EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
L Whitehead	The Governing Body of North Downs Primary School(1) J Douglass(2)

Heard at: London South by CVP **On**: 6,7,8 and 9 September 2022

Before: Employment Judge Anderson
N O'Hare
H Carter

Appearances
For the Claimant: In Person
For the Respondents: A Peck (counsel)

JUDGMENT

1. The claimant's claim that the first respondent failed to make a reasonable adjustment is upheld.

2. The claimant's claim that the second respondent failed to make a reasonable adjustment is dismissed.

3. The claimant's claim of unfair dismissal against the first respondent is upheld.

REASONS

The claim

1. The claimant brings a claim of disability discrimination, by way of a failure to make a reasonable adjustment, and constructive unfair dismissal against the respondents. The respondents are the governors of a primary school, the claimant's employer, and the head teacher at the school. The claimant was employed as a teacher from 1 September 2015 until her resignation on 18 September 2019. The claimant has photo-sensitive epilepsy. The respondent accepts that that is a disability for the purposes of the Equality Act 2010 and that the claimant was disabled at the relevant time.

2. No clear list of issues had been agreed between the parties though in a case management order dated 24 September 2020 EJ Siddall records the provision, criterion or practice (PCP) relied upon by the claimant for her claim of failure to make a reasonable adjustment. After some discussion at the hearing, the following list of issues was agreed, based largely on Mr Peck's opening note:

    1. *Failure to make reasonable adjustments*
        a. *Was the decision to remove an old projector and install a new touchscreen a PCP?*
        b. *If so, did the first and/or second respondent apply that PCP?*
        c. *Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?*
        d. *What was the disadvantage? The claimant said that the disadvantage was that all lessons were displayed on a digital screen device, which she could not use because of her disability, and this meant that the curriculum she was expected to teach was not available to her. She could not then teach as others did and as was expected of her.*
        e. *Did the first and/or second respondent know, or could they reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage? If so, did the first and/or second respondent take such steps as were reasonable to avoid the disadvantage?*

    2. *Constructive unfair dismissal*
        a. *Was the claimant constructively unfairly dismissed, contrary to ss.95(1)(c) and 98 Employment Relations Act1996 and/or s.39(2)(c) Equality Act 2010? In determining that issue, the following questions fall to be considered:*
            i. *What conduct does the claimant rely on as a breach of the implied term of mutual trust and confidence? The claimant said she relied on the failure to make a reasonable adjustment.*
            ii. *Was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the first respondent?*
            iii. *Did the first respondent have reasonable and proper cause for the conduct?*
            iv. *If the conduct did amount to a breach of the implied term, did the claimant resign in response to it?*
            v. *Did the claimant resign sufficiently promptly in relation to the alleged breach, or did she waive any breach and/or affirm her contract of employment?*
            vi. *If the claimant was constructively dismissed, the first respondent does not advance a potentially fair reason for the dismissal*.

The hearing

3. The claimant represented herself at the hearing. Mr Peck of counsel represented the respondents. The tribunal was provided with a bundle of 357 pages. During the hearing some further documentation on remedy was supplied by the claimant detailing recent earnings. Mr Peck supplied an opening note, a chronology and a cast list. The claimant supplied an opening note and a closing note. In addition, the tribunal received six witness statements. The claimant had one witness in addition to herself, Ms Glaysher Dowe. The respondent had four witnesses: Ms J Douglass, Ms A Knapp, Ms L Morgan and Mr S Wade. All six witnesses attended the hearing to give evidence in person.

