medical needs. She went on to say in evidence that she considered her disability as part of a societal model of disability and to do her job she did not need any adjustments. When it was put to her if she had been asked differently on a societal model, would she have answered differently, she replied no.

247. Her position as to the reasons why she completed the health forms, whilst

understandable, was not helpful to the Respondent (we refer to her witness statement evidence at paragraphs 74-76 in this regard).

248. This was made all the more stark by her subsequent complaint that the Respondent had failed to make reasonable adjustments in respect of her disability.

The Claimant signing notes of meetings as accurate

249. The practice of getting the Claimant to sign documents there and then in meetings. This is not good practice because it does not allow a person to absorb what was written and to correct it if necessary.

250. At the time of the events in question, the Respondent was not made aware that the Claimant needed to have documents in large size/font. The first time this appears to have been raised is at the disciplinary meeting and by her union representative. The specific requirement for a certain font size was not raised until commencement of the Tribunal proceedings.

251. Ms Dellis gave evidence that although the Claimant held documents up to her face, she did not appear to struggle to read them.

252. Whilst the Claimant felt pressurised and stressed, that would apply to anyone in such circumstances and does not link to disability.

253. The Claimant was adamant that she did not have any cognitive impairment affecting her understanding and she was indignant at the Respondent asking if she understood what had been said to her because she believed this to be an indication that they questioned her cognitive ability. The Respondent's position was that this came about because the Claimant repeatedly questioned what they said to her and insisted that she had met her targets and passed her probation when the Respondent had repeatedly told her she had not.

The Claimant

254. It was clear from the evidence that the Claimant reacted badly to any form of criticism of her performance.

255. The Claimant readily accepted the positive elements of any feedback as indicating that she was doing well in all aspects of her role and indicative that she had passed her probation, but unfortunately ignored or dismissed the Respondent's ongoing concerns or criticisms.

256. The Claimant clearly saw it as an imposition to be called into meeting and without prior notice and without a companion and to be observed undertaking activities. We found nothing untoward in any of this.

257. The Claimant said on a number of occasions that she just wanted to be left alone to get on with her job.

258. She placed great emphasis on her having undertaken work in a nursery environment for 5 years without any criticism although with respect we would point out that this was undertaking agency work and not on a potentially permanent basis as with the Respondent.

The Respondent

259. Despite some shortcomings, the Respondent was accommodating in its dealings with the Claimant, in allowing the Claimant's mother and family friend into meetings, in speaking with her mother on the telephone and corresponding with both her parents.

Submissions

260. As we indicated at the start of this Judgment, we received lengthy written submissions from both Counsel which were amplified orally at the end of the evidence. We do not propose to set these out within our Judgment but have taken them fully into account and refer to specific submissions where appropriate within our conclusions.

Relevant Law

261. Section 15 Equality Act 2010:

> *"(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."*

262. Section 19 Equality Act 2010:

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

263. Section 20 Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format…"

264. Section 21 Equality Act 2010:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

265. Section 26 of the Equality Act 2010:

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

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

266. Section 27 Equality Act 2010:

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

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

Conclusions

Burden of Proof

267. Under section 136 Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

268. The Employment Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

269. Madarassy also found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

270. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondents' explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

271. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Discrimination arising from disability

272. A complaint of discrimination arising from a disability is essentially where a claimant is alleging that s/he has been treated unfavourably as a result of something arising from his/her disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate

means of achieving a legitimate aim.

273. At paragraph 4 of the Agreed List of Issues, the Claimant relies on the following things as arising in consequence of her disability: a reduced ability to perceive and react to issues arising in the classroom due to her visual and/or hearing impairment; a requirement for additional support and understanding in performing her duties; the Respondent's perceptions of her performance; her severe facial disfigurement or visible difference resulting in different facial expressions; and difficulty performing tasks requiring manual dexterity and/or fine motor skills.

274. At paragraph 5 of the Agreed List of Issues, the Claimant relies on 19 allegations of unfavourable treatment which we have dealt with in our findings above.

275. At paragraph 6 of the Agreed List of Issues, we are asked to determine whether those allegations actually occurred. We will go through each of these in turn, relying on our above findings, but do not propose to set these out in full and so reference should be made to the Agreed List of Issues:

276. Paragraph 5.1: we find that this did not occur as pleaded;

277. Paragraph 5.2: we find that this did occur as pleaded;

278. Paragraph 5.3; we find that this did not occur as pleaded;

279. Paragraph 5.4: we find that this did occur as pleaded;

280. Paragraph 5.5: we find that this did occur as pleaded;

281. Paragraph 5.6: we find that this did occur as pleaded;

282. Paragraph 5.7: we find that this did not happen;

283. Paragraph 5.8: we find that this did occur as pleaded;

284. Paragraph 5.9: we find that Mrs Smith did not accuse the Claimant of lying about not having seen a child perform a similar activity on 26 April 2019 but she did require the Claimant to carry out another activity on 3 May 2019;

