EMPLOYMENT TRIBUNALS

Claimant: Mrs N Cumiskey

Respondent: Lancashire County Council

Heard at: Manchester **On:** 13-17 December 2021
1 February 2022
(in Chambers)

Before: Employment Judge McDonald
Mrs J Byrne
Ms A Berkeley-Hill

REPRESENTATION:

Claimant: Mr M Mensah (Counsel)
Respondent: Mr J Boyd (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim that she was subjected to a detriment in breach of regulation 7 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 by the respondent delaying the provision of a reference for her is dismissed on withdrawal.

2. The claimant's claim that she was constructively dismissed and that that dismissal was an “ordinary” unfair dismissal in breach of section 94 of the Employment Rights Act 1996 fails and is dismissed.

3. The claimant's claim that she was constructively dismissed and that that dismissal was an automatically unfair dismissal in breach of regulation 7 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 fails and is dismissed.

4. The claimant's claim that the respondent treated her less favourably in breach of regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 by providing her with proportionately less contingency time than her full-time comparators succeeds.

5. The claimant's claim that the respondent indirectly discriminated against her in relation to the protected characteristic of sex in breach of section 19 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. The claimant worked as a Primary School Teacher for the respondent from 11 November 2002. From 1 September 2009 she worked at Pinfold Primary School ("the School"). The claimant resigned with effect from 31 December 2019. She says that her resignation was a constructive dismissal and that it was an unfair dismissal. She also says that she was treated less favourably because she was a part-time worker and was subjected to a detriment and/or dismissed because she refused to forego rights under the Part-Time Workers Regulations 2000. The claimant says that that treatment was also indirect sex discrimination, relying on the fact that adverse treatment of part-time workers causes a particular disadvantage to women.

2. Both parties were represented by counsel. The claimant was represented by Mr Mensah and the respondent by Mr Boyd. There was an agreed bundle of documents consisting of 454 pages ("the Bundle"). References in this Judgment to page numbers are to page numbers in that bundle. The parties had prepared written witness statements for their witnesses.

Preliminary Matters

3. At a preliminary hearing on 24 July 2020 Employment Judge Shotter held a case management preliminary hearing. The Case Management Summary and orders from that hearing were at pages 47-55 of the bundle.

4. At the start of the first day's hearing we dealt with the preliminary matters set out below.

Potential recusal issue

5. The claimant's case had at various points involved representatives from the National Education Union ("NEU"). Ms Berkeley-Hill, one of the Tribunal members, is also an NEU member and a lay representative for that union in the Bradford area. At the start of the start of the hearing Ms Berkeley-Hill gave a full account of her involvement with the union. She confirmed that as a lay representative she was not employed by the NEU but was instead a teacher who was seconded to the NEU. She worked exclusively in the Bradford area and the Yorkshire/Humber region. This case involved the NEU in the North West region. Ms Berkeley-Hill confirmed that she did not know either of the two NEU representatives referred to in the claimant's witness statement, Chris Anderson and Julie Gordon. She confirmed that she is not on any NEU national committee nor any interest groups. That meant that she did not attend national conferences and so did not come into contact with NEU colleagues from outside of her region. The only exception was in relation to a multi-academy Trust which had started with a school in the North West region and had schools in the Bradford area. Ms Berkeley-Hill confirmed that she did on occasion contact the

Regional Officer in the North West in relation to that multi-academy Trust but had not been involved in any individual casework in relation to it. She confirmed that she was not involved in any Employment Tribunal cases on behalf of the NEU. Any such cases would be referred to the Regional Officer and would not be dealt with by a lay representative such as Ms Berkeley-Hill.

6. Having taken instructions, neither party objected to Ms Berkeley-Hill continuing to be part of the Tribunal that heard the case.

Conversion of the case to a CVP hearing

7. Employment Judge Shotter had listed the case to be heard in person. The claimant, Mr Mensah and Mr Boyd all attended the hearing in person on the first day. The Employment Judge also attended in person and the other Tribunal members attended by CVP. Both parties asked that the remainder of the hearing take place by CVP. That was particularly in light of recent increased concern about the Omicron variant of COVID. It was agreed that the remainder of the hearing would take place by CVP.

Regulation 5(3) of the Part-Time Workers Regulations (applicability of the pro-rata principle)

8. Employment Judge Shotter's Case Management Order (paragraph 5.1) had directed that the final List of Issues was to be agreed not less than 28 working days before the first day of the final hearing. At the start of the hearing that List of Issues had still not entirely been finalised. As discussed under "Issues" below, Mr Mensah and Mr Boyd were able to agree a List of Issues which is annexed to this judgment.

9. When discussing the List of Issues, it became apparent that the respondent's position was that this was a case where the pro-rata principle in regulation 5(3) of the Part-Time Workers Regulations was not appropriate. Mr Mensah initially indicated that the claimant's position was that the respondent needed to amend its response if that was its position. Having had an opportunity to consider the case of **James and others v Great North Eastern Railways [UKEAT/0496/04]** Mr Mensah accepted that that was not a matter which the respondent was required to plead as part of its response. There was therefore no need to consider any application to amend on the part of the respondent.

Timetabling of the hearing

10. In her Case Management Order, Employment Judge Shotter had envisaged that the Tribunal would be able to conclude hearing the evidence within three days giving time to deliberate on the fourth day and give judgment on the fifth day. Both parties agreed that that timetable was not realistic now that the extent of documentary evidence had become clear. Both parties agreed, however, that it would be possible to conclude the evidence and submissions relating to liability within the five day timetable. It was agreed that it was in accordance with the overriding objective to proceed with the case rather than seek to postpone it (which would have probably resulted in a listing in 2024).

11. The Tribunal took an extended break at lunchtime on Day 3 of the hearing because Mr Mensah was feeling unwell. On return after that break, Mr Mensah

confirmed that he was well enough to continue with the hearing and that a Lateral Flow Test he had taken as a precaution produced a negative result.

12. The evidence concluded at lunchtime on Day 5. We took an extended break to allow Mr Mensah and Mr Boyd to finalise their written submissions and to enable us to read those submissions. We then heard oral submissions from Mr Boyd and Mr Mensah. There was insufficient time for the Tribunal to deliberate so a chambers day was listed for deliberations on 1 February 2022. Given that allowed time for further written submissions we directed that the parties send any further written submissions in reply by 7 January 2021. Mr Mensah did so but Mr Boyd did not.

13. The Employment Judge apologises to the parties that his absence from the Tribunal for various reasons and other judicial work has led to a delay in finalising this reserved judgment.

The issues in the case

14. By the start of the evidence, Mr Mensah and Mr Boyd had agreed a List of Issues in the case. The final version is annexed to this judgment.

15. In answer to the Employment Judge's questions, Mr Boyd confirmed that if the Tribunal found that there had been a constructive dismissal the respondent was not seeking to argue that that dismissal was nonetheless a fair dismissal.

16. When it came to the express term of the contract on which the claimant relied for her constructive dismissal claim, Mr Mensah confirmed that it was the term at paragraphs 51.5 and 51.6 of the statutory School Teachers' Pay and Conditions Document ("the STPCD") which require that the number of hours that a teacher must be available for work must be "allocated reasonably throughout those days in the school year on which the claimant is required to be available for work".

17. In relation to the constructive unfair dismissal claim, Mr Boyd confirmed that there was no suggestion by the respondent that the claimant had affirmed her contract following the breach.

18. At the start of the hearing Mr Mensah confirmed that the claimant did still pursue a claim of detriment under the Part-Time Workers Regulations regulation 7 in relation to the delay in providing a reference (referred to at paragraph 22 of the amended Particulars of Claim (page 35)). However, that claim was withdrawn by the claimant during her evidence. It is dismissed on withdrawal as part of this judgment.

19. In relation to the indirect discrimination claim, Mr Boyd was not instructed to concede that a PCP which particularly disadvantaged part-time workers necessarily particularly disadvantaged women as a group but indicated that it was not likely that this was going to be a matter of great contention.

Evidence

20. The Tribunal spent the first day in dealing with the preliminary matters in the case and reading the witness statements and those documents in the Bundle referred to in those statements.

21. The claimant gave evidence on Day 2 and 3. The respondent's witnesses gave evidence on Days 3-5 of the hearing. On Days 3 and 4 we heard the evidence of Mrs Claire Tjaveondja ("Mrs Tjaveondja"), the Head Teacher of the School at the relevant times. On the afternoon of Day 4 we heard the evidence of Miss Gill Ledgerton ("Miss Ledgerton") who heard the claimant's grievance in October 2019. On the morning of Day 5 we heard evidence from Mrs Kerry Oram ("Mrs Oram") a HR Adviser for the respondent and from Mrs Lorimer Russell-Hayes (Mrs Russell-Hayes) who heard the claimant's grievance appeal.

Background Facts

22. The claimant started working at the School on 1 September 2009 on a part-time basis as a teacher. The School is a small primary school. It consists of two classes. One has children from reception to Key Stage 1 (i.e. 4-7 years old). The other, in which the claimant taught, has children from Key Stage 2 (i.e. 7-11 years old). That classroom was known as "Oak".

23. At the start of the 2018/19 academic year there were 31 pupils in Oak. There were 15 pupils in the Key Stage 1 classroom (which was known as "Ash" and subsequently known as "Willow").

24. The claimant was also the Special Educational Needs Co-ordinator ("SENCo") for the School. That involved liaising with the SEN departments within the respondent and Sefton Council, preparing and submitting relevant paperwork including relating to Educational Health Care Plans, chairing annual reviews and booking outside agencies to work with the children identified as having SEN.

<u>The claimant's terms of employment</u>

25. As a teacher, the claimant's terms and conditions was governed by a combination of national and local conditions of service. For the purposes of the claimant's case, the key document is the STPCD. It sets out the statutory requirements for teachers' pay and conditions for maintained schools. Local authorities such as the respondent must abide by the STPCD requirements. The STPCD is published annually.

26. In the List of Issues and on occasion during the hearing the STPCD was referred to as "the Burgundy Book". Although nothing turns on it, for the avoidance of doubt we confirm that the Burgundy Book is a different document from the STPCD. The Burgundy Book is the Conditions of Service for School Teachers in England and Wales. It covers matters such as sick pay and maternity rights. It was not suggested that its terms were relevant to the issues we are deciding in this case.

27. The STPCD is updated and re-published annually. Relevant extracts from the September 2018 and September 2019 versions were included in the Bundle (pp.58-75 and pp.443-444). We are satisfied that the paragraphs relevant to the issues in this case are the same in both versions.

28. The claimant alleges that the respondent breached paragraphs 51.5 and 51.6 of the STPCD. In 2018-2019 they provided that:

> "51.5 A teacher employed full-time must be available to perform such duties at such times and such places as may be specified by the headteacher (or, where the teacher is not assigned to any one school, by the employer or the headteacher of any school in which the teacher may be required to work) for 1265 hours, those hours to be allocated reasonably throughout those days in the school year on which the teacher is required to be available for work.
>
> 51.6. Paragraph 51.5 applies to a teacher employed part-time, except that the number of hours the teacher must be available for work must be that proportion of 1265 hours which corresponds to the proportion of total remuneration the teacher is entitled to be paid pursuant to paragraphs 40 and 41."

29. The 1265 hours (or proportionate part time equivalent) referred to in 51.5 is known as "directed time". In the claimant's case, it was not in dispute that for the Autumn 2019 term which is the focus of the dispute about directed time she was contracted on a part-time 0.48 FTE basis. That meant her total directed time for the year was 607.2 hours.

30. In 2018-2019 paragraphs 51.7 and 51.8 provided that:

> "51.7. In addition to the hours a teacher is required to be available for work under paragraph 51.5 or 51.6, a teacher must work such reasonable additional hours as may be necessary to enable the effective discharge of the teacher's professional duties, including in particular planning and preparing courses and lessons; and assessing, monitoring, recording and reporting on the learning needs, progress and achievements of assigned pupils.
>
> 51.8. The employer must not determine how many of the additional hours referred to in paragraph 51.7 must be worked or when these hours must be worked."

31. That means that the claimant's working hours were not limited to her directed time of 607.2 hours per year. She was also required by her terms and conditions to work reasonable additional hours to fulfil her duties. The respondent could not direct when those additional hours were worked.

32. Central to the claimant's case is a dispute about "contingency time". "Contingency time" is not a term used in the STPCD. In this judgment we use it to mean unallocated directed time, i.e. that part of a teacher's directed time which is not allocated to particular tasks such as teaching, PPA time or break duty.