The law

4. The discrimination claims is brought under sections 20 and 21 of the Equality Act 2010.

> ***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> …
>
> ***21 Failure to comply with duty***
>
> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

5. The tribunal's task is to consider the proposed provisions, criteria or practices (PCPs) and determine whether there was a PCP that placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not suffer the disadvantage. If there are one or more such PCPs and the employer has knowledge of the disability and its effects, the tribunal will move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage. This requires careful analysis of the evidence and finding of the relevant facts to which the legal tests should then be applied. In considering what steps would have been reasonable, with the burden of proof resting on the respondents, the tribunal looks at all the relevant circumstances and determining that question objectively, may well consider practicability, cost, service delivery and/or business efficiency. The central question is whether the respondent has complied with this legal duty or not (see *Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664*). Guidance is also provided in *Environment Agency v Rowan [2008] IRLR 20* that the tribunal should look at the nature of any substantial disadvantage

caused to the claimant by any PCPs before looking at whether there was any failure to make reasonable adjustments.

6. For Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 states:

> ***136 Burden of proof***
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

7. The claimant also claims constructive unfair dismissal under s95 (1) c) Employment Rights Act 1996.

> ***95 Circumstances in which an employee is dismissed***
> **1.** *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if …*
> *…*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct.*

8. This is what has become known as "constructive dismissal". The leading case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* makes it clear that the employer's conduct must amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

Findings of Fact

(The second respondent, Jane Douglass, is referred to as Ms Douglass in the fact finding section of this judgment)

9. The claimant was employed by the first respondent as a teacher from 1 September 2015. The claimant worked part time. The first respondent runs a primary school across three separate sites.

10. The claimant has photo-sensitive epilepsy which is a disability for the purposes of the Equality Act 2010. The nature of the claimant's disability is that various patterns and lights cause seizures. The claimant begins to feel ill before a seizure, experiencing what she describes as an aura. The claimant was diagnosed in early childhood and has learned to understand the warning signs of a possible seizure and take action to avoid it. She also takes medication for her condition. The claimant declared her disability at the outset of her employment by the first respondent.

11. When the claimant's employment commenced, teaching in classrooms was facilitated by the use of a projector and an interactive whiteboard. This equipment did not cause the claimant any difficulties and no adjustments were required.

12. The first respondent developed a plan to replace old technology with new in 2014. The roll out was to commence in 2015. It was not completed until 2019. The plan involved, at the outset, the replacement of interactive whiteboards and projectors with VividTouch touchscreens.

13. The purchase and roll out of the new touchscreens commenced in early 2016. The claimant's sensitivity to the touchscreens was noted in the minutes of an IT meeting that took place on 26 April 2019. Ms Douglass, the second respondent, was present at that meeting and at all relevant IT meetings. The claimant had meetings with the IT team, headed by Mandy Knapp over the following weeks. The IT team suggested solutions such as adjusting the refresh time on the touchscreens or specialist spectacles but the claimant's experience was that these were not solutions to the issue.

14. Ms Knapp said that the IT team had asked the claimant to provide further details of her condition to help them access information on what they could do but never received this. The claimant said that she had many meetings with IT at this time and felt she had provided all of the useful detail she could.

15. In October 2016 the claimant taught in a classroom in which the projector had been removed and a VividTouchscreen had been installed. She became ill and had to leave the classroom. The first respondent has no record of this event. Witness evidence was given by the claimant and Ms Glaysher-Dowe. The tribunal finds that the event happens as described by the witnesses.

16. In December 2016 the claimant became ill after teaching in the IT suite using a VividTouchscreen. Steven Wade, the deputy head teacher assisted the claimant. He informed the school office of the incident but no incident report was made either by Mr Wade or by the office staff. This is not in line with the first respondent's policy which is that all medical incidents or accidents should be recorded.

17. The claimant continued to use a projector and interactive white board. The new touchscreen was not installed in her teaching room. The claimant developed workarounds for the times when she was in proximity to a touchscreen. In staff meetings she would sit out of sight or with her back to a touchscreen if it was being used for staff meetings or training. When she had to use it for teaching in the IT suite she sat behind the screen and was assisted by a teaching assistant who operated the screen.

18. In January 2018 Sweethaven, the company contracted to supply and deliver the roll out, alerted the first respondent to a new touchscreen called Illyama. It was noted at an IT meeting on 30 January 2018 that the new screens used infra-red technology which may not affect the claimant in the same way that the Vividtouch touchscreens did.