285. Paragraph 5.10: we find that Mrs Smith did not interfere with the Claimant's work on 2 May 2019 in the pejorative sense that it is meant but did accuse the Claimant of leaving a knife unattended;

286. Paragraph 5.11: we find that Mrs Smith did email the Claimant on 2 May 2019 to indicate that she would be expected to deliver a focused activity but she had not previously informed the Claimant that it would not be necessary for her to deliver the activity the following day. As we have indicated we find that clearly this was a misunderstanding on the part of the Claimant;

287. Paragraph 5.12: we find that this did happen as pleaded;

288. Paragraph 5.13: we find that this did happen in as far as Ms Coackley failed to address the Claimant's grievance at the meeting on 7 May 2019 and there was an ongoing failure to investigate that grievance. However, we find that Ms Coackley did not fail to follow the Respondent's policy by discussing the grievance with Mrs Smith, the grievance policy being inapplicable to staff on probation and it being unreasonable to expect an employer to investigate a complaint of bullying and harassment without discussing it with the person accused;

289. Paragraph 5.14: we find that Mrs Smith handed the Claimant a written warning regarding the knife incident on 8 May 2019 but whilst the Claimant had not been informed of any disciplinary proceedings being commenced, the Respondent was not obliged to follow the disciplinary procedure given that it did not apply to staff on probation. Whilst the warning was handed to the Claimant inappropriately in the staff room in front of colleagues, this was standard procedure and it was in a sealed envelope. Whilst we do not believe this to be best practice, we took nothing untoward from it;

290. Paragraph 5.15: we find that this did happen as pleaded;

291. Paragraph 5.16: we find that Mrs Smith's approach to investigating the alleged incident with the handling of a child on 7 May 2019 and a parent complaint, whilst tainted by her being the subject of a complaint by the Claimant of which she was aware, potentially demonstrated a lack of impartiality and objectivity.

292. Paragraph 5.17: we find that this did happen as pleaded;

293. Paragraph 5.18: we find that this did happen as pleaded;

294. Paragraph 5.19: we find that this did happen as pleaded.

295. At paragraph 7 of the Agreed List of Issues, we were then directed to determine whether those matters that we found had occurred amounted to unfavourable treatment?

296. We had regard to Mr Green's written submissions at paragraphs 29-30. Whilst of course we considered the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, as directed, we drew benefit from the test observed in discussion by Lord Canwath, in the Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme & Anor [2019] IRLR 306, SC (from the headnote):

"In most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions, nor between an objective and a 'subjective/objective' approach. The Code of Practice provides helpful advice as to the relatively low threshold

of disadvantage which is sufficient to trigger the requirement to justify under this section."

297. We also had regard to paragraph 5.7 of the Equality & Human Rights Commission's (EHRC) Employment Code:

"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

298. In Shamoon, the then House of Lords, said as follows:

"In order for a disadvantage to qualify as a "detriment", it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, contrary to the view expressed by the EAT in Lord Chancellor v Coker, on which the Court of Appeal relied in the present case, it is not necessary to demonstrate some physical or economic consequence…

Per Lord Scott concurring:

The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so."

299. With this in mind, we then turned to consider those sub-paragraphs of paragraph 5 of the Agreed List of Issues that we found to have occurred either in whole or part to consider the issue of whether they amounted to unfavourable treatment.

300. Paragraph 5.2: yes;

301. Paragraph 5.4: yes, although we had reservations about the use of the word "demotion";

302. Paragraph 5.5: we concluded that putting someone on a PIP is not unfavourable treatment, it is a corrective tool to address performance issues.

Applying Shamoon, the difficulty is that the Claimant did not accept or even perceive that her performance was lacking and we do not find that this is a reasonable conclusion for her to draw from what happened. It can only reasonably be considered unfavourable if it was unwarranted. But by applying Williams, we find it is unfavourable treatment;

303. Paragraph 5.6: we concluded that this did not amount to unfavourable treatment. Whilst the Claimant had not yet started in that room, she had worked in other rooms, she had five years' experience as an agency worker and she had 6 weeks to plan the activity;

304. Paragraph 5.8: applying Shamoon, we concluded that this did not amount to unfavourable treatment because whilst the feedback was largely critical of the Claimant it could only reasonably be considered unfavourable if it was unwarranted. But by applying the lower threshold within Williams, we found that it did amount to unfavourable treatment.