Directed time and contingency time

33. The respondent's "Statement on the Use of Directed Time for Teachers in Delegated Schools (May 2019)" ("the Guidance") (pp.88-97) supplemented the STPCD paragraphs on working time by providing advice and examples of how directed time could be applied in practice within schools. It was "commended to schools as good practice" (para 1.2).

34. Para 1.3 provides that it is "good practice to provide each individual teacher with a Directed Time Statement setting out how the Headteacher has allocated their directed time over the academic year". In this judgment we use "DTS" as an abbreviation for those statements. Example DTS are included at Appendix A to the Guidance. Both examples in the Bundle (pp.96-97) were for full-time teachers, p.96 being for a full-time teacher in a primary school.

35. Section 4 of the Guidance (pp.91-92) deals with "The Use of Directed Time". Para 4.4 refers to contingency time. Para 4 provides:

> **"4. The Use of Directed Time**
>
> 4.1 Up to the maximum of 1265 hours of directed time must be allocated reasonably through the 195 days on which teachers are required to be available for work. For part-time teachers please refer to section 6 below.
>
> 4.2 The requirements made by Headteachers on individual members of staff may vary according to the type of the school and the role of the teacher.
>
> 4.3 Requirements for the use of directed time should include but are not limited to:-
>
> (a) pre and post-school supervision requirements;
>
> (b) the school's teaching day (including mid-session breaks but excluding the lunch period);
>
> (c) required attendance at staff and parents' meetings;
>
> (d) the five non-teaching days;
>
> (e) teacher appraisal;
>
> (f) other duties such as curriculum development, recording, reporting and assessment;
>
> (g) Planning, Preparation and Assessment (PPA) time amounting to a minimum of 10% of the teacher's timetabled teaching time.
>
> 4.4 A reasonable contingency reserve within the 1265 hours should be maintained to retain flexibility and allow for unforeseen requirements occurring during the course of the academic year.
>
> 4.5 Enrichment activities such as fieldwork, PE and musical and drama work which are voluntarily undertaken outside school session time will not count towards directed time unless teachers are required to be available for these activities.
>
> 4.6 The amount of time taken for a lunchtime break or travelling to and from the place of work does not count towards directed time. However, where a teacher is required by the Headteacher to work on different sites during

the school day (i.e. where it is a split-site school), the time taken to travel from one site to another would count towards directed time."

36. Section 6 of the Guidance deals with arrangements for part-time teachers. It provides, so far as relevant, that:

> **6. Arrangements for Part-Time Teachers**
>
> 6.1 Directed time for part-time teachers is pro rata of 1265 hours, in line with the contract of employment. For example, a teacher with a contract of 0.6 FTE (full-time equivalent) would have 759 hours of directed time. This should broadly include a pro rata margin for contingency, and a broadly pro rata equivalent of a full-time teacher's requirements in respect of staff and parents' meetings, pre and post school supervision and the school's teaching day.
>
> 6.2 Where a non-contact day falls on a day on which a part-time teacher would not normally work, and the teacher agrees to attend, additional payment could be made in recognition of the attendance on a non-contact day.
>
> 6.3 The STPCD 2018 paragraph 41 states that part-time teachers must be paid in accordance with the "pro rata principle" for basic pay and all additional payments, except for TLR3. The "pro rata principle" means the number of hours that the teacher is employed for during the course of the school's timetabled teaching week as a proportion of the total number of hours in the school's timetabled teaching week.
>
> 6.4 The "school's timetabled teaching week" (STTW) means the aggregate period of time in the school timetable during which pupils are normally taught plus any additional hours the teacher may agree to work from time to time at the request of the Headteacher. This excludes assemblies, registration, midsession breaks and lunch breaks.
>
> 6.5 [Provides an example of the calculation of a part-time classroom teacher's hours including directed time and PPA. We do not set this out in full but took it into account in making our findings].

37. The claimant's evidence (WS para 20) was that "non-allocated directed time" or contingency time referred to at para 4.4 "[allows] for flexibility and unforeseen events…. In my 32 years of teaching, I've only had to attend to handful of unforeseen events within my contingency time. In reality we use it for the overspill of work, marking, putting up displays, meetings with parents, SEN review meetings etc. It might not amount to much, but it is important as it helps to give breathing space to do work."

38. The parties in this case disagreed about how much of the claimant's directed time for the Autumn 2019 term should count as "allocated" and, therefore, how much contingency time she had. We deal with our findings about that under the heading "The claimant's and her comparator' contingency time and the claimant's working hours" at paras 113-135 below. First, we set out our findings of fact about the events

leading up to the claimant's resignation on 24 September 2019 and in the period to the end of her employment on 31 December 2019.

The position prior to Ms Tjaveondja's appointment in September 2018

39. When she started working at the School the claimant was contracted to work 18.46 hours per week. In 2015 she reduced her hours to 15.63 hours per week. Her unchallenged evidence was that this was partly because statemented children had left the school so there was less SENCo work and partly to better fit with her caring responsibilities at home. The claimant did not have a DTS relating to this period. Her evidence was that she had originally been given one but it was not included in the Bundle.

40. Prior to Mrs Tjaveondja's appointment the claimant taught Oak as a job share with Ms Gillison, the previous Head Teacher. The KS1 class was taught by Miss Whiteside who was a full-time teacher. The claimant taught for full school days on Monday and Tuesday. She then took her PPA and contingency time on Wednesday mornings to do her SENCo work. She worked those Wednesday mornings from home.

41. In 2016 the claimant had a period of absence from work due to stress. We find that was caused by the way that complaints from parents had been dealt with by the School. A Stress Risk Assessment ("the 2016 SRA") was completed. The updated version of that document was at pp.126-127. We find the focus of the 2016 SRA was on the way the claimant and the School communicated about and dealt with parent complaints rather than on workload issues. It did, however, include confirmation that the claimant would continue to be allocated 1 hour a week for her SENCo duties; that she would only have to attend staff meetings on a pro-rata basis; and that there would be a handover meeting (with Ms Gillison her then job-share) for 30 minutes on Tuesday afternoon each week. The action points recorded that because the claimant only worked 2 days a week in school there were "inherent problems with communication and a responsibility on the claimant to make sure she read notes and kept up to date with staff meetings she did not attend."

Autumn Term 2018

42. Mrs Tjaveondja started as headteacher at the School in September 2018. We accept that Mrs Tjaveondja was genuinely committed to ensuring that staff had a good work life balance and when she joined she acknowledged her duty of care to ensure the staff's wellbeing as well as her own (p.448).

43. However, during this first term, Mrs Tjaveondja identified changes she wanted to make to the way things were being done at the School. We find that Mrs Tjaveondja's view was that practices at the School had stagnated and did not reflect current good teaching practice. She worked closely with the respondent's advisors to identify how improvements could be made. She also looked to learn from other schools of similar size. She focussed in particular on planning more effectively and on updating the approach to marking pupils' work.

44. We find that during this first term the relationship between Mrs Tjaveondja and the claimant was relatively good. They shared the teaching of the KS2 class, Oak.

The claimant's working pattern remained the same, with her Wednesday mornings being non-teaching mornings worked from home.

45. We find, however, that the burden on the claimant did increase during this term for two main reasons. The first was that neither she nor Mrs Tjaveondja had particular expertise in teaching maths. The claimant accepted that she had become deskilled in maths teaching, having not taught that subject for a number of years. Ms Gillison had taught maths as part of their job share but she left no lesson plans or other structured materials when she left. Because of Mrs Tajvaeondja's duties as Head and her own lack of experience in teaching maths, we find the burden to plan the maths lessons fell primarily on the claimant. The second reason was the time needed to get to grips with the new ways of working which Mrs Tjaveondja wanted to introduce.

46. The 2016 SRA was reviewed and updated following a meeting on 22 November 2018 attended by the claimant, her union rep, Mrs Tjaveondja and a representative of the respondent's HR team (pp.126-127). The update was triggered by complaints made by parents of children in Oak. The claimant raised concerns that stress was being caused by failures to follow the School's Complaints Policy. The update was focussed on the handling of complaints by parents rather than on workload issues. The only updated action point related to what information the claimant was to be given about complaints when she was not in work. We find that at that point the stress risk was associated with those complaints rather than with the workload expected of the claimant.

Spring Term 2019

47. During the Spring Term 2019 (7January to 5 April 2019) Mrs Tjaveondja started to implement what she saw as necessary changes at the School if it was to improve its performance.

MIT support and the change in Mrs Tjaveondja's role

48. In addition to identifying a need to update practices at the School, Mrs Tjaveondja had by Spring Term 2019 identified gaps in the School's statutory paperwork which needed to be addressed before OFSTED's next visit which was due in May 2019. By the end of January 2019, the School's chair of governors and the respondent had agreed on 2 key actions to enable Mrs Tjaveondja to address the issues she had identified. These actions were communicated to staff at the staff meeting on 28 January 2019.

49. The first action was to ask the respondent's Monitoring and Intervention Team (MIT) to provide advice and support. The MIT team are a County Council team of advisors who are usually brought in to support schools of concern. Although that is usually done where a school has been placed in special measures or given an improvement notice as a result of an OFSTED inspection, MIT can also be invited into a school on a voluntary, pre-emptive basis. Mrs Tjaveondja decided to do so to enable MIT to provide staff with bespoke professional development as well as supporting her in making decisions about changes to the way things were done at the School.

50. The second action was to identify a KS2 teacher to take over Mrs Tjaveondja's teaching duties to free her up to implement the changes at the School and address the gaps in the statutory paperwork. Once implemented, this action would have a direct impact on the claimant because the new teacher would be her job-share in relation to the teaching duties for Oak.

The claimant's switch to full-time and associated challenges

51. It was not possible to find a permanent job-share before the end of the 2018-2019 school year. The alternative was to use supply teachers to fill the gap. The claimant instead offered to teach Oak full-time on a temporary basis until a permanent job-share was found. We find Mrs Tjaveondja did raise concerns about the claimant working full-time given that there was a stress risk assessment in place for her. We find that the claimant maintained that she preferred to work full time rather than liaise with a supply teacher (or a succession of such teachers). She started teaching full time from the 4 March 2019, part way through the Spring Term.

52. We find that the claimant found two aspects of the full-time role challenging. The first was the work involved in planning maths lessons. The second related to marking.

53. When it came to planning maths lessons, Ms Gillison had taken on that work prior to the 2018-19 School year but had left limited planning materials. The claimant had, by her own admission, become deskilled in maths because she had not been teaching it in recent years. At the start of the term, Mrs Tjaveondja had identified that gap and bought a Maths planning support CD for the School, costing £450.00 to help plan the Maths lessons. However, the claimant found that CD to be of limited use. That was partly because she struggled to access it (particularly when working from home) and because it did not include ready made lesson plans but learning objectives and planning resources, requiring her to draw up the lesson plans.

54. The claimant found the maths planning particularly time consuming because of the need to prepare different plans for the different age groups within Oak. On 18 March 2019 the claimant raised this concern in an e-mail to Mrs Tjaveondja and teaching colleagues (p.140). She referred to it being "impossible" to plan 12 maths sessions a week and explained she needed something which provided ready-made materials for each session. When she proposed buying materials from Hamilton Trust which included plans in Word format for mixed age group planning which she could easily amend, Mrs Tjaveondja was supportive. On 20 March 2019 she emailed the claimant to agree she should buy the resources saying, "if it makes it easier…then great" (p.141).

55. When it comes to marking, Mrs Tjaveondja wanted to change the approach to marking, placing an increased emphasis on "on the spot" marking during lessons as opposed to marking books after classes had ended. That was viewed as good educational practice and in Ms Tjaveondja's view would result in a reduced marking burden overall. A new Marking and Feedback Policy ("the Marking Policy") (pp.76-87) was drafted to reflect that approach. The new policy was not finalised and presented to the claimant and colleagues until the Summer Term 2019. Even before the introduction of that policy the claimant was finding it difficult to keep up with her marking because of the demands of teaching full-time.

56. During the Spring Term MIT undertook class observations and implemented action plans. The claimant was informally assessed by MIT on 28 March 2019. Ms Tjaveondja, the claimant and the MIT members present had a discussion with the claimant about her having become deskilled in maths. She acknowledged that was the case and said that she was falling behind with marking because of the time she was spending getting up to date with the curriculum and planning. She was told by MIT that she would be provided with support. That was to be provided through sessions with the respondent's Teaching and Learning Consultant for English, Stephen Kenyon ("Mr Kenyon") and Teaching and Learning Consultant for maths, Ian Richardson ("Mr Richardson").