19. The claimant agreed to test the new screen on 17 May 2018 with her husband in attendance in case she became unwell. After the test she emailed Jane Douglass and Karen Blumire (a member of the IT team) as follows:

    "No major problems with the new type of whiteboard, but I wasn't totally healthy afterwards. I'm happy to have one in the classroom, but I think I'll use it sporadically, so would like to keep the old projector for as long as it may live, if that's OK with you both.

    I'll only use it if I have a TA, just to be on the safe side."

20. Ms Knapp in her witness statement paraphrases this email as the claimant telling IT that she was '*feeling fine'*. The respondents rely on the email as an indication that the claimant did not have a serious issue with the Illyama touchscreen. The claimant gave evidence that she had a migraine when she returned home. The tribunal finds that the first sentence of the email indicates that the claimant did not have a seizure after using the screen but she did feel unwell and the new touchscreen was not a solution to the claimant's difficulties with the use of touchscreens.

21. The tribunal's attention was drawn by witnesses and Mr Peck to the words *'would like to keep the projector for as long as it may live'* as evidence that the claimant would be happy to use the touchscreen only, once the projector ceased to function. The claimant said that was not what she meant. The tribunal does not accept the respondents' interpretation of this line as meaning that the claimant did not require a projector long term but simply as an acknowledgement that it was old and would not last forever, which was common ground and the reason behind the roll out of the new touchscreens.

22. In November 2018 planning began for the installation of an Illyama screen in the claimant's classroom in July 2019. It was established that the projector and white board would need to be moved to accommodate the new screen. The claimant suggested that the new screen be mounted on a trolley. Ms Knapp gave evidence that she thought this was a very good idea but that Ms Douglass had said it was not a feasible option. Ms Douglass said in her witness statement that it was a joint decision made by her and Mandy Knapp. In oral evidence she conceded that she made the decision.

23. In the minutes of an IT meeting that took place on 5 March 2019 it is recorded that:

    '[The claimant] has health and safety concerns about using the new touchscreen so we will keep the existing projector in Puffins class at Leigh.'

24. On 13 June 2019 Ms Morgan, a reception year teacher, visited the site at which the claimant taught with her reception class, who would be based at that site when they moved to Year 1. Ms Morgan, Diane Prout her teaching assistant, the claimant and her teaching assistant (Ms Glaysher-Dowe) were present. Ms Douglass attended later in the day. It is the position of Ms Morgan that it was the claimant's suggestion that the claimant work in the Year 2

classroom, that she had volunteered to spend the whole day in that classroom and in written evidence she quoted the claimant as saying *'if I don't try I'll never know'*. The issue was that the Year 2 class room had a Vividtouch touchscreen, no projector and was the classroom in which the claimant had become ill in October 2016. The claimant denies that she volunteered to work in the year 2 classroom and said she simply did as she was told. She also denied making the comment about trying it out to Ms Morgan. On balance the tribunal find that the claimant did not volunteer to move classrooms or make this comment. The evidence is that the claimant had consistently raised the issue of her disability and had elaborate workarounds in place as well as, for instance, testing out the Illyama with someone there to ensure her safety. The tribunal finds that it is unlikely that she would suddenly have taken a different, gung-ho approach to her health. Furthermore, Ms Morgan could not be sure of the exact words used.

25. There was a further dispute in evidence between Ms Glaysher Dowe and Ms Douglass over when and how Ms Glaysher Dowe had raised concerns about leaving the claimant in the Year 2 classroom alone, at the times that Ms Glaysher Dowe needed to be absent. The tribunal does not need to make a finding on how and where this conversation took place. It notes that both witnesses agree that it did take place, Ms Glaysher Dowe raised her serious concerns about the claimant's and the children's safety in the Year 2 classroom, and Ms Douglass heard these concerns.