305. Paragraph 5.9: as we have indicated above we did not find that Mrs Smith accused the Claimant of lying. The Claimant was required to carry out another activity, but this arose from the Respondent's reasonable belief that the activity was not original. However, the Claimant's position was that she had not seen it before and construed what was being said as she was lying, and so on balance we find that it does amount to unfavourable treatment in respect of the requirement to carry out another activity on 3 May 2019;

306. Paragraph 5.10: as to interfering with the Claimant's work we conclude that this does not amount to unfavourable treatment when applying the test under Shamoon. The Claimant was cutting the fruit too small, and the Respondent pointed this out to her. As to accusing her of leaving a knife unattended, we found that she did and again it is not unfavourable treatment under Shamoon, although the issue is that the Claimant does not accept that she did. But again, applying the lower threshold indicated by Williams, we find that this does amount to unfavourable treatment;

307. Paragraph 5.11: we conclude that it is not unfavourable treatment to expect the Claimant to deliver a focused activity which had been scheduled from 26 April simply because the Claimant believed without cause that it had been postponed. It is also not unfavourable treatment as to the room. It was a room that the Claimant was not entirely unfamiliar with, and she had 5 years' experience of working in a variety of environment as an agency worker. But again applying Williams, we find that it is unfavourable treatment;

308. Paragraph 5.12: we conclude does not amount to unfavourable treatment. The Respondent had good cause to make these accusations and to say that three safeguarding issues would be discussed with Mrs Coackley. Even if the Claimant did not accept this does not make it reasonable to view this as unfavourable treatment. But again by applying Williams, we find that it does amount to unfavourable treatment;

309. Paragraph 5.13: we found that only the first sentence of this allegation

occurred, and we conclude that it does amount to unfavourable treatment;

310. Paragraph 5.14: we found that the Claimant was handed the letter containing the written warning and without being informed of any disciplinary proceedings being commenced. But the Claimant was on probation and so the disciplinary procedure did not apply (as indeed neither did the grievance procedure). Whilst there might be a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures, that might have any bearing on a possible uplift in compensation, there had been a meeting at which the issue was discussed, and the Claimant agreed with the account given and so there was nothing to investigate or hold a meeting for. Under Shamoon, this does not amount to unfavourable treatment. The issue is that the Claimant does not subsequently accept that she did anything wrong. But by applying Williams, we find that it does amount to unfavourable treatment;

311. Paragraph 5.15: the Respondent had received a serious complaint from a parent, had investigated this by speaking to other members of staff, the parent and to the Claimant, and suspended her pending disciplinary action, which was reasonable. It is not reasonable of the Claimant to view this as unfavourable treatment. Again the issue is that the Claimant views it as unfavourable treatment because she does not accept that she has done anything wrong. So under Shamoon it does not amount to unfavourable treatment but in applying Williams, we find that it does;

312. Paragraph 5.16: we conclude that this does amount to unfavourable treatment. The Claimant made a complaint about Mrs Smith and then Mrs Smith investigated her and it is not unreasonable to believe that Mrs Smith knew about her complaint;

313. Paragraphs 5.17-19: we conclude that these matters each amount to unfavourable treatment.

314. We are then directed at paragraph 8 of the Agreed List of Issues to determine whether that unfavourable treatment was because of something arising in consequence of the Claimant's disabilities?

315. We were referred to paragraphs 5.8 and 5.9 of the ECHR Employment Code of Practice:

"5.8

The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9

The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of

their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet."

316. Turning then to consider each of the sub-paragraphs of paragraph 5 of the List of Issues that we determined amounted to unfavourable treatment, we have concluded as follows:

a) Paragraph 5.2: the nappy incident and not supporting the baby's head incidents were things arising in consequence of the Claimant's disabilities;

b) Paragraph 5.4: the demotion was in consequence of the performance issues and so was in consequence of things arising from her disability;

c) Paragraph 5.5: we find in part was something arising from the Claimant's disability in respect of the nappy issue but not other matters within the PIP at B194;

d) Paragraph 5.8: this was not the Claimant's first day in that room and in any event the negative feedback is not something arising from her disability;

e) Paragraph 5.9: did not arise from the claimant's disability;

f) Paragraph 5.10: we were not convinced that this arose from the Claimant's disability given that we only found that the issue was the size of the cut pieces of fruit and that the Claimant had cut them too small. It was unclear how the Claimant's manual dexterity would impede her ability to cut fruit into larger pieces;

g) Paragraph 5.11: has nothing to do with the Claimant's disability;

h) Paragraph 5.12: has nothing to do with the Claimant's disability;

i) Paragraph 5.13: does not identify something arising from disability and is more of a pleading one would find in an unfair dismissal case;

j) Paragraph 5.14: is not related to the Claimant's disability and again is more of an unfair dismissal point;

k) Paragraph 5.15: the reasons for the Claimant's suspension are not things arising from her disability;

l) Paragraph 5.16: there is nothing to link Mrs Smith's approach to investigating the alleged incident with the handling of the child to the Claimant's disability and again it is more of an unfair dismissal point;

m) Paragraphs 5.17-5.19: we conclude have nothing to do with the Claimant's disability.

317. At paragraph 9 of the List of Issues, in respect of those allegations of unfavourable treatment which we have found were because of something arising in consequence of the Claimant's disabilities, we were then directed to consider whether the Respondent had proved that the treatment was a proportionate means of achieving a legitimate aim? The paragraphs that we have found satisfied paragraphs 7 and 8 of the List of Issues, are paragraphs 5.2, 5.4 and 5.5.