Summer Term 2019

57. We find that although the claimant was struggling with keeping up with marking and lesson planning, her relationship with Ms Tjaveondja at the start of the Summer Term was still a positive one. By the end of that term, however, matters had deteriorated significantly. We set out our findings about relevant incidents specific to the claimant below. Those incidents took place in the context of a staff restructure at the School which led to a decision to reduce the number of Teaching Assistants ("TAs") employed at the School.

58. From around May 2019 the staff started to hear about the restructure which led to uncertainty and a degree of bad feeling within the School. That was partly because some staff took the view that TA redundancies were being made to fund the part-time teacher who was taking on Mrs Tjaveondja's teaching duties.

59. The MIT had also prepared a School Improvement Plan ("SIP") which ran from May 2019 to July 2020 and set out actions to be taken and targets to be met, including some by the end of the Summer Term. That added to stress felt by staff at the School and to a degree of uncertainty because it led to changed priorities part way through the Summer Term.

MIT support and SENCO and Maths Co-ordinator roles

60. On 22 April 2019, just before the start of the Summer Term, the claimant emailed Mrs Tjaveondja (p.146). Although it refers to needing to plan 15 lesson plans for English which will increase her workload, the email is friendly and positive in tone. She refers to discussing the lesson planning issue with "Ian" on Friday 26 April 2019. We think that should refer to Mr Kenyon, who was to provide MIT support on English, rather than Mr Richardson.

61. The claimant had 3-4 one to one sessions with Mr Kenyon on English before the end of May 2019. The aim of these sessions was to support her in her planning and teaching. There was a dispute about when and how many sessions she had with Mr Richardson on Maths. We find that the only one to one session the claimant had with him was on 14th June 2019. The claimant's evidence was that she was enthused by that session and spent 14 hours on the subsequent weekend familiarising herself with the various resources which Mr Richardson had highlighted. In the Stress Risk Assessment she completed for the 23 September 2019 meeting, the claimant said she found the input from MIT helpful but suggested they were not always mindful of work life balance.

62. During this term, the claimant and Mrs Tjaveondja agreed that Mrs Tjaveondja would take over the role of SENCo and that the claimant would take on the role of maths co-ordinator. Mrs Tjaveondja had recorded this as being suggested by the claimant and agreed at the claimant's interim appraisal on 15 May 2019 (pp.119-125 at Objective 3, p.124). The claimant denied that this was accurate. She accepted the discussion about switching roles had taken place but said that it had been discussed at staff meetings rather than at her interim appraisal. On balance, we prefer the claimant's evidence that this change was suggested by Mrs Tjaveondja. We find it unlikely that the claimant would have proactively raised the possibility of her becoming the curriculum lead on maths given that she was struggling to get up to date on that topic.

63. We find that as late as July 2019 there was a lack of clarity about when the switch of rules was due to come into effect and, in particular, when Mrs Tjaveondja was going to fully take over the SENCo work. However, we find that the claimant agreed to the change and welcomed the SENCo role being taken off her, something she confirmed in the 23 September risk assessment (p.204).

Events from 12 June 2019 to 2 July 2019 – deterioration in the claimant and Mrs Tjaveondja's working relationship

64. One proposal to reduce the claimant's workload was that KS2 at the School be reduced to 3 age groups rather than 4. On 12 June 2019 the claimant and Mrs Tjaveondja paid a visit to Crawford Village School to see how that approach worked there. We accept the claimant's evidence that in the car on the way to that school she said to Mrs Tjaveondja that she was "going under" with the four age groups in KS2 and only one TA (the other being off on long term sick). Mrs Tjaveondja did not say much in response. We find that, as the claimant suggested in her witness statement, that was because at that point there were proposals in place to help the claimant both by way of MIT support and the proposed reduction in the KS2 class to 3 age groups. In the event that reduction was not implemented.

65. We find that the working relationship between Mrs Tjaveondja and the claimant was still good when that visit took place. However, it started to deteriorate significantly towards the end of June 2019. We find a key trigger was Mrs Tjaveondja sending the claimant a report of a scrutiny of pupils' books carried out by her and Gillian Wilton, one of the MIT advisers, on the 17 June 2019. A report of the outcome of the book scrutiny was produced in table form ("the Book Scrutiny Report") (pages 160-165) and emailed by Mrs Tjaveondja to the claimant and Miss Whiteside (the KS1 class teacher) on Friday 28 June 2019.

66. Mrs Tjaveondja saw the Book Scrutiny Report as setting a benchmark identifying areas where development was needed and against which future improvements could be charted. In her email she noted that there were comments common to both classes, that they had already discussed and were addressing them and that they could be built into the action plans already in place.

67. There were adverse comments relating to Oak, the class the claimant was then teaching full time. Specifically, the Book Scrutiny Report said that the quantity of work was below what was expected (26 pieces of work out of a possible 60 school days); that there was little evidence of differentiated challenge between the year groups; and that a large amount of work was unmarked across all year groups.

68. We find that the claimant found those comments upsetting and unfair. She emailed comments in response to Mrs Tjaveondja on Sunday 30 June 2019 (pp.148-149). She said that she had only had the pupils for 40 sessions and noted that the 20 sessions taught by Mrs Tjaveondja prior to March 2019 did not appear to have been taken into account. She also said that marking "was an issue" and that she had purposefully not spent "hours catching up on unmarked pieces" because she felt that it needed to be highlighted that the task was unsurmountable. She recognised that there was going to be an updated marking policy but maintained it was not possible to plan and mark for a 4 age group class and still maintain a work-life balance. She also raised her major concern about losing a TA in Oak under the restructuring but still being expected to teach 4 year groups with the added difficulty of 3 of the pupils needing 1:1 support.

69. Around this time, Mrs Tjaveondja and MIT were working on developing and introducing the new Marking Policy. There were two aspects of the Marking Policy which caused the claimant concern. The first was the requirement to ensure that all work from one class was marked before the next class in the same subject took place. For the claimant, that would mean needing to ensure that work was marked for the following day. The second element which caused the claimant concern was the emphasis in the Marking Policy on "on the spot marking". Mrs Tjaveondja's view was that it was good educational practice to mark pupils' work in class with them rather than after the class had ended. This "on the spot" marking was seen as more beneficial for pupils' learning. Mrs Tjaveondja's view was that it also reduced rather than added to a teacher's workload. The claimant took a different view and thought that it would be impossible for her to teach an age differentiated class and to "on the spot" marking. She thought that would be particularly difficult given that the number of TAs in her class was being reduced.

70. At a staff meeting on 1 July 2019 Mr Richardson attended to provide training on the new Marking Policy. The claimant aired her frustration at the meeting, giving her view that the required marking was unmanageable especially with reduced TA support. She was unhappy when Mr Richardson confirmed that a TA was meant to support a whole class rather than provide 1:1 support to individual pupils.

71. At that same meeting it was confirmed that one of the TAs was off work due to work related stress. We find that the claimant made a remark to the effect that she could also have six months off with stress. Mrs Tjaveondja found it unprofessional of the claimant to have made that remark in a meeting, especially at a meeting where Mr Richardson of MIT was present.

72. On the following day there was a review for a pupil who had an Education and Health Care Plan. The pupil's parent was a school governor. Mrs Tjaveondja took the view that the claimant had inappropriately used that meeting as an opportunity to raise her concerns about the staffing restructure and the reduction of TA numbers. Although we accept the claimant's point that the level of staff support would be relevant when discussing a pupil's EHCP, we prefer Mrs Tjaveondja's evidence on this point. We find that by this point the claimant was using every opportunity to voice her concerns. Her doing so with a governor (albeit at an EHCP meeting) seems to us consistent with the claimant's subsequent direct approach to that governor by email on 14 July 2019 (page 154). In that email the claimant raised concerns about the impact on staff stress of Mrs Tjaveondja's appointment and the restructuring. She

asked for some sort of consultation "between governors and staff", i.e. bypassing Mrs Tjaveondja.

73. Mrs Tjaveondja asked the claimant to have a word with her in Mrs Tjaveondja's office after the EHCP meeting on 2 July 2019. The claimant and Mrs Tjaveondja met in the office at around 4.25 p.m. just before the claimant was heading home. Mrs Tjaveondja raised the issue of the claimant's behaviour at the staff meeting on 1 July and at the EHCP meeting and told her she viewed it as inappropriate. She said that if the claimant had concerns she should raise them with her rather than in front of others in meetings. She referred to the claimant's email of 30 June 2019 in which the claimant said she would not "back-mark" books and told her it was part of a is teacher's duty to carry out marking. In the claimant's words, matter then "got into tit for tat". The claimant suggested that Mrs Tjaveondja had not been able to keep up with marking when she was teaching the class. The claimant again told Mrs Tjaveondja that she was "going under". There was a discussion of visiting another school to see how they dealt with a four age group class but the claimant was dismissive of the idea as she thought the school was not comparable.

74. Mrs Tjaveondja asked the claimant what support she needed. The claimant said more time to look over maths stuff. Mrs Tjaveondja responded that as maths coordinator the claimant would get more time and training. The claimant repeated that she was going under. Mrs Tjaveondja's notes of the meeting (typed up version at pp.382-383) record her as saying "So, its capability then?" and then claimant responding "Yes, its capability". There was no dispute that the word "capability" was used and no dispute that It was agreed that Mrs Tjaveondja then said she would speak to Andy Cooper of the respondent's HR team about setting up a meeting. We find Mrs Tjaveondja and the claimant took different views about the implications of the reference to "capability". We find the claimant saw it as a threat on Mrs Tjaveondja's part i.e. effectively, of disciplinary action. We find that Mrs Tjaveondja took the view that implementing the capability policy was the next step she was required to take if an employee was struggling to fulfil their role. We find she viewed it as a potentially supportive rather than necessarily a punitive step.

75. We find that In July 2019 Mrs Tjaveondja also presented the Self-Evaluation Report on the School to the staff (pp.351-365). After discussion with MIT she had agreed that the "Quality of Teaching, Learning and Assessment" at the School should be rated as "Requires Improvement". This also contributed to a deterioration in relations between the claimant and Mrs Tjaveondja.

Discussions about the claimant's working hours for September 2019

76. Parallel to these events we find that the claimant and Mrs Tjaveondja were discussing what the claimant's working hours would be in September 2019. At some point prior to the 2 July 2019 meeting it was clear that the claimant would be returning to work part-time from September 2019 (the interview to appoint the job-share for KS2 took place on 9 July 2019). In consultation with MIT, Mrs Tjaveondja intended Maths and English (the Core subjects) to be taught in the mornings from September 2019. That was viewed as good educational practice because pupils were fresher and so better able to learn in the morning. Mrs Tjaveondja wanted the same teacher to teach all the mornings or all afternoons to maintain continuity.

77. Because the claimant was struggling with maths in particular, Mrs Tjaveondja suggested she may want to teach afternoons when the secondary subjects like geography and history would be taught. The claimant had been teaching those subjects prior to September 2018. The claimant preferred to teach the mornings. Initially she was told that she would need to work 5 mornings a week. However, the claimant said she could not do so due to family commitments and Mrs Tjaveondja agreed she would work 4 mornings a week (Monday to Thursday). The dates when these discussions took place were not clear from the evidence we heard but it is clear from what was said at the meeting late on 2 July 2019 that by that date it had been agreed that the claimant would be teaching mornings.

78. Staff rotas and working patterns for September 2019 were discussed on 22 July 2019 which was an INSET day and also the last day of term. The claimant was told she would be working Monday afternoon as well as 4 mornings a week. We find that the final timetable could not be agreed until late July because of the need to take into account the work pattern for the new job-share, Mrs Zaim. We set out our findings about the claimant's working pattern from September 2019 at paras 113-135 under the heading "The claimant's and her comparator' contingency time and the claimant's working hours."

Events after 2 July 2019 to the start of the Autumn 2019 Term

79. There was a further book scrutiny on 4 July 2019. The Book Scrutiny Report (p.163) was updated and noted that work had been marked. The claimant had been given an afternoon to do so by Mrs Tjaveondja, although some of the time had been taken up by the claimant dealing with a pupil behaviour issue. The claimant spoke to her union in the wake of the meeting on 2 July and wanted to have a meeting at which the union rep had agreed to be present.