26. Ms Morgan found the projector in the claimant's classroom to have been of poor quality and she chose not to use it. She described it in her witness statement as fuzzy and not fit for effective day to day teaching. She later reported this concern to Ms Douglass. Ms Knapp said that it had intermittent movement/vibration across the screen but the claimant said to her that she had not noticed this. Ms Douglass refers in her witness statement to Ms Morgan saying it had flickering and poor visual quality. Ms Morgan does not say in her witness statement that the screen was flickering. Ms Douglass says that when she was present on 24 July 2019 in the claimant's classroom the projector clarity was poor. The tribunal accepts that the projector was nearing the end of its use.

27. On or around 1 July 2019 Ms Knapp had a conversation with Ms Douglass about the installation in the claimant's classroom. She said that they met for an informal chat to discuss arrangements and to pass on her concerns about the reliability of the current set up. She explains the technical issues in her witness statement and states *'In the end it was decided after all the problems we had experienced with the IT equipment, the age of the projector and the logistical challenges of relocating the IT equipment that it really wasn't worth doing.' [para 22]* In oral evidence Ms Knapp said that the decision to remove the projector was a joint decision (by Ms Knapp and Ms Douglass), and that Ms Douglass had told Ms Knapp that she should do what she thought was right. Ms Knapp said to Ms Douglass that she was worried about how the claimant would react if the projector was taken out.

28. Ms Douglass's account of the meeting is different. She says that she and Ms Knapp did talk *'at some stage'* and

'All I can remember is a conversation with Mandy during the time of her discussions with Sweethaven over the installation arrangements. Mandy was concerned, I think, that we may not be able to retain the projector as well as whether or not it made sense to retain it. My involvement was very minimal as Mandy co-ordinated the installation of the new screens across the school.

In oral evidence she said that Ms Knapp had told her that she had concerns about retaining the two screens and Ms Douglass told her not to worry and just do what she could do. Ms Douglass said she was not aware until 4 September that the projector had been removed. Ms Douglass said she did not appreciate the seriousness of Ms Knapp's concerns about retaining the two screens and projector and did not end the meeting thinking that the projector would be removed.

29. The tribunal finds that the removal of the projector was discussed at the meeting that took place on or around 1 July 2019 between Ms Knapp and Ms Douglass and it was agreed between the two at that meeting that the projector would be removed. Ms Knapp's recollection of the meeting was clearer than that of Ms Douglass who acknowledged in her witness statement that she did not have a full recollection of it. Ms Knapp, who is line managed by Ms Douglass, was sure enough of her recollection to confirm in oral evidence that she did not agree with the account given by Ms Douglass in her witness statement. The tribunal accepts that Ms Douglass may not have known until 4 or 5 September 2019 that the projector had actually been removed but finds that she was aware that it would be removed before the new term began. It does not accept that her involvement with the process was minimal. Whilst it acknowledges that she did not have technical knowledge, she was present at all IT meetings at which planning around the claimant's disability was raised and was consulted by Ms Knapp about the removal of the projector.

30. Following the meeting, to which the claimant was not invited, neither Ms Knapp nor Ms Douglass spoke to the claimant or in any way alerted her to the fact that the projector would be removed. Neither did they put in place any plan to source an alternative. Ms Knapp said that she had hoped the claimant could use the Illyama screen because 'the test had been successful', referring to the test on 17 May 2018 when the claimant reported no major incidents but not feeling totally healthy. There is no evidence that Ms Knapp put her mind to the matter at all. Ms Knapp confirmed in oral evidence that potentially suitable alternative projectors were still available to buy at that time.