318. The Respondent's legitimate aims are set out at paragraph 8.1 above. Namely:

    a) The performance management and professional development of members of staff, including the Claimant;
    b) The use of the probationary period to assess the suitability of members of staff (including the Claimant) for continued employment;
    c) The safeguarding of the children in the Respondent's care;
    d) The need of the Respondent to investigate and respond to parental feedback and complaints.

319. We accept the Respondent's submissions regarding the legitimate aims. Paragraphs 5.2, 5.4 and 5.5 relate, directly or indirectly, to the Respondent's performance management of the Claimant and this is clearly a legitimate aim. The Respondent's conduct taken as a whole, has the strong appearance of a perfectly normal, reasonable and proportionate performance management/probationary exercise, involving: the setting of clear objectives; a schedule of regular observations and meetings; the giving of oral and written feedback; and that feedback being given in the form of "positives" and "actions"; and measured against objective criteria (taking B208C as an example).

320. We further accept that in the context of a children's nursery, matters of safeguarding of the children in the Respondent's care are paramount and is clearly a legitimate aim. Quite rightly the incidents involving an unattended knife, a soiled nappy, a child climbing on a chair and the parental complaint of mishandling a child can be characterised as safeguarding issues which have to be dealt with accordingly. The Respondent is entitled to take steps to investigate and apprise itself of the facts of each incident having put the allegations to the Claimant this being a proportionate means of achieving that legitimate aim.

321. Similarly, we accept that it is a legitimate aim for the Respondent to investigate and respond to parental feedback and complaints given that parents effectively leave their children in the care of the Respondent in loco parentis. The allegation of mishandling a child was a very serious one and it was proportionate in achieving the aim for the Respondent to interview the parent, staff members and the Claimant, to conduct an investigation and hold a formal disciplinary meeting. Indeed, the Respondent did not dismiss the Claimant for this incident despite finding on balance of probabilities that she had mishandled the child.

322. We therefore conclude that the Respondent has made out the defence under section 15. As a result we find the complaint of discrimination arising from disability is unfounded and is dismissed.

Direct discrimination

323. Under section 13 EQA it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

324. At paragraph 10 of the Agreed List of Issues, the Claimant relies on the same allegations as set out at paragraph 5 of that document. We have set out our conclusions as to which of these allegations were made out at paragraphs 318 above.

325. We had regard to Mr Cook's written submissions at paragraphs 38-42 and 164-168. In essence, he submits that the evidence points to the Respondent treating the Claimant because of her physical disabilities as having some sort of mental impairment which impacted upon her ability to understand and act upon instructions. In other words, that the Respondent subconsciously held the view that because of the Claimant's physical disabilities she had some form of mental impairment.

326. He points to the following as indicative of this: the Respondent repeatedly asking the Claimant in meetings or when she was given instructions whether she understood what was being said to her; Mrs Dellis using hand gestures to explain why the Claimant was failing in her probation to illustrate the improvement she needed to make; accusing the Claimant of copying the AB patterns activity from another colleague; the Respondent's belief pursued in cross examination that various emails sent by the Claimant to the Respondent were actually produced by her parents.

327. We do not accept this submission. From our findings we conclude that the Respondent had legitimate concerns about the Claimant's performance and these were explained to her in meetings. The only reason that she was asked whether she understood what was being said to her was because of her repeatedly querying what had been said and why it was that she was still on probation and had to undertake further observations. Mrs Dellis said in evidence that she used hand gestures simply to illustrate to the Claimant that she was at one level whereas she needed to get to another, higher level. In evidence, the only issue as to the authorship of emails came up in respect of one email and that was simply because when asked what she meant, the Claimant did not or could not explain what she meant but simply referred back to the email. The allegation of copying the AB Patterns activity purely went to the value of the observation and we do not accept the reliance placed on the word "true" at B408 as having the construction placed upon it.

328. The real difficulty that the Respondent faced was the Claimant's apparent and repeated misunderstanding of the nature of the feedback provided to her

and her reliance on positive feedback as being indicative of her having passed her probationary period to the exclusion of the negative feedback. As was said in evidence, in effect, a mundane meeting which should only take a matter of minutes turned into a half-hour meeting in which the Claimant required things to be explained to her repeatedly.

329. Turning then to paragraph 12 of the Agreed List of Issues, looking at the matter in the round and considering the Claimant's disabilities individually and cumulatively we do not find that the less favourable treatment relied upon was because of the Claimant's disabilities.

330. With regard to paragraph 13 of the Agreed List of Issues, there is no evidence to indicate that a hypothetical comparator would have been treated differently.

331. As to paragraphs 14 and 15 of the Agreed List of Issues, Sandra was in fact a substantive member of staff and was not on probation and so we find she is not a valid comparator given that material difference.