80. The claimant and Mrs Tjaveondja exchanged emails on 10 and 11 July 2019. There was discussion about when the switch of SENCo and Maths Co-ordinator roles was due to happen. Mrs Tjaveondja confirmed in her email of 11 July that it would be in September and suggested the claimant look for Maths Coordinator training so that could be booked in. She also said they could have a discussion about hours to ensure there was time built in via PPA and planning to manage the workload (p.151).

81. In that same email Mrs Tjaveondja referred to their discussing capability and said that she would like to complete a new stress risk assessment for the claimant and asked for her permission to make a referral to Occupational Health ("OH"). She suggested that any action plan should wait until September when the claimant would be returning to a part-time role. We find that email was placatory and supportive. The claimant's reply was more confrontational in nature. She denied that she and Mrs Tjaveondja had "discussed capability" as her email suggested and said that she had been called into the office for "an unscheduled meeting" and then been told that Mrs Tjaveondja would need to contact Andy Cooper in HR because "it was capability". She referred to having spoken to her union and said she was not prepared to wait until September for a meeting to discuss next steps. She asked for "a speedy response".

82. Mrs Tjaveondja's response on the evening of 14 July was terse. It said she had called the claimant in to talk about her unprofessional behaviour; that she would

contact Andy Cooper to see if he needed to be at the meeting; and would let the claimant know as soon as she heard back. Later that evening the claimant contacted Mrs Jackson, the chair of governors, suggesting they look at staff well being and "some sort of consultation between staff and governors" (p.154). Although she indicated that she was taking steps to ensure that staff wellbeing was being addressed according to correct procedures there was no specific action relating to the claimant taken by Mrs Jackson arising from that interaction at that time. The governors did circulate the OFSTED wellbeing questionnaire to staff at the end of September 2019 but this was after the claimant resigned. The delay was due in part to the limited time available to the governors (as volunteers) to devote to School matters and in part because of a desire to see how things panned out at the start of the new term following the appointment of Mrs Zaim (p.223).

83. Mrs Tjaveondja sought HR's advice in the wake for her exchange of emails with the claimant but was advised that a formal meeting was not necessary. She and the claimant did meet at the end of term and the claimant read out to Mrs Tjaveondja a chronology of the times when she had raised her concerns about struggling with marking and planning. Mrs Tjaveondja refers to the claimant reading out "30 points that she felt was unfair" in the Occupational Health referral she made in relation to the claimant on 1 August 2019 (432-434). That referral does seem to us to set out Mrs Tjaveondja's perspective on what had occurred in a slightly more defensive way than one would perhaps expect in an OH referral.

84. A telephone OH assessment of the claimant took place on 13 August 2019. The report of the same date (pp.156-157) advised that the claimant was unfit for work because of the severity of her symptoms. It noted that although her symptoms had improved as she was on summer break, thinking about work increased her symptoms. Those were reported to include low mood, disturbed sleep, reduced concentration and poor motivation to an extent which the mental health tool used in the assessment indicated was significant. OH advised her to contact her GP. The follow up action was for OH to conduct a review appointment before the start of the new School term to assess the effectiveness of any treatment the claimant had undertaken and her fitness for work.

<u>Events from the start of Autumn Term 2019</u>

85. The Autumn Term started on 3 September 2019. The claimant was at work from the start of term, working her new pattern of Monday to Thursday mornings and Monday afternoon. Mrs Tjaveondja had not been in touch with her over the summer, having been advised by HR not to do so in light of the 13 August OH Report.

86. From the start of this term Mrs Oram, who had recently joined the respondent, replaced Andy Cooper as Mrs Tjaveondja's contact point with the respondent's HR Team.

Events prior to the 23 September meeting – OH review and draft DTS

87. The OH review mooted in the 13 August OH Report took place on 6 September 2019 by telephone. The OH Report of the same date (pp.167-169) concluded that the claimant was fit to work but that the workplace issues she had experienced would be a barrier to recovery unless addressed.

88. The report advised that as a first step there should be a meeting with an appropriate manager to begin a constructive dialogue about the problems that the claimant had been experiencing. It suggested completing a stress risk assessment to record any concerns and to set out an action plan to address those concerns. It also advised management to monitor the claimant's workload to "avoid uneven, unexpected or excessive demands, and to ensure that it was commensurate with current capabilities". It underlined the importance of recognising stressors arising and taking prompt empathetic action. It suggested that supportive mentoring might help provide an opportunity to express any workplace needs and concerns.

89. Mrs Oram and Mrs Tjaveondja were in contact about the SRA meeting from 9 September onwards. The relationship between the claimant and Mrs Tjaveondja had not improved since the end of the previous term. In her emails to Mrs Oram, Mrs Tjaveondja expressed the view that the claimant was "being tricky" and "trying to call the shots". She gives an example of the claimant telling Mrs Tjaveondja that the claimant could not put up displays because she only had 9 minutes of directed time available to do so which was not enough time. Mrs Tjaveondja asked for HR to attend the SRA meeting. Mrs Tjaveondja acknowledged to Mrs Oram that there was a lot for the claimant to plan and that she was taking on a coordinator's role (p.178) but that MIT were providing support.

90. We do find that the claimant was at this point insisting on a strict adherence to the directed time rules and assiduously querying the expectations in terms of hours, e.g. when teachers could be expected to be at school at the start of the day. Mrs Tjaveondja expressed the view to Mrs Oram that it was "getting ridiculous". She said that while she believed in lessening the workload, she also believed in joining in "with the whole school life". On 12 September 2019 she reported that the claimant had that day reduced the 9 minutes of directed time available to put up displays to 7 and told Mrs Tjaveondja that she needed that time to look at emails. We find that the claimant was, in Mrs Tjaveondja's view, negatively impacting on Mrs Zaim (who was new and enthusiastic) by telling her she should not have attended an extra staff meeting, prompting Mrs Zaim to ask for a DTS (p.176).

91. Mrs Tjavendja did not have any experience of preparing a DTS. She provided Mrs Oram with information about the claimant's and Mrs Zaim's working hours and duties so that Mrs Oram could prepare their draft DTS. Because she had only recently joined the respondent, she did so with advice from a colleague in the HR team.

92. On 13 September Mrs Oram emailed Mrs Tjaveondja the first version of the DTS for the claimant and for Mrs Zaim. In the email, Mrs Oram reported that based on the assumptions she had made, the claimant was being directed to work more hours than she was paid, i.e. she had no contingency time. In contrast, she reported, Mrs Zaim had 33.13 contingency hours over the year. That first draft DTS for the claimant was not in the Bundle. The draft DTS for the claimant immediately following Mrs Oram's email shows contingency time of 22.62 hours for the year rather than a deficit (pp.182-185). It also has an "assumptions" column which was not added until the version sent to Mrs Oram to Mrs Tjaveondja on 17 September 2019 (p.186).

93. Although it is not clear where the draft DTS at pp.182-185 fits in, we find that the first version of her DTS sent to the claimant by Mrs Tjaveondja on 19 September

2019 was the version at pp.187-190. The total directed time in that draft (551.50 hours p.a.) and the calculation of inset time as 13.50 p.a. fit with the claimant's comments on that draft. Those comments were sent by the claimant to Mrs Tjaveondja by email at 7:29 on the 23 September 2019, i.e. on the morning of the SRA meeting (p.193). Mrs Oram set out some initial responses to the claimant's comments by annotating the claimant's email of 23 September 2019. The issue was then discussed as part of the 23 September SRA.

94. Rather than going through the details of the discussions about what should and should not be included as directed time here, we deal with them under the heading "The claimant's and her comparator' contingency time and the claimant's working hours" at paras 113-135 below.

The SRA meeting on 23 September

95. The SRA meeting was attended by the claimant, Chris Anderson (her union representative), Mrs Tjaveondja and Mrs Oram. Mrs Oram took notes which were incorporated into the SRA document ("the September SRA") (pages 197-205).

96. On 17 September 2019 Mrs Tjaveondja had emailed the claimant an invite letter to the meeting, a copy of the OH report and a proforma SRA for the claimant to complete. The claimant had completed the "specific issues described by the employee" section of the SRA form. We find that the claimant focussed her concerns on three areas. The first was her directed time allocation and her contention that she was treated less favourably in terms of directed time allocation (specifically the allocation of contingency time) compared with a full-time teacher. The second issue was what she regarded as a lack of support in terms of maths, with the claimant saying that she had become de-skilled in maths. The final point was in relation to workload generally. The claimant was in essence, we find, saying that she was currently feeling overwhelmed and feeling that she was being required to work over and above what was consistent with a work/life balance. A significant element of that was the impact of the Marking Policy.

97. The September SRA was completed with agreed actions. These were:

- The DTS statement to be updated in line with the discussions between the claimant and the respondent at the meeting She was also to be supplied with a DTS for a full-time member of staff in response to the claimant's comments about feeling she was treated less favourably. She was sent those on 16 October 2019 (p.269). We set out our findings about them and details about the discussions about contingency time in "The claimant's and her comparator' contingency time and the claimant's working hours" at paras 113-135 below

- It being agreed that the claimant would attend two full inset days on Mondays because the claimant struggled to attend twilight sessions as it meant going home and coming back.

- A suggestion that the claimant attend staff meetings alternate weeks but with an open invitation for her to attend any staff meeting she chooses.

- In relation to the concern raised about the claimant becoming deskilled in relation to maths, it was agreed that the claimant would temporarily relinquish the maths coordinator responsibility and use the one hour per week set aside for that role to develop her maths skills.

- In relation to marking, it was agreed that Ms Tjaneondja would arrange an independent review of the claimant's marking. That was to ascertain whether she needed support in order to help her adapt to the new policy or whether the policy itself needed amending in light of the claimant's comments.

98. The claimant's own evidence was that she felt the meeting had been productive and that Mrs Oram had put forward some good suggestions. The claimant left the meeting feeling much more positive (in the grievance meeting on 17 October 2019 she said she felt "buoyed up" by the meeting). A review date of 25 November 2019 was agreed.

The "last straw" incident and the claimant's resignation on 24 September 2019

99. Mrs Oram followed up on the following morning by emailing Mrs Tjaveondja the September SRA form with some additional comments; a further amended DTS for the claimant; and a draft DTS for a full-time teacher (pp.196-207). Before these were sent to the claimant, however, the claimant resigned. She did so on 24 September, the day after the SRA meeting. Her case is that her resignation was triggered by the actions of Mrs Tjaveondja at lunchtime on that day.

100. The claimant and Mrs Tjaveondja differed in their versions of exactly what happened. We find that both witnesses were sincere in their version of events and doing their best to recall events some time ago. We did not find either account entirely reliable. In making our findings we have taken into account their evidence at Tribunal and what they wrote or said nearer the time of the incident. In particular we took into account the claimant's resignation email (p.225), her grievance (p.216-217) what was said at the grievance hearing (pp. 273-282) and in Mrs Tjaveondja's email to Mrs Oram on the 25 September 2019 (p.374).

101. We find that on 23 September a further book scrutiny had taken place. The feedback from that scrutiny had been added to the Book Scrutiny Report. The way that had been done meant it was not always clear which feedback related to the 23 September scrutiny and which to earlier scrutinies. The feedback for the 23 September was a mixture of positive and negative. It noted some aspects as being "much improved" and recorded that "marking usually reflected the Marking Policy". In terms of areas for development, it highlighted the need for differentiated learning objectives and marking and assessment to be against age related expectations. It also identified the need to ensure children's errors were not repeated once they have been highlighted.

102. 24 September 2019 was a Tuesday, so the claimant was due to work the morning only. Her second lesson finished at noon. However, she had stayed in school to update the "working walls" displays and liaise with her co-teacher, Mrs Zaim. She also dealt with some dinner time pupil behavioural incidents. This meant she was still in her classroom at 12.55 p.m. There was no evidence to suggest that Mrs Tjaveondja had required her to stay beyond noon.

103. Mrs Tjaveondja wanted to provide the claimant with the updated Book Scrutiny Report. She had bobbed into the classroom to do so earlier but the claimant had been talking to Mrs Zaim. Mrs Tjaveondja came back to the classroom at around 12.55 p.m. as the claimant was scooping up the maths book to take them to the staff room. We find Mrs Tjaveondja attempted to feedback about the scrutiny but the claimant said she could not do so then and needed to mark. She said she would look at the Book Scrutiny Report at home. Mrs Tjaveondja gave her the report and the claimant went into the staff room. We do not accept the suggestion which we understand Mr Mensah to make at para 37 of his written submissions that Mrs Tjaveondja "insisted" on discussing the feedback with the claimant there and then.