31. On 8 July 2019 the claimant met with Ms Douglass. Ms Douglass said the claimant told her that she would be leaving at the end of the autumn term as she needed to move to be near to a particular school that she wanted her daughter to attend. She said in oral evidence that the claimant mentioned in this meeting that she had problems with a wall at her property. The claimant did not cover this matter in her witness statement but said in oral evidence that she told Ms Douglass that her house was going on the market and if all went to plan she would leave, at the earliest, by the end of December 2019. She said that in a second conversation on 4 September 2019 she advised Ms

Douglass, when she met her in the corridor, in response to Ms Douglass asking how things were going with the house sale, that she had to take it off the market as there was a dangerous wall on the property. Ms Douglass remembers having a conversation with the claimant that day but does not recall any discussion about the house sale. The claimant did not refer to this conversation in her witness statement. There is no evidence about what was said between Ms Douglass and the claimant on these two occasions other than their own written and verbal evidence. The tribunal noted that the claimant did not refer to either meeting in her witness statement but also that she did not have professional assistance in drafting her witness statement and is a litigant in person. The evidence in the bundle about a problem with the wall did not assist the tribunal. The tribunal has found the claimant to be a reliable witness throughout the hearing and where there were some inconsistencies in her evidence, these were of a minor nature. Whilst Ms Douglass was also a credible witness there are some inconsistencies in her witness statement and her recollection of events in general, for example of the meeting with Mandy Knapp in June/July 2019 about the removal of the projector, was not as clear as the claimant's, and her evidence on who made the decision about a trolley being unviable was different in oral and written evidence. On balance the tribunal prefers the evidence of the claimant in relation to the discussions that took place on 8 July 2019 and 4 September 2019 concerning when she might leave the first respondent's employment.

32. The claimant returned to school on 4 September 2019. This was an inset day. The claimant discovered at lunchtime that the projector and interactive white board had been removed. An Illyama touchscreen had been installed. The claimant immediately spoke to the deputy head teacher Ciara Deeks who, after consultation with the school bursar, raised with the claimant that there was no risk assessment or care plan for the claimant and asked to see a prescription.

33. The claimant emailed Ms Douglass the following evening to re-iterate her concerns. Ms Douglass responded the next morning (Friday 6 September 2019) referring to the dreadful flickering on the interactive white board and suggesting an OH referral. She invited the claimant to meet with her at the beginning of the following week but also went to see the claimant that day where an OH referral was discussed, and the claimant explained that she had no recent written evidence of her condition as it was diagnosed in childhood and self-controlled. The claimant said in her written evidence that it been suggested by Ms Douglass that they meet six days after her email of 5 September 2019 but conceded in cross examination that she was mistaken.

34. A referral to OH was made on 6 September 2019 by Ms Parrot the bursar, and the claimant had a telephone consultation with OH on 9 September 2019. Ms Douglass and the claimant arranged to meet on 13 September 2019 to discuss the OH report which they expected to have received by then. The claimant emailed Ms Douglas on 12 September 2019 noting that she needed to replan lessons and photocopy extensively. In oral evidence she explained that the content of the lessons was provided to teachers in a format that could be used on the touchscreens or on the projector and interactive white board

and she had to convert her lessons for use without the technology. She said that this caused substantial extra work. The claimant also raised in this email that she had not been provided with a place in breakfast club for her daughters. The claimant's two daughters attended the school at that time. She said that she couldn't even get into work without this and noted that her *'position is fast becoming untenable'*. Ms Douglass replied to the email saying that she would speak to Ms Deeks about the lesson planning issue and the other Year 1 teacher could assist, also noting that the OH report had not been received and commenting about the technology that had been removed as follows:

"…Mandy was actually very concerned for you about how much that one was flickering. She'd kept it going, with the projector, for as long as she could. I'll ask her as to whether she has any suggestions for an alternative one though, maybe something which can project onto the whiteboard?"

35. It is the respondent's position that the extra work the claimant was put to was minimal and suggested by Mr Peck that the impact was limited due to the part time nature of the claimant's work and the number of days she was in work from discovering that the equipment had been removed, to her resignation. He also said that any burden of extra work fell on both the claimant and the other Year 1 teacher Ms Gahan. Ms Douglass said that she would ask Ms Deeks to assist and that Ms Gahan should plan her lessons in the same way as the claimant. There is no evidence that Ms Deeks did assist and the claimant's evidence is that when she suggested this change to Ms Gahan the teacher knew nothing about it and the suggestion *was 'not received positively as it would cause her additional workload also…'*. The tribunal finds on the evidence that the removal of the projector caused substantial extra work to the claimant during the period 4 to 18 September 2019. There is no evidence that Ms Gahan also took on extra work because of the issue as on the claimant's evidence the matter had not been raised with her by the senior management team.