332. We find the complaint of direct discrimination is unfounded and it is dismissed.

<u>Failure to make reasonable adjustments</u>

333. Under sections 20 and 21 EQA, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination.

334. This complaint has been pleaded as a PCP case alone. Where an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

335. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

336. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

337. The PCPs that the Claimant relies upon are set out at paragraph 16 of the Agreed List of Issues. Dealing with them each in turn:

a) Paragraph 16.1: the requirement to plan activities independently with written plans and evaluations. The Respondent disputed that this PCP was applied to the Claimant. We therefore considered the matter. The job description for Nursery Practitioner (L3) at B106 includes the requirement to *"plan activities that are engaging, fun and stimulating for the children"*. The job description for Nursery Assistant Practitioner (L2) at B190 contains the requirement "*to offer suggestions and ask questions and to ensure the planning of activities are linked to the individual children's needs and interests, gain from daily observations, evaluations as well as children's tracking in line with the EYFS"* and to *"plan activities that are fun, exciting and inviting for the children, with the help of your team within an environment which is exciting and enabling"*. In cross examination Mrs Coackley accepted that these requirements both applied to the Claimant in her different roles. Mrs Smith agreed but did say that the Claimant was not asked to undertake the whole planning of activities as an Assistant but to contribute to it. However, we concluded that this evidence was such as to show that this PCP was applied to the Claimant both as an L3 and L2;

b) Paragraphs 16.2-16.8: the practice of observing planned activities; the performance management policy as applied by the Respondent and the requirement for the Claimant to undertake a performance improvement plan; the practice of providing documentation with small font sizes; the practice of scheduling meetings with limited notice; the practice of moving teaching and support staff between different rooms containing children of different age ranges; the practice of giving oral instructions to teaching and support staff within the classroom environment and not face-to-face; the practice of conducting investigation and review meetings in the absence of an employee companion or trade union representative. The Respondent accepts that these are PCPs;

c) Paragraph 16.9: the practice of expecting staff at Level 2 to take sole responsibility for planned focused activities. Whilst we considered the Respondent's submissions, at paragraph 165, we concluded that this was a PCP which was applied to the Claimant;

d) Paragraph 16.10: the practice of expecting a member of staff to design focused activities for children they do not know. The Respondent accepted that this was a PCP which was applied to the Claimant;

e) Paragraphs 16.11 and 16.12: the practice of requiring that staff members should *"think of an activity by yourself"* which links to learning goals rather than using familiar activities or activities suggested elsewhere; the practice of expecting Level 2 staff to plan an activity, order any items needed in write an evaluation in their own time. We heard no evidence that these PCPs were applied generally and such evidence that we did hear only suggested that they were applied to the Claimant.

338. At paragraph 17 of the Agreed List of Issues, we are asked to consider

whether the PCPs that we have found were applied placed the Claimant at a substantial disadvantage in comparison with non-disabled persons for the reasons set out in a number of sub-paragraphs. We deal with these below:

a) Paragraph 17.1 (referring to the PCP at paragraph 16.4): Because of her visual impairment, the Claimant had difficulty reading small text. She felt particularly pressurised at having to read text provided to her in small font during meetings and asked to sign meeting notes. We accept that providing documents with small size font placed the Claimant at a substantial disadvantage and we were guided by paragraph 174 of Mr Cook's written submissions;

b) Paragraph 17.2 (referring to the PCP at paragraph 16.7): Because of her hearing impairment, it was challenging for the Claimant to adequately hear and digest all instructions when those instructions were given in a classroom environment and not delivered face-to-face and/or in a quiet location. We considered Mr Cook's written submissions at paragraph 178 and Mr Green's submissions at paragraph 172. We accept that such a PCP placed the Claimant at a substantial disadvantage and we note that digesting instructions presupposes that they have been adequately heard;

c) Paragraph 17.3 (referring to the PCP at paragraph 16.3): The way in which the performance improvement plan was implemented and applied to the Claimant – late and not in accordance with policy – left the Claimant with little time to show improvement in the light of the restrictions imposed by her disabilities at and subjected her to increased stress. We accepted Mr Green's submission that the difficulty with this PCP is that it impermissibly conflates an alleged act of unfavourable treatment (that is, the lateness and wrongness of the application of the PIP) with substantial disadvantage, which per the logic of a reasonable adjustments claim, is made good when the application of a neutral PCP to a disabled person which results in a substantial disadvantage which would be avoided by the taking of reasonable steps. We also accept that the other difficulty with the substantial disadvantage alleged is that it would require us to make a positive finding, without regard to any specific impairment arising from any specific disability, that the Claimant's disabilities generally caused her to be slower in showing improvements against targets. Moreover, this would be contrary to the Claimant's evidence both in writing and orally at the hearing, that she was more than capable of doing her job and that the negative feedback that she received was misconceived and discriminatory. We therefore conclude that the Claimant was not put to a substantial disadvantage in respect of the PCP at paragraph 16.3;

d) Paragraph 17.4 (referring to the PCPs at paragraphs 16.5 and 16.8): Because of her hearing impairment and visual impairment in particular, the Claimant felt stressed and pressurised by meetings being held at short notice and in the absence of a companion. In the context, it was difficult for her to hear and process information given during those