104. The claimant began to read the Book Scrutiny Report in the staff room. We find she was upset by what she read, in particular what was said about differentiated objectives and assessment. On balance, we accept Mrs Tjaveondja's evidence that when she came into the staff room shortly afterwards she believed the claimant was reading a comment from one of the previous scrutiny exercises. Mrs Tjaveondja tried to point out what she felt were the positive comments from the latest scrutiny to the claimant. By this point the claimant was upset and in tears. Mrs Tjaveondja tried to give her a consoling hug but the clamant recoiled and said "no". The claimant said she had had enough, couldn't take any more and was resigning. She asked a colleague to fetch her coat and left.

105. Later that afternoon, the claimant emailed Mrs Tjaveondja to say she would not be in school the following day as she felt too stressed (p.215). Mrs Tjaveondja acknowledged that by emailing the claimant to say she hoped she would feel better soon.

106. At 18:12 that evening the claimant emailed Mrs Tjaveondja again, this time copying in Mrs Oram. Her email was headed "Resignation on grounds of stress". It said that she believed that as a part time teacher she was being treated unfairly compared to a full-time teacher because the contingency time given to a full-time teacher was disproportionately larger than that given to her and that as a result she had to spend 14 hours per week keeping up with marking and planning for which she was not paid which had left her feeling overwhelmed and stressed about work. She said that at 12:55 that day Mrs Tjaveondja had presented her with the latest scrutiny and wanted to go over it with her when "this was outside my directed time". She said on examination of the scrutiny she felt the feedback told her that her efforts were not good enough which reduced her to tears in the school. As a result she said she wanted to leave the School. She said it would not benefit her health to continue working at a school where expectations of staff required her to work at least an additional 14 hours per week without pay just to keep on top of marking. She said she had been told by Mrs Tjaveondja that "failing to do this is a disciplinary issue". We find this was a reference to the conversation on 2 July 2019.

107. Mrs Oram replied on the 25 September 2019, suggesting that the decision to resign appeared to be a sudden one given the SRA meeting on 23 September which had focussed on completing the September SRA and putting remedial action in place. She said that if the claimant did not intend to resign she should let her know immediately. She gave her two working days to let her know if her intention was <u>not</u> to resign, failing which the resignation would be processed. She confirmed that if the claimant was resigning the earliest final date of employment could be was 31 December 2019, i.e. the end of that school term. She asked the claimant to let her

know if she wanted to consider possible alternative options and to let her know whether she wanted discussions to be direct with the claimant or with her representative. Finally, she said that a number of the concerns in the claimant's email could constitute a grievance. She sent the claimant the respondent's Grievance policy so the claimant could consider whether she did want to raise those as a grievance (p.217-218). The claimant subsequently confirmed she was resigning and lodged a grievance.

Events post the claimant's resignation

108. On 7 November 2019 in her appeal against the grievance outcome, the claimant confirmed she resigned on 24 September 2019 and that the last straw was Mrs Tjaveondja asking her to look at the book scrutiny outside her directed hours (p.297). That means that events subsequent to 24 September 2019 are not relevant to the claimant's unfair dismissal claim. Although we have taken into account the evidence we heard, we set out our findings about what happened after that date below in brief form only.

109. There were two elements to the claimant's grievance. The first was a claim of unfair practices towards part time workers in relation to directed time. The second was a claim that the School's governors had failed in their duty to safeguard the health and well-being of their staff in general and the claimant in particular. The grievance referred to the amount of stress the claimant had been put under due to working conditions.

110. The grievance was heard by Miss Ledgerton on 17 October 2019 and not upheld. Her reasons were set out in a letter sent by Mrs Oram on Miss Ledgerton's behalf on 6 November 2019 (pp.291-293). In broad terms, Miss Ledgerton found that steps to address the claimant's concerns about workload had been taken (the Maths CD, MIT support) or were going to be taken (the steps identified in the September SRA). When it came to the alleged inaccuracies in the claimant's DTS she found that the DTS was still under discussion with the claimant when she resigned, with changes agreed in the September SRA. In relation to the alleged unfairness between the part-time and full-time contingency time entitlement she found that the proportional difference could be objectively justified "due to full-time staff being in school during the afternoons and, therefore, being more likely to be called upon to deal with unforeseen events hence the requirement for a higher proportion of contingency time". Ultimately, she concluded, "both full time and part time employees are within their contractual directed time allocation".

111. The claimant appealed against the grievance outcome on the 7 November 2019. She challenged the findings that adjustments had been made to the DTS; disputed that the objective justification put forward that working in the afternoons justified a full-time worker being entitled to 5 times the contingency time a part timer was entitled to; and said that in considering her workload there had been a failure to take into account the reduction in TA support and the increase in her workload arising from that. The appeal was rejected by a panel of 3 co-opted governors following a grievance appeal hearing on 16 December 2019. They set out their reasons for doing so in a letter dated 19 December 2019 (pp.331-334).

112. An OH report on 14 October assessed C as fit for work, noting that workplace issues were a barrier to recovery. The mental health assessment tool indicated moderate symptoms (pp.262-263). The claimant's GP indicated in a fit note dated 31 October 2019 that she was fit for work (albeit with adjustments). There were discussions between Mrs Oram and the claimant about whether the claimant should be on special leave rather than sick leave, but she ultimately remained on sick leave until the end of her notice period on 31 December 2019.

<u>The claimant's and her comparator' contingency time and the claimant's working hours.</u>

113. The claimant says she was treated less favourably in terms of the contingency time allowed to her when she returned to being a part-time teacher in Autumn Term 2019.

The claimant's contingency time for Autumn Term 2019

114. As already mentioned, the Bundle contained a number of drafts of the DTS for the claimant for that term. In her witness statement, Mrs Tjaveondja accepted (paragraph 47) that the draft DTS at pages 182-185 was incorrect because it made a number of assumptions which could be discounted following discussion with the claimant. Mrs Tjaveondja's witness statement accepted that the DTS sent to the claimant on 19 September 2019 (the one at pages 187-190) was also incorrect. The DTS for the claimant at pp.419-422 are, as far as we can see, duplicates of those earlier DTS.

115. The document we have found of most use in making findings about the claimant's directed time is the DTS sent to the claimant on 16 October 2019 (p.271) ("the October DTS"). That represents the position after the respondent had taken into account the claimant's initial comments by email on the 23 September 2019 and at the SRA meeting on that date.

116. Some items on the October DTS remained consistent with earlier DTS, including the allocation of 6 hours (3 x 2 hours) p.a. for parents' evening and 19 hours p.a. for attending staff meetings every other week. However, the claimant's comments resulted in an increase in teaching time to 2 hours 45 minutes on Tuesday to Thursday to reflect the earlier starts of the first lesson on those days, reducing the contingency time by 19 hours p.a. The October DTS also reflected the respondent's acceptance that the claimant was on duty for 2 breaks rather than 1 (one being playground duty and the other being first aid duty). That reduced the contingency time by a further 9.5 hours p.a.

117. There was a further increase in directed time to take into account PPA (increased so it was still 10% of the increased teaching time); the one hour maths development time agreed for the claimant on Monday afternoon and liaison time. That made the total "teaching time" 503.50 hours p.a. There were reductions in the non-teaching (INSET) days from 3 to 2 but with each INSET day being 6 hours.

118. The respondent also accepted that the claimant was required to attend a handful of assemblies a year (Harvest, Christmas) and that the DTS would be amended to reflect that. 3 assemblies per year were added averaged out at 5

minutes per week and adding 3.16 hours p.a. to the total directed time shown on the 23 September version.

119. The end result was that the October DTS showed the claimant having contingency time of 16.03 hours p.a. The claimant disagreed that the October DTS was accurate. Her case was that there was other time which should be regarded as directed and therefore not part of contingency time. We deal with our findings about these next.

Breaks

120. The claimant said that all four morning breaks should be counted as part of her directed time. As we've said, the respondent's position was that two of them should. The claimant's argument was based on the effect of the Playground Policy (pp.242-243) which she was sent on 24 September 2019. That was after the claimant resigned so she was never subject to the policy in practice and there was no evidence about how it worked in practice.

121. The relevant part of the policy was the first two paragraphs which set out what should happen if children misbehaved during break time. In brief, if a child misbehaved twice they would be given a red card and "sent in". The claimant's case was that when this happened during morning break then she would be expected to supervise that child even if she was not on duty during that break. That meant that all the breaks were directed time. Although the wording of the policy is not entirely clear, we read it differently. It seems to us to make clear that a child will be sent in if there is a member of staff available but does not require members of staff to be available every break. We accept Mrs Tjaveondja's evidence that there was nothing to prevent a member of staff from going for a walk for 15 minutes and leaving the school premises during break time. The position seems to us accurately set out in Mrs Oram's email to the claimant on 21 November 2019 (p.308), i.e. "if the Head's not available teachers aren't required to cover as if it's not possible for the child to miss their play immediately then there is a contingency for them to miss the next play".

122. We find, therefore, that 2 rather 4 of the claimant's breaks were directed time and that this was correctly reflected in the October DTS.

Liaison time

123. Liaison time was time spent by the claimant and her co-teacher of Oak liaising to ensure effective running of that class. With Ms Gillison this had been after the children had finished for the day on Tuesday. The claimant's case (para 30 of her witness statement) was that there was no timetabled liaison time during Autumn term when she would have been liaising with Mrs Zaim.

124. We accept the claimant's case that the need for "up to 30 minutes" liaison time was agreed in the 2016 SRA. We find that would be characterised as allocated directed time. In the October DTS "liaison time" is included on Monday afternoon as part of the "2 hours 45 mins PPA/Maths development/liaison". Only 25 minutes is allocated, however, whereas it seems clear to us from the 2016 SRA that 30 minutes should be.

125. We find, therefore, that the claimant's allocated directed time should be increased by 5 minutes per week. Over the 38 week year that amounts to 3.16 hours which should be subtracted from the claimant's contingency time in the October DTS. It reduces the claimant's contingency time to 12.87 hours p.a.

Trap time

126. The claimant said that according to the STPCD schools should avoid trapped time i.e. periods of time which are not included in directed time but which are not sufficient for the teacher to have an actual break. She said that break times when she was not on duty and assemblies she was not required to attend fell into this category. In her emailed comments on 23 September she suggested that she would have "almost an hour" of trap time per week.

127. We were not directed to anywhere in the STPCD of the Guidance which referenced this concept. Mrs Oram's evidence was that she was not familiar with it. In that absence we find that the claimant's contingency time should not be reduced further on account of it. In any event, as we've noted above at para 121, when it comes to breaks we accepted that teachers were free to leave the school premises and could do so in practice if they chose. We cannot therefore see how that time could be counted as allocated directed time.

Conclusion on the claimant's contingency time for the Autumn Term 2019

128. Taking into account our findings above, we find that the correct calculation of the claimant's contingency time for the Autumn Term 2019 was 12.87 hours p.a. Her total directed time was 607.20 hours. The contingency time represented 2.64% of her directed time.

The claimant's full-time comparators' contingency time

129. The claimant relied on two actual comparators. The first was Miss Whiteside, the full-time teacher who taught the younger class, Ash, at the School. The DTS at p.270 does not expressly name Miss Whiteside. However, she was the only full-time teacher and we find that DTS sets out her directed time. It shows her having 89.33 hours contingency time p.a. Her total directed time was 1265 hours. The contingency time represented 7.01% of her directed time.

130. The second comparator relied on by the claimant was herself when she was a full-time teacher during part of the Summer Term 2019. There was no DTS for the claimant relating to that period. We accept the evidence set at p.41 of her witness statement that during that term her contingency time was 105.50 hours p.a. Her total directed time as a full-time teacher was 1265 hours. The contingency time represented 8.33% of her directed time.

131. We find those figures show that the claimant as a part-time teacher in Autumn Term 2019 received proportionately less contingency time than Miss Whiteside or the claimant when a full-time teacher. Mrs Tjaveondja accepted that was the case in her witness statement (para 77 at p.75 of the witness statement bundle).