meetings. We considered Mr Green's written submissions at paragraphs 176-181. Whilst the Claimant's evidence was that she struggled in noisy environments when the speaker had their back to her, this was not the case in the meetings that she was called to. The Claimant also agreed that she had no deficit of understanding, indicating that what she hears, she understands what is heard unimpaired. From this it follows that there is no reason why the Claimant ought not to have been able to hear what was said to her in a meeting conducted outside of the nursery rooms with speakers who addressed her directly. There is no evidence that she misheard or misunderstood any particular part of any meeting. The short notice of meetings has no logical connection with her ability to hear. We therefore do not accept that she was put to substantial disadvantage in respect of this PCP;

e) Paragraph 17.5 (referring to the PCPs at paragraphs 16.2, 16.3, 16.6, 16.10): Because of her various impairments, the Claimant required additional time to adapt to different classroom environments. We considered Mr Cook's written submissions at paragraph 175 onwards and Mr Green's written submissions at paragraphs 182-186. As we have already stated above, we felt that Mr Cook's submissions generalised. We agreed with Mr Green, that this is an exceptionally weak point. It is not clear which of the Claimant's disabilities created the substantial disadvantage. There is no obvious connection between the Claimant's disabilities of impaired vision, impaired hearing, severe facial disfigurement and impaired manual dexterity/fine motor skills, and the four PCPs that the alleged substantial disadvantage arises from. The difficulty again, as with paragraph 17.3 above, is that the disadvantage is cast in the terms of an adjustment, namely that because of her various impairments, the Claimant required additional time to adapt. As Mr Green puts it, this puts the cart before the horse. Providing additional time as a step which the Claimant alleges would be reasonable for the Respondent to take to avoid the disadvantage, but the disadvantage cannot sensibly be the need for additional time. The logic is circular, and the pleading is a non sequitur. We therefore find that the Claimant was not put to a substantial disadvantage as alleged in paragraph 17.5;

f) Paragraph 17.6: The Claimant avers that the PCPs, individually and/or collectively, impaired her ability to perform her role in the light of her disabilities and thereby placed her at increased risk of dismissal. This is a very general pleading, and it is very difficult to understand the evidential basis as well as the legal basis of the substantial disadvantage relied upon. Indeed it is at odds with the Claimant's assertion at B395 that she did not consider that her disabilities had any material impact on her performance at work and her assertions in oral evidence that she did not require any assistance to undertake her role. For these reasons we conclude that the Claimant was not put to the substantial disadvantage alleged in this paragraph.

339. Dealing with the PCPs not covered in paragraph 17 of the Agreed List of Issues. Namely the PCPs at paragraphs 16.1 and 16.9. Mr Cook deals with

these generally at paragraphs 175-177 of his written submissions. However, we reject the submissions on the same basis as we have indicated in respect of paragraphs 17.3 and 17.6.

340. We would note that the Claimant had no cognitive impairment. It did not come out in evidence that the Claimant needed more time to plan activities with written plans and evaluations. The evidence was that she felt it unnecessary and pressurised by the deadlines but it not clear what impairment this could relate to. We therefore find that no substantial disadvantages is shown.

341. We are then left with the PCPs at 16.4 and 16.7 where we have found that the Claimant was put to substantial disadvantage.

342. We then turned to paragraph 18 of the List of Issues which poses the question, did the Respondent know, or could it reasonably have been expected to know, that the PCPs put the Claimant to substantial disadvantage in comparison with non-disabled persons? The Respondent denies actual or constructive knowledge.

343. We have considered Mr Cook's written submissions at paragraphs 169-171 and Mr Green's written submissions at paragraphs 194-202.

344. There were a number of occasions on which the Claimant was asked, in a variety of ways, about her need for adjustment and support:

    a) on her induction in December 2018; in January 2019 when she initially declined larger gloves;

    b) when she was given her PIP review document which stated at the end *"please ask any advice or support throughout and if you identify any barriers please inform me and we will work together to minimise these wherever possible"* (B195);

    c) in the meeting on 18 of March 2019 where she was told she needed to let Mrs Smith know if there was any barrier that could stop her from progressing and passing her probation period (B198);

    d) on 25 March 2019 when the Claimant told Mrs Dellis that she did not feel she needed any support;

    e) on 3 April 2019 at the care plan meeting, Mrs Dellis asked specific questions about the Claimant's conditions and any support she required that might arise from them, and the claimant responded no to every question;

    f) on 26 April 2019, at the PIP review meeting Mrs Smith specifically asked whether the Claimant had any health issues that she could be supported with and the Claimant said no (B244);

    g) in the statement of physical and mental fitness which the Claimant

completed on 26 April 2019, in which she stated that she had no conditions or illnesses that may require special consideration of reasonable adjustments (B253);

h) on 1 May 2019, when the Claimant requested the presence of the union representative (which has been pleaded as a proposed reasonable adjustment), she was asked why and her reply was simply that she wants them with her without setting out any disadvantage to which she was being put;

i) on 28 May 2019 at the disciplinary meeting when Mrs Coackley asked the Claimant if she required more support and her response was that she does not need any adjustments, that she can just do her job (B370).