132. When it comes to the contingency time granted to Mrs Zaim, the other part-time teacher in Autumn Term 2019, in the initial draft DTS for her she had had 33.13

hours contingency time allocated to her which we calculate would have represented 5.03% of her directed time. However, we heard no evidence about how that initial DTS was adjusted and so are not in a position to make a definitive finding about the contingency time she was actually allocated in Autumn 2019.

The claimant's working hours during Summer Term 2019 and Autumn Term 2019

133. Central to the claimant's case is that she was required to work additional hours to the extent that she was not able to achieve a work-life balance (para 29 of Mr Mensah's closing submissions). She says the disproportionately small amount of contingency time she was given contributed to this.

134. The claimant's specific evidence on this point was limited but not significantly challenged either in Mrs Tjaveondja's evidence or at Tribunal. We find that during the Summer Term when she was working full time the claimant regularly worked beyond her contracted finishing time at School and also worked weekends. On occasion this involved her working into the early hours.

135. We accept Mr Boyd's submission that there was a significant change in September 2019 with the claimant reverting to part-time hours. We accept the claimant's evidence that during Autumn Term 2019 she continued to work significant additional hours beyond her directed time in order to keep up with marking and planning. This included staying on at School on Tuesdays-Thursday and marking in lunchtime. She also continued to work weekends. The respondent did not appear to dispute the claimant's calculation in her September SRA (p.202) that marking equated to at least 7 hours a week and that with a further 7 hours spent on planning she was working an additional 14 hours per week.

Findings relevant to objective justification

136. In terms of objective justification, the evidence from Mrs Oram and also from Mrs Russell-Hayes was that full-timers had more contingency time because they were more likely to have to deal with unforeseen circumstances because they were present throughout the school day including at the end. Miss Ledgerton and Mrs Russell-Hayes accepted that there was no data as such to say that there were more incidents at the end of the day. They relied on the experience of the Head Teacher in reaching that conclusion. With respect to Mrs Tjaveondja, however, this was her first role as Head Teacher. It was not clear to the Tribunal why there would be significantly more "unforeseen circumstances" at the end of the day as opposed to at the morning drop off or, indeed, during the school day.

Relevant Law

137. The relevant law in relation to the claims brought by the claimant is as follows.

Unfair Dismissal

138. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the effective date of termination, which the claimant had in this case.

139. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

140. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

Constructive dismissal

141. A constructive dismissal occurs where "the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct" (s.95(1)(c) ERA). To be a constructive dismissal the employer's actions or conduct must have amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.**

142. In this case the claimant relies on both a breach of an express term of the contract and a breach of the implied duty of trust and confidence.

143. The express terms alleged to be breached are those set out at paragraphs 51.5 and 51.6 of the Burgundy Book which require the number of hours that a teacher must be available for work must be "allocated reasonably throughout those days in the school year on which the claimant is required to be available for work".

144. Not every breach of contract by an employer will entitle an employee to resign and claim constructive dismissal. That right can only arise where there is a repudiation or breach of a fundamental term by the employer **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**. This may be because the term breached goes to the root of the contract, or because the employer's words or conduct indicate that it does not intend to honour future obligations under the contract.

145. When considering whether a breach of a fundamental term has occurred, it is not appropriate to ask whether the employer's actions lay within the band of reasonable responses available to an employer (**Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**). We accept Mr Boyd's submission that Sedley LJ did in that case say that reasonableness is:

> "… one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement":

146. When it comes to the implied term, there is implied into every contract of employment a duty of mutual trust and confidence. Each party to the contract is under an obligation not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**). The

question for the Tribunal is whether, viewed objectively, a party's conduct has breached the implied term (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland**).

147. If a party is found to have been guilty of conduct breaching that implied term, that is something which goes to the root of the contract and amounts to a repudiatory breach. Such conduct by an employer entitles an employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

148. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there will be a final act or "last straw" before the resignation. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that that "last straw" need not itself be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of has to be more than very trivial and has to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach.

149. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

150. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

Less favourable treatment in breach of the Part-Time Workers Regulations

151. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTWR") makes less favourable treatment of a part-time worker unlawful and provides protections against detriment and unfair dismissal.

152. PTWR Regulation 5, so far as material, provides that:

> **(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **(2) The right conferred by paragraph (1) applies only if–**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds.**
>
> **(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.**

153. In **Hendrickson Europe Ltd v Pipe [2003] UKEAT 0272/02/1504** the EAT approved the analysis by counsel of what was required to establish a breach of regulation 5 as requiring a four stage process: First, what is the treatment complained of? Secondly, is that treatment less favourable than that of a comparable full-time worker? Thirdly, is the less favourable treatment on the ground that the worker was a part-time worker? Fourthly, if so, is it justified?

154. Regulation 8(6) provides that:

> **Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.**

155. A claim under reg.5 requires an actual comparator. It is not permissible to rely on a hypothetical comparator (**Carl v University of Sheffield [2009] ICR 1286, EAT**). The exception to this is where the claimant moves from full-time to part-time working. In those circumstances, regulation 3(2) provides that:

> **Notwithstanding reg. 2(4), reg. 5 [right not to be less favourably treated] shall apply to a worker to whom this reg. applies as if he were a part-time worker and as if there were a comparable full-time worker employed under the terms that applied to him immediately before the variation or termination.**

156. The EAT in **James and others v Great North Eastern Railways [UKEAT/0496/04]** gave guidance on the correct approach to deciding whether the pro-rata principle is appropriate:

> "A Tribunal addressing itself to r.5 should always consider whether it is appropriate to adopt the pro-rata principle. A Tribunal should bear in mind that the fundamental purpose of the pro rata principle is to enable a valid comparison to be made between the remuneration of a part-time worker and

> his full-time counterpart, so as to identify whether a part-time worker is being treated less favourably and if so to what extent." (paragraph 50)

157. A claim under Reg.5 can only succeed if the less favourable treatment is "on the ground that the worker is a part-time worker". There are conflicting EAT decisions on whether the worker's part-time status has to be the "sole" cause of the less favourable treatment or an effective cause, albeit not the sole cause. In Scotland, the EAT has ruled it must be the "sole" cause (**McMenemy v Capita Business Services Ltd [2006] IRLR 761, EAT** and **Gibson v Scottish Ambulance Service, EATS/0052/04**). McMenemy was approved by the Court of Session, Inner House at **[2007] IRLR 400**. However, the EAT in England and Wales has held the part-time status need only be an effective cause (**Sharma v Manchester City Council [2008] RLR 623** and **Carl v University of Sheffield**).

158. In **Carl**, the EAT reviewed the conflicting cases and concluded that "on the grounds that" in reg 5(2)(a) meant that "part-time work must be the effective and predominant cause of the less favourable treatment complained of: it need not be the only cause". Although Mr Boyd submitted that we should prefer the approach in **McMenemy** because the case had been approved by the Court of Session, we find that we are bound to follow the EAT decision in **Carl**. It is a decision of the EAT in England and Wales reached in full awareness of the previous conflicting authorities. The EAT in England and Wales in the more recent case of **Dodds v Ministry of Justice [2021] 12 WLUK 465** also considered the decision in **Carl** on this issue to be binding on it.

159. Case-law on other forms of discrimination have confirmed that unless the case is one involving the application of an inherently discriminatory criterion, the question for the Tribunal is why did the alleged discriminator act as he did – what consciously or unconsciously was his reason (**Nagarajan at para 29**). In answering that "reason why" question a simple "but for" test is insufficient (**B v A [2007] I.R.L.R. 576**).

160. The Explanatory Notes to the PTWR explain that less favourable treatment will only be justified on objective grounds if it can be shown that the less favourable treatment:

(1) is to achieve a legitimate objective, for example, a genuine business objective;

(2) is necessary to achieve that objective; and

(3) is an appropriate way to achieve the objective.

161. The elements of this test are the same as those which apply in deciding whether potentially indirect discrimination is objectively justified so the case-law on this issue (see below) will be relevant.

Being subjected to a detriment/dismissal in breach of regulation 7 of the Part-Time Workers Regulations

162. Regulation 7 of the PTWR provides that:

> **(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).**
>
> **(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).**
>
> **(3) The reasons or, as the case may be, grounds are—**
>
> **(a) that the worker has —**
>
> **(i) brought proceedings against the employer under these Regulations;**
>
> **(ii) requested from his employer a written statement of reasons under regulation 6;**
>
> **(iii) given evidence or information in connection with such proceedings brought by any worker;**
>
> **(iv) otherwise done anything under these Regulations in relation to the employer or any other person;**
>
> **(v) alleged that the employer had infringed these Regulations; or**
>
> **(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or**
>
> **(b) that the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).**
>
> **(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the worker is false and not made in good faith.**
>
> **(5) Paragraph (2) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part X of the 1996 Act.**

163. That means that if a claimant is dismissed for one of the reasons set out in regulation 7 of the PTWR that is an automatically unfair dismissal.

164. In **Hendrickson** the EAT accepted that it would be an error of law for a Tribunal to find that a breach of the PTWR (other than reg 7) meant that the claimant was thereby automatically unfairly dismissed.

Indirect sex discrimination in breach of section 19 of the Equality Act 2010 ("EqA")

165. S.19(1) of the EqA provides that

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.

166. S.19(2) of the EqA sets out the four elements of an indirect discrimination complaint:

> **"(2) …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."**

167. In this case, the relevant protected characteristic is sex.

168. In indirect discrimination cases, the burden of proof lies with the claimant to establish the first, second and third conditions within section 19(2). Only when the claimant has established those does the burden shift to the respondent to establish its objective justification (**Dziedziak v Future Electronics Limited EAT 0271/11**). This approach was affirmed by the Supreme Court in **Essop and others v Home Office (UK Border Agency) 2017 ICR 640 SC**.

169. The Equality and Human Rights Commission (EHRC) Code confirms that a PCP can arise from a one off or discretionary decision. In **Ishola v Transport for London [2020] EWCA Civ 112** the Court of Appeal confirmed that an act that has occurred or is likely to occur more than once will usually be regarded as a PCP.

170. Section 19(2) of the 2010 Act requires that the employer applies *or would apply* the PCP equally to people who do not share the protected characteristic of the claimant. It allows for a hypothetical comparator group (**British Airways plc v Starmer 2005 IRLR 862)** and for adverse disparate impact to be measured by reference to that group.

171. **Essop** clarified previously conflicting Court of Appeal authorities by confirming that it is not necessary for the claimant to show *why* the PCP puts people sharing a protected characteristic at a disadvantage.

172. The purpose of indirect discrimination legislation is to challenge practices which appear neutral, in that they apply to everyone, but have a disadvantageous effect on the protected group ("group disadvantage") when compared to other people who do not share the protected characteristic.

173. There are different methods of establishing group disadvantage.

- The EHRC Code says that sometimes “a link between the protected characteristic and the disadvantage might be obvious (para 4.11). Tribunals have been willing to assume that certain working patterns will cause women a particular disadvantage because of childcaring responsibilities. In **Shackletons Garden Centre v Ms D Lowe, UKEAT/0161/10/JOJ**, the EAT held that the Tribunal was entitled to come the conclusion that significantly more women than men are primarily responsible for the care of their children and that accordingly the ability of women to work particular hours is substantially restricted because of those childcare commitments in contrast to that of men. More recently, in **Essop** (para 26) Lady Hale in discussing the reasons why one group may find it harder to comply with a PCP than others gave as an example “social [reasons] such as the expectation that women will bear the greater responsibility for caring for the home and family than will men”.

- The EHRC Code states that where it is less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, statistics or personal testimony may help to demonstrate that a disadvantage exists (para 4.11). In **Essop** (para 28) Lady Hale noted as a salient feature of indirect discrimination claims “that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.”

174. In addition to group disadvantage, the claimant has to show individual disadvantage. In **Ryan v South West Ambulance NHS Trust [2021] I.R.L.R. 4,** para 55, the EAT confirmed that both group and individual disadvantage must be established. The individual claimant "has to show that she has been put at "that disadvantage". "That disadvantage" is the same disadvantage that the group to which she belongs to is, or would be, put; there must be 'correspondence' between the two.

175. If a claimant has met the burden of proof in establishing the first three parts of section 19 then the burden will shift to the respondent to establish its objective justification defence.

176. There is no statutory definition of a legitimate aim but the EHRC Code provides that must be legal and not discriminatory. It should represent a real objective consideration.