345. The most compelling evidence we heard and which we accept, was from Mrs Dellis as to the meeting on 3 April 2019, at which she created a care plan with the Claimant, which she describes as one of the hardest meetings she had ever undertaken (which is at paragraph 191 above). In cross examination she also stated that she saw the Claimant hold a page of notes close to her face to read it but did not appear or say that she had any difficulty reading it.

346. We therefore conclude that the Respondent did not have actual or constructive knowledge of the substantial disadvantage in respect of those PCPs.

347. Consequently we do not need to deal with the issues arising in paragraph 19 of the Agreed List of Issues.

348. We find the complaint of failure to make reasonable adjustments is unfounded and it is dismissed.

Indirect discrimination

349. Indirect discrimination is defined in section 19 EQA. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

350. At paragraphs 20 and 21 of the Agreed List of Issues, the Claimant relies upon the PCPs that were pleaded in respect of the reasonable adjustments case and their application to the Claimant by the Respondent.

351. At paragraphs 22 and 23 of the Agreed List of Issues, we are asked in turn did those PCPs place, or would those PCPs have placed, individuals who shared the Claimant's protected characteristic at a disadvantage and if so did

those PCPs place the Claimant personally at a disadvantage? We were assisted by Mr Green's written submissions at paragraphs 227-229 and we accept that this amounts to essentially the same enquiry as we have undertaken in respect of substantial disadvantage for the purposes of the reasonable adjustments complaint.

352. What this means is that we are left to consider the PCPs at paragraphs 16.4 and 16.7.

353. On the evidence that we heard we accept that both the practice of providing documentation in small font sizes and the practice of giving oral instructions to teaching and support staff within the classroom environment and not face-to-face place or would place individuals who shared the Claimant's protected characteristic at a disadvantage, and we find that those PCPs placed the Claimant personally at a disadvantage.

354. We then turned to consider paragraph 24 of the Agreed List of Issues, namely does the Respondent prove that those PCPs were a proportionate means of achieving a legitimate aim. The Respondent relies on the amended legitimate aims set out at paragraph 8.2 above, namely:

a) The performance management and professional development of members of staff, including the Claimant;
b) The use of the probationary period to assess the suitability of members of staff (including the Claimant) for continued employment;
c) The safeguarding of the children in the Respondent's care;
d) The need of the Respondent to investigate and respond to parental feedback and complaints;
e) The efficient management of the Respondent's workforce;
f) The Respondent's statutory duties to ensure particular ratios of trained adults to children under its care.

355. We considered Mr Cook's written submissions at paragraphs 181 and 182 and Mr Green's written submissions at paragraph 234.

356. With regard to paragraph 16.4, small font sizes, there is simply no objective justification for this. There is no legitimate aim, and it cannot be proportionate when the simple thing to do would be to provide documents in larger font. It is unfortunate that the Claimant simply did not explain her difficulty with documents in small font size to the Respondent at the time of the events in question.

357. With regard to paragraph 16.7, oral instructions within the classroom and not face to face. We accept that it is always possible in a busy nursery environment that matters may arise during the course of the day requiring the giving of instructions rather than before or after the children are in the room. We also accept that if the Claimant was to be taken out of the nursery room to give instructions face to face, someone has to go with her to give those instructions orally and write things down. We further accept that this would not always be possible or appropriate particularly given the needs of the

children. There is also the need to consider the maintenance of trained staff to children ratios as per the Respondent's statutory duties. We can see that taking staff out of the room to give face to face instruction could be very disruptive to the efficient management of the Respondent's workforce.

358. As a result we find the complaint of indirect discrimination in respect of the PCP only at paragraph 16.4 is made out. The rest of this complaint is unfounded and is dismissed.

Harassment

359. Harassment is defined under section 26 EQA. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

360. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his/her dignity is violated, etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his/her dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

361. We were also guided by ECHR Employment Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

362. We were guided by the Court of Appeal in Pemberton v Inwood [2018] IRLR 542, CA and the words of Underhill LJ at paragraph 88 of the judgment:

"[S]ection 26 of the 2010 Act [entitled "Harassment"] … is not in identical terms to s 3A of the Race Relations Act 1976, with which I was concerned in Dhaliwal … the precise language of the guidance at para 13 of [that] judgment … needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

363. We were also assisted by the referral to the Employment Appeal Tribunal case of Reed v Stedman [1999] IRLR 299, EAT and in particular the quote from paragraph 28 of the judgment:

"…it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed."

364. However, we do note that this was a case relating to sexual harassment and this passage was obiter.

365. At paragraphs 25 and 26 of the Agreed List of Issues the Claimant relies upon the same factual allegations that we have determined in respect of paragraph 5 of that document. We have indicated which of those allegations we found to have occurred and those that we found had occurred that related to the Claimant's disabilities.