177. ECJ authorities established that the PCP must correspond to a real need on the part of the respondent, be appropriate with a view to achieving the objective in question and be necessary to that end. A balance must be struck when considering proportionality between the discriminatory effect of the PCP and the reasonable needs of the party who applies it. Section 19(2)(d) requires the Tribunal to carry out an objective balancing exercise between effect of and reasons for the PCP taking into account all relevant facts (EHRC Code para 4.30). It is not enough that a reasonable employer might think the criterion justified (**Hardy & Hansons plc v Lax [2005] IRLR 726 at paras 31-32)**.

178. The EHRC code at paragraph 4.30 provides an employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'.

179. Lord Justice Sedley in **Allonby v Accrington and Rossendale College and ors** explained:

> "**Once a finding of a [PCP] having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the [employer]'s reasons demonstrated a real need to [dismiss] the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the PCP on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter."**

Discussion and Conclusions

180. In this section of our judgment we set out our conclusions applying the relevant law to the facts. We have not set out the submissions made by Mr Mensah and Mr Boyd in writing or orally in full but have taken them into account and referred to them where relevant. We have set out our conclusions by reference to the questions in the List of Issues.

Employment Rights Act 1996

Constructive Unfair Dismissal – s.95(1) (c)

(1) Did the respondent require the claimant to work additional hours over that which she was contracted to work, taking into account her allegation that she was afforded disproportionately less contingency time than that of a full-time teacher. If so, was this requirement so unreasonable, in that the claimant was unable to achieve a work life balance?

181. We find it is important in answering this question to bear in mind the difference between the claimant's directed time and the "hours which she was contracted to work". The claimant's directed time was that part of the claimant's contractual hours during which the respondent could direct the claimant to work. It was 607.20 p.a. hours, the pro-rata proportion of the 1265 p.a. directed time of a full-time teacher.

182. As Mr Boyd submitted, however, the claimant' directed time was not the full extent of the time she was contractually required to work. Paragraph 51.7 of the STCPD provides that in addition to their directed time "a teacher must work such reasonable additional hours as may be necessary to enable the effective discharge of the teacher's professional duties, including in particular planning and preparing courses and lessons; and assessing, monitoring, recording and reporting on the learning needs, progress and achievements of assigned pupils."

183. At paragraph 33 of his written submissions Mr Mensah for the claimant said that "if the claimant had school duties, they should have been completed within her contracted hours and contingency time when she was at school". If by that he is suggesting that all school duties including marking and planning should be

completed within the claimant's directed time then we find that is inconsistent with 51.7. The contractual obligations applicable to the claimant clearly required her to do school related work over and above the directed time allocation.

184. We accept that it was not for the respondent to determine how many such additional hours must be worked or when they must be worked by the claimant (para 51.8). We find that the respondent did not seek to do so in the sense of expressly stipulating what those hours were or when they were worked.

185. As we explain below, the claimant was provided with disproportionately little contingency time by the respondent in Autumn Term 2019. We have considered whether that could be said to have inevitable resulted in the claimant being "required" to work additional hours in breach of her contractual terms. We find it did not. Even had the claimant being given the equivalent proportionate contingency time to Miss Whiteside (i.e. an additional 5% of her directed time) that would have amounted to an addition of less than an hour's contingency time a week. Even if all of that contingency time had been available for the claimant to mark or plan (as opposed to deal with actual contingencies arising) that would not have made the difference between the claimant having to work additional hours and not, given her evidence about the amount of marking and planning she needed to do.

186. We have also considered the submission made by Mr Mensah in relation to issue 4 below which is that Mrs Tjaveondja's actions on the 24 September amounted to her seeking to require the claimant to work over and above her directed time. Based on our findings of fact about what happened on that day (para 103) we reject that submission.

187. On that basis, we do not find that the respondent breached the express term of the claimant's contract relied on by the claimant (i.e. paragraphs 51.5 and 51.6 of the STPCD). It seems to us that the heart of the claimant's constructive dismissal case was an argument that she had been given an intolerable workload. That seems to us to be an argument about a breach of the implied term of trust and confidence rather than a breach of paras 51.5 and 51.6 relating to directed time.

(2) Express term - Did the requirement amount to a fundamental breach of an express term of the contract of employment? (sections 51.5 and 51.6 at p.65/66)

188. We have explained above why we found that the respondent did not breach the express term of the contract relied on by the claimant. If we are wrong, and the respondent was in breach of that term, we would have found that the breach was not a fundamental one. On our findings, the respondent had not repudiated the contract or acted in a manner which made clear it did not intend to be bound by it. Instead (as we explain more fully below in relation to the alleged breach of the implied term) the respondent had taken steps to seek to address the issues raised by the claimant. That included committing both to reviewing her role and duties and its policies including the Marking Policy.

(3) Implied term – Did the employer have reasonable and proper cause for requiring the claimant to work those additional hours?

If not, was this conduct calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence?

(4) Did the claimant resign in response to a fundamental breach of an express or implied term of contract?

(5) Last straw – Did the claimant resign in response to the last straw? Did the event on 24 September 2019, taken in conjunction with the respondent's prior conduct, amount to something that was more than trivial.

189. We have found it more convenient to set out our conclusions on these issues together using the approach set out in **Kaur**. The second question in **Kaur** (affirmation) did not arise because the claimant resigned almost immediately after the last act complained of.

190. The first and third **Kaur** questions are what was the most recent act by the employer which the claimant says caused her resignation and was that act itself a repudiatory breach. The acts relied on by the claimant were the behaviour of Mrs Tjaveondja on the 24 September 2019 and the contents of the Book Scrutiny Report.

191. We have already explained above why we did not find Mrs Tjaveondja's actions in approaching the claimant to be a breach of paras 51.5 and 51.6. We have considered whether, viewed objectively, her actions amounted to a breach of the implied term. We find they did not. She was merely trying to feed back to the claimant about the latest book scrutiny. When the claimant told her she did not want to do so then, Mrs Tjaveondja did not pursue the matter. We do not find that her handing the claimant the Book Scrutiny Report to the claimant was a breach of the implied term. The claimant had said she would look at the report later.

192. When it comes to the Book Scrutiny Report itself, we accept Mr Boyd's submission that there was nothing in it that could amount to a breach of the implied term. We accept that the claimant found some of its contents upsetting. Our focus, however, must be on the respondent's behaviour, viewed objectively. As we said in our findings of fact, the latest round of feedback in that report was a mixture of positive and negative. It was not such as to in itself destroy or seriously damage the employment relationship. It noted improvements as well as areas for development. We do not find that Mrs Tjaveondja's actions or the Book Scrutiny Report's contents amounted in themselves to a breach of the implied term entitling the claimant to resign and claim constructive dismissal.

193. The fourth **Kaur** questions is whether the "last straw" acts were nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term.

194. As set out in Mr Mensah at para 34 of his written submissions, the conduct by the respondent said to amount to a breach of the implied term was requiring the claimant to work additional hours and "raising the threat of disciplinary proceedings". At paragraph 36 of his submissions he also referred to the "continued insistence by the respondent that she continually add to her workload".

195. Mr Mensah confirmed in his oral submissions that the "last straw" contributed to the breach of the implied term rather than being an "innocuous" incident which triggered the resignation. That means that on the claimant's own case there was no cumulative breach of the implied term before the last straw. On that basis, if the acts said to be the last straw were not acts which themselves contributed to a breach of the implied term, the case must fail. We find they were not such acts. We find that neither Mrs Tjaveondja's behaviour on 24 September 2019 nor the contents of the Book Scrutiny Report were "acts" for which there was no proper cause and that neither, viewed objectively, were calculated or likely to contribute to destruction or serious damage to the employment relationship.

196. For completeness, we have considered whether the respondent's acts up to the last straw(s) breached the implied term. We understand the claimant's case to be that from 18-19 March 2019 when she alerted Mrs Tjaveondja that her workload was unsustainable, the respondent had failed to take steps to address her workload or to mitigate its effect. Instead, the claimant was "threatened" (to use her wording) with capability or disciplinary proceedings and her workload increased through the introduction of the Marking Policy.

197. Mr Boyd submitted, and we accept, that in her evidence the claimant was clear that the breach related to the period of her return to part-time hours in Autumn Term 2019, not to events that had happened earlier. We accept his submissions that during that period (3 to 24 September 2019) there was no action on the part of the respondent which amounted (in itself or cumulatively) to a breach of the implied term. As we have set out in our findings, the claimant returned to work and was found to be fit for work by the OH report dated 6 September 2019. There was a recommendation that a Stress Risk Assessment and action plan be created. That resulted in the September SRA meeting and the September SRA.

198. That September SRA set out a number of steps which the respondent agreed to take to address concerns raised by the claimant. That included the claimant relinquishing her Maths Co-ordinator role but retaining the time to get up to speed with maths on Monday afternoons; an independent review of the claimant's marking and agreement to review the Marking Policy and potentially amend it in light of the claimant's comments. There was a commitment to update the claimant's DTS in light of her comments. The claimant's own view was that the meeting was a positive one. Viewed objectively, we cannot see that the respondent's actions as at 24 September 2019 could be said to be calculated or likely to destroy or seriously damage the employment relationship-in fact quite the opposite.

199. For completeness, we have considered whether it could be said that there was a breach of the implied term at an earlier stage, specifically during the Summer Term 2019. That is in case (contrary to what the claimant said in evidence) it was part of her case that events prior to Autumn 2019 should also be taken into account in deciding whether there was a breach of the implied term. Those events included in particular the introduction of the Marking Policy and the "threat of disciplinary/capability". As to the former, we accept Mr Boyd's submission that the introduction of a new Marking Policy was something which the respondent was perfectly entitled to do in order to improve educational practice in the School. Viewed objectively, that was not something which we find could contribute to a breach of the implied term, in particular given that the respondent was willing to keep its impact under review (see the September SRA). When it comes to the "threat of

capability" our finding was that Mrs Tjaveondja took the view that implementing the capability policy was the next step she was required to take if an employee was struggling to fulfil their role. We find she viewed it as a potentially supportive rather than necessarily a punitive step. We do not accept that this is properly characterised as a "threat" of capability/disciplinary. An employer is entitled to invoke its capability process where an employee is saying that she cannot cope with workload in part because she has become deskilled. Although the relationship between Mrs Tjaveondja and the claimant was at low point when the "capability" conversation took place we do not accept (if that is the submission) that the capability process was invoked by Mrs Tjaveondja without due cause.

200. Finally, we have considered whether, stepping back and viewing events from March 2019 to 24 September 2019 as a whole the respondent's conduct breached the implied term. We do find that the respondent could have done some things better. Particularly when it came to preparing the DTS, its approach was confusing and, at times, confused. We also think that Mrs Tjaveondja's inexperience may have led at times to instances of breakdowns in communication with staff and delays in implementing steps, e.g. where she needed to take HR advice before deciding on next steps. One example is the claimant's Occupational Health Referral which was not put in train until August 2019. Having said that she clearly had to deal with a very challenging situation both in terms of a need to reduce staffing resources and implement the changes she saw as being needed to improve school practices. The claimant was clearly struggling with her workload but steps were taken to assist in Summer Term both in terms of providing advice from MIT (which the claimant accepted was helpful) and in terms of the Occupational Health Referral. We also think that viewed objectively the respondent was entitled to take the view that September 2019 would represent a clean slate (as Mr Boyd put it) with the claimant returning to part-time working with a permanent job-share.

201. Our conclusion is that the last straws did not, in themselves or taken cumulatively with previous action by the respondent, breach the implied term. The claimant was not constructively dismissed. That means her claims of unfair dismissal (both "ordinary" unfair dismissal and "automatic" unfair dismissal in connection with the PTWR) fail.

Part-Time Workers Regulations

Less favourable treatment – r.5

(6) Is the pro-rata principle appropriate in terms of comparing the claimant with either suggested comparator in the context of proportionate contingency time in her overall directed time?

202. Mr Boyd made vigorous submissions that this case was not about pay and benefits and that the pro-rata principle did not apply. In his written submissions he noted that the "bulk of the jurisprudence relating to regulation 5 claims centre upon the issue of pay and ensuring proportional parity of pay. While it is accepted that the regulation covers scenarios broader than just a part-time worker's pay (and one sees cases involving opportunities for training etc.), the respondent would confidently predict that claimant will not be able to advance any legal authority to support the proposition that regulation 5 can be used to claim proportional parity of a particular

part of how an employee spends their working time." Mr Mensah did not in his submissions direct us to any such authority.