366. It would be fair to say that in respect of those matters the Claimant's position

is that the conduct was unwanted.

367. There is no evidence to support a finding that the conduct complained of was done with the purpose of violating the Claimant's dignity, etc.

368. So the focus is really on whether the conduct complained of had the effect of violating the Claimant's dignity, etc.

369. Harassment is not persuasively advanced by the Claimant in submissions. The matters that we found to have occurred may be related to disability and be unwanted, but we cannot find them to be done with the purpose of violating the dignity… (etc) and in so far as the effect of the conduct is concerned having regard to the Claimant's perception of the conduct it is not reasonable for the conduct to have had this affect. The Claimant was being subjected to performance management and she felt it to be unnecessary and objected to it.

370. We therefore conclude that the complaint of harassment is unfounded, and we dismiss it.

Victimisation

371. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 EQA.

372. The Claimant relies on a number of protected acts which are set out at paragraph 31 of the List of Issues. Dealing with these each in turn:

373. Paragraph 31.1: Her complaint to Mrs Coackley on 6 May 2019 regarding bullying and harassment by Ms Smith. From our above findings we conclude that this is not a protected act.

374. We were referred to the case of Chalmers v Airpoint Ltd UKEATS/0031/19 16 December 2020. In that case Mrs Chalmers brought a Tribunal claim against her employers, including a complaint of victimisation. She relied on a grievance that she sent by email as containing a protected act. In that email she complained that her exclusion from two work-related events "may be discriminatory". The Employment Appeal Tribunal held that the Tribunal was entitled to interpret the email according to its natural meaning and to interpret it as not alleging that Mrs Chalmers had been discriminated against on grounds of sex. In supporting its conclusion, the Tribunal was entitled to consider that the word "may" would usually be thought to signify doubt or uncertainty, the absence of a reference to sex discrimination, and that the claimant was experienced in HR, as well as articulate and well educated.

375. On considering our findings we conclude that the Claimant's complaint to Mrs Coakley on the 6 May 2019 is not a protected act. There is nothing in the email relating to disability here and the word "harassment" is simply used in

a general sense without this. Simply because the Claimant is disabled does not make it implicit that the word "harassment" was used in the legal sense under the Equality Act 2010.

376. Paragraph 31.2: the written and oral case put forward on the Claimant's behalf by her union representative at the disciplinary hearing on 28 May 2019 in which the Claimant made an express allegation of disability discrimination. From our findings we conclude that this is a protected act.

377. The alleged detriments that flow from the protected acts are set out at paragraph 32 of the List of Issues. These are as follows:

    a) Paragraph 32.1: in the meeting on 7 May 2019, Mrs Coackley failing to address the Claimant's 6 May 2019 complaint about bullying and harassment by Mrs Smith;

    b) Paragraph 32.2: on 8 May 2019 Ms Smith handed the Claimant a written warning concerning the alleged incident with a knife on 2 May 2019 in circumstances where the Claimant had not been informed of any disciplinary proceedings being undertaken;

    c) Paragraph 32.3: Mrs Smith suspending the Claimant on 13 May 2019;

    d) Paragraph 32.4: Mrs Smith's approach in investigating the alleged incident with the handling of a child on 7 May 2019 which the Claimant avers demonstrated a lack of impartiality and objectivity;

    e) Paragraph 32.5: the decision, on 7 June 2019, that the Claimant had not passed her end of probation review;

    f) Paragraph 32.6: Mrs Coackley's criticisms of the Claimant's performance in the 7 June 2019 probation review meeting.

    g) Paragraph 32.7: the Claimant's dismissal on 14 June 2019.

378. The detriments pleaded at paragraph 32.1 to 32.4 fail because we have found that paragraph 31.1 is not a protected act.

379. That leaves the allegation that the detriments pleaded at paragraphs 32.5 to 32.7, that the decision on 7 June 2019 that the Claimant had not passed her end of probation, Mrs Coackley's criticisms of the Claimant's performance in the 7 June 2019 probation review meeting and the Claimant's dismissal on 14 June 2019, were because of the protected act at paragraph 31.2, the written and oral case put forward on C's behalf by her union representative at the disciplinary hearing on 28 May 2019 in which the Claimant made an express allegation of disability discrimination.

380. We rely on our above findings from which there is nothing to indicate that the alleged detriments flow from the protect act.

381. We therefore find that the complaint of victimisation is unfounded, and we dismiss it.

Judgment

382. We therefore conclude that the Claimant's complaints of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, failure to make reasons adjustments, harassment and victimisation are unfounded and are dismissed, save for the complaint of unlawful indirect disability discrimination in respect of paragraph 16.4 of the Agreed List of Issues.

383. We invite the parties to seek to resolve the issue of remedy between themselves and to let the Employment Tribunal know by 1 October 2021 if they require a remedy hearing. The matter will be listed for a one day remedy hearing if so required.

Employment Judge Tsamados
Date 6 August 2021