203. We find that the claimant certainly viewed contingency time as a "benefit" in the sense that she regarded it as "free/flexible time" which provided her with an opportunity to catch up on work such as marking or planning. Mr Boyd submitted this was to misunderstand what contingency time is. It is not meant to be time "off" but rather time when there is no specific directed work being done but the teacher can at any time be called on by the Head Teacher to carry out duties. It is unallocated directed time rather than undirected time. As we understand Mr Boyd's submission, it was wrong to regard contingency time as a "perk" or "benefit". In any event, he submitted, it was not the sort of benefit which was contemplated by the relevant provision in the regulations. "Benefits" in that context is clearly aligned to pay and refers therefore to benefits which can be quantified, e.g. in terms of holiday entitlement.

204. We take into account the guidance in **James** about the purpose of the pro-rata principle, i.e. that the fundamental purpose of the pro rata principle is to enable a valid comparison to be made between the remuneration of a part-time worker and her full-time counterpart. We accept Mr Boyd's submission that the allocation of directed time does not fit with that purpose. The allocation of directed time (including contingency time) for a particular teacher will be dependent on the needs of the school and can also be individual to a particular teacher. Mrs Oram gave evidence that contingency time would, for example, be greater for an individual teacher who had an underlying health condition which meant that they needed more contingency time in order to plan or prepare. The claimant's own case provides another example- she was allocated time to reskill in maths.

205. Given the number of individual factors involved in deciding the allocation of a teacher's time and fitting that in with the school timetable, a strict application of the pro-rata principle would in practice be impractical. We also accept Mr Boyd's overarching submission that contingency time does not fit easily with the sorts of pay and benefits to which the pro-rata principle has been found to apply in the legal authorities.

206. We therefore accept Mr Boyd's submission that the pro rata principle is not appropriate in deciding whether the claimant was treated less favourably in terms of the allocation of contingency time.

(7) Who is the full-time comparator – the claimant when full-time and Miss Whiteside?

(8) Are either comparator appropriate comparators in the circumstances?

207. Mr Boyd accepted that both the nominated comparators, i.e. Miss Whiteside and the claimant when she was full-time, satisfied the test in the regulations for being appropriate comparators.

(9) Did the respondent treat the claimant as a part-time worker less favourably than it treated a comparable full-time worker in terms of her contingency hours and additional hours required to work outside of her directed time by providing her proportionately less contingency time than her full-time comparator?

208. We find that the claimant was given proportionately less contingency time than both full-time comparators. We have set out our findings on the proportion of contingency time for the claimant and the comparators at paras 113-135 above. We found the contingency time allocated to the claimant (2.64%) to be proportionately less than that allocated to her comparators (7.01% and 8.33% for Miss Whiteside and the claimant when full-time respectively). As we have noted, Mrs Tjaveondja accepted in her witness statement that that was the case.

209. We have found that the pro-rata principle does not apply. The respondent was not required to provide the claimant with exactly the same proportion of contingency time as her comparators. However, the extent of the disparity in contingency time is such that we find the claimant was treated less favorably than her comparators in the contingency time allocated to her.

(10) If so, was the treatment on the ground that the claimant was a part-time worker?

210. As explained at para 158 above we find that the question we must ask is whether the claimant's part-time status was an effective cause (rather than the sole cause) of the less favourable treatment. The case-law says we must look at the "reason why" there was less favourable treatment, rather than applying a simple "but for" test. PTWR Regulation 8(6) provides that it is for the employer to identify the ground for the less favourable treatment. Mrs Tjaveondja's reason for allocating less contingency time to the claimant is set out at paragraph 86 of her statement. It is that a full-timer would be present throughout the day and have to deal with a greater proportion of unforeseen incidents. It seems to us that that reason for allocating less contingency time is inherently linked to the claimant being a part-time worker. Based on that evidence we find that the claimant's part-time status was an effective cause of the claimant's less favourable treatment when it comes to allocation of contingency time. That finding seems consistent to us with the significant reduction in the claimant's contingency time being triggered by her move from being a full-time worker to being a part-time one.

211. In reaching that conclusion we have taken into account the fact that the other part-time teacher, Miss Zaim, appears to have been allocated significantly more contingency time. We do not find that undermines our conclusion. When it comes to the regulation 5 claim, the claimant need only show that the reason she was treated less favourably was her part-time status, not that all part-timers were treated less favourably.

(11) Was such treatment justified on objective grounds?

The legitimate aim is said to be the effective operation of the school in the context of full-time teachers having to deal with more unforeseen events than part-time teachers.

If it is found that full-time teachers have proportionately more contingency time than part-time teachers, is that a proportionate means of achieving the alleged legitimate aim?

212. As we set out in our findings, there was no evidence or data to substantiate the claim that full time teachers need to deal with more unforeseen events within their directed time than part-time teachers. The case for the respondent was that

more such unforeseen events happen at the end of a day. As Mr Mensah submitted, there was no proper analysis to demonstrate that was the case. It was not clear to us why unforeseen events were more likely to happen at pick-up time rather than drop-off time or during the school day. The onus is on the respondent to establish objective justification and we find they have failed to do so.

Regulation 7

(12) Did the delay in providing a reference constitute a detriment under Regulation 7 because it arose out of the claimant having brought legal proceedings and/or alleged that the respondent had infringed the regulations? (para 22, p.35)

213. This claim was withdrawn by the claimant.

Regulation 7 – Dismissal

(13) Did the claimant resign because she refused to forego her right not to be treated less favourably under the Regulations and/or otherwise had done anything under these Regulations in relation to the respondent?

(14) Was the reason/s for the respondent's conduct which caused her to resign, action by which, had she been dismissed would have entitled her to claim automatic unfair dismissal?

214. We have found that the claimant was not constructively dismissed so this automatically unfair dismissal claim fails. For the avoidance of doubt, we do not find that the claimant resigned because she refused to forego her right not to be treated less favourably under the Regulations and/or otherwise had done anything under these Regulations in relation to the respondent. She resigned because of the last straw incidents on 24 September 2019 which we have found did not fundamentally breach her contract of employment.

Equality Act 2010 claims

Indirect Discrimination – s.19

(15) What was the PCP?

The PCP relied upon by the Claimant is the Respondent having part-time teachers work a greater proportion of allocated directed time with less contingency time than full-time workers.

(16) Was that an operative PCP?

215. We do not find this was an operative PCP. The onus is on the claimant to prove it was a PCP operated by the respondent and applied to all part time teachers not just the claimant. As we recorded above, there was no evidence as to the contingency time ultimately allocated to Mrs Zaim in Autumn Term 2019. Her starting position in terms of contingency time in the very first DTS was (as reported by Mrs Oram to Mrs Tjaveondja in September 2019) significantly more favourable than the claimant's. She had around 5% contingency time. That is less than the contingency

time for a full timer in the October DTS but significantly closer to it than the claimant. However, we do not have Mrs Zaim's final DTS. We do not know if her contingency time increased or decreased by adjustment after the initial DTS so that it was in line with the full-timer's by October. We find there is insufficient evidence for us to conclude that she was afforded less contingency time than full-time workers. Consequently, we find there was insufficient evidence for us to conclude the operation of the PCP contended for. We cannot tell whether other part-timers were treated in the same way as the claimant. The claim of indirect sex discrimination fails at this first hurdle.

216. In light of that conclusion, we have not addressed the remaining questions in the List of Issues relating to the indirect discrimination claim in detail. In brief, however, had we found that a PCP was applied to part-time workers we would have concluded that it did put women at a particular disadvantage (given the majority of part-time workers are women); that the claimant shared the group disadvantage; and that the respondent failed to show that the PCP was objectively justified (for the reasons set out in relation to the PTWR Regulation 5 claim).

Next Steps

217. The claimant's claim that she was treated less favourably in breach of regulation 5 of the PTWR succeeds. A remedy hearing will be listed in relation to that claim. The claimant's other claims are dismissed.

Employment Judge McDonald
Date: 21 July 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 21 JULY 2022

FOR THE TRIBUNAL OFFICE

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IN THE MANCHESTER EMPLOYMENT TRIBUNAL **Claim No.2415070/2019**
BETWEEN:

MRS. N. CUMISKEY

Claimant

-v-

LANCASHIRE COUNTY COUNCIL

Respondent

AGREED LIST OF ISSUES

Employment Rights Act 1996

Constructive Unfair Dismissal – s.95(1) (c)

1. Did the Respondent require the Claimant to work additional hours over that which she was contracted to work, taking into account her allegation that she was afforded disproportionately less contingency time than that of a full-time teacher. If so, was this requirement so unreasonable, in that the Claimant was unable to achieve a work life balance?

2. Express term - Did the requirement amount to a fundamental breach of an express term of the contract of employment? (sections 51.5 and 51.6 at p.65/66)

3. Implied term – Did the employer have reasonable and proper cause for requiring the Claimant to work those additional hours?

   If not, was this conduct calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence?

4. Did the Claimant resign in response to a fundamental breach of an express or implied term of contract?

5. Last straw – Did the Claimant resign in response to the last straw? Did the event on 24th September 2019, taken in conjunction with the Respondent's prior conduct, amount to something that was more than trivial.

Part-Time Workers Regulations

Less favourable treatment – r.5

6. Is the pro-rata principle appropriate in terms of comparing the Claimant with either suggested comparator in the context of proportionate contingency time in her overall

directed time? (For the avoidance of doubt the Respondent submits that it is inappropriate for four reasons:

(a) the Part-Time Worker Regulations and Regulation 5 in particular are about proportionate pay and benefits, not absolute parity of all terms;

(b) contingency time is not pay or benefits;

(c) the needs of the School mean that the precise make up of full time and part-time teachers directed time (including contingency time) is never likely to be proportionately identical teacher to teacher, nor would that be practicable; and

(d) It was not the intention of the legislation to ensure that every facet of a part-time worker's job is proportionately the same as a full timer.

If it was, for example, in the index case, a part-timer on .48 FTE teaching contract would be expected to attend .48 duration of an assembly, .48 duration of a parent consultation etc. The Respondent would suggest that makes a nonsense of the Regulations.

7. Who is the full-time comparator – the Claimant when full-time and Miss Whiteside?

8. Are either comparator appropriate comparators in the circumstances?

9. Did the Respondent treat the Claimant as a part-time worker less favourably than it treated a comparable full-time worker in terms of her contingency hours and additional hours required to work outside of her directed time by providing her proportionately less contingency time than her full-time comparator?

10. If so, was the treatment on the ground that the Claimant was a part-time worker?

11. Was such treatment justified on objective grounds?

The legitimate aim is said to be the effective operation of the school in the context of full-time teachers having to deal with more unforeseen events than part-time teachers.

If it is found that full-time teachers have proportionately more contingency time than part-time teachers, is that a proportionate means of achieving the alleged legitimate aim?

~~Regulation 7~~

12. ~~Did the delay in providing a reference constitute a detriment under Regulation 7 because it arose out of the Claimant having brought legal proceedings and/or alleged that the Respondent had infringed the regulations? (para 22, p.35)~~ **[Withdrawn by the claimant on Day 3 of the hearing].**

Regulation 7 - Dismissal

13. Did the Claimant resign because she refused to forego her right not to be treated less favourably under the Regulations and/or otherwise had done anything under these Regulations in relation to the Respondent?

14. Was the reason/s for the Respondent's conduct which caused her to resign, action by which, had she been dismissed would have entitled her to claim automatic unfair dismissal?

Equality Act 2010 claims

Indirect Discrimination – s.19

15. What was the PCP?

    The PCP relied upon by the Claimant is the Respondent having part-time teachers work a greater proportion of allocated directed time with less contingency time than part-time workers;

16. Was that an operative PCP?

17. If so, did that PCP apply to those who did not share the Claimant's PCP i.e. sex?

18. Did or would that PCP put persons with the same PCP as the Claimant put them at a particular disadvantage compared to those who did not share the PCP?

19. Did the PCP put the Claimant at that disadvantage?

20. Can the Respondent justify the PCP by showing it to be a proportionate means of achieving a legitimate aim? (see paragraph 11 above)

Remedy

21. Is the Claimant entitled to any of the following remedies?

    (a) Compensation for unfair dismissal

    (b) An award for injury to feelings – sex discrimination.

    (c) Just and equitable compensation – PTWR

    (d) Appropriate declarations by the Tribunal in respect of the Respondents' conduct towards the Claimant.