36. In oral evidence Ms Douglass confirmed that she did not speak to Mandy Knapp about the issue on 6 September as she was very busy at the start of term with troubleshooting and could not confirm if she has spoken to her at all about this matter during that period.

37. Ms Douglass was on leave for domestic reasons after 13 September 2019 and did not return to work before the claimant's resignation.

38. The claimant met with Mr Wade on the morning of 16 September 2019. This meeting was not referred to in witness evidence by either Mr Wade or the claimant, but after that meeting the bursar emailed the claimant in the following terms:

'We understand that you would like to be released from your contract as soon as possible…'

The claimant responds *'over the weekend I was advised not to terminate my contract at this stage…'*

39. Mr Wade spoke to Ms Douglass on 16 September 2019 and reported to the claimant early on 17 September 2019 that the first respondent had not seen a report and needed to, then needed time to respond to it. The claimant responded *'Is it that people don't believe me about my epilepsy?'*.

40. The final and complete OH report was delayed and was not received by the first respondent until after the claimant's resignation. The respondents' position is that this delay was on the part of the claimant. The claimant said that she needed to make amendments to the report for accuracy reasons and that the first respondent received a summary report before her resignation. Mr Wade agreed that he had seem a summary report on 17 September 2019, before it was withdrawn for amendment, which said the claimant was fit to work with adjustments. The final report recommends that the claimant should avoid using smartboards, suggests the manufacturer is contacted about potential adjustments and suggests it may be beneficial if a projector board is reinstated.

41. On 18 September the claimant attended work and Mr Wade said that she approached him and Ms Deeks in the playground. She said to Ms Deeks *'I hope your diary is clear for tomorrow because that's the way it's got to be.*' The claimant said that she meant by this that she had been previously advised by Ms Douglass that if she was unable to teach because of the problems with technology Ms Deeks would cover for her, and she was of the view that she was unable to teach. The tribunal accepts this explanation.

42. The claimant then met with Ms Knapp that same morning, 18 September 2019. There is agreement between them that there was a conversation about the projector not being put back up. Ms Knapp said that she cannot remember the words. Ms Knapp said she remembers that the claimant asked if the equipment would be reinstated and what was going on but Ms Knapp had nothing to tell her, she had been absent the previous day and as far as she was aware there was no plan. She said she did not know how things would go forward. The claimant said that when she spoke to Ms Knapp she said she had not been asked to restore or source a projector and that to her knowledge they were not going to be reinstated. The claimant then returned home and resigned by email at 13:47. The claimant had previously contacted Mr Rode, a school governor, it appeared with the intention of raising a grievance. She sent the grievance letter to Mr Rode at 13.43, four minutes before her resignation. The claimant said in evidence that her earlier emails to Ms Douglass were a grievance. The tribunal finds that those emails to Ms Douglass earlier in the month constitute at most an informal grievance. The claimant referred in oral evidence to the letter to Mr Rode as an explanation of her reasons for leaving rather than as a grievance. The tribunal was not taken to the grievance policy but finds that no formal grievance was raised before the letter to Mr Rode on 18 September 2019 at 13:43.

43. It is the claimant's position that she resigned in response to the respondents' failure to make a reasonable adjustment, i.e. their failure to provide a projector and white board for her use as an alternative to a touchscreen. Mr Peck for

the respondents said that the claimant resigned because she did not have childcare and suggested that she had planned to leave at the end of that term in any event and decided to leave earlier. In support of these arguments Mr Peck said that it was clear that the respondents were acting promptly to resolve the technological problems and suggests that the claimant's communications with the respondent between 4 and 17 September 2019 about how the matter could be resolved show that the removal of the projector was not the operative factor. The tribunal finds that when the term commenced the claimant had no intention of resigning before the end of that term. It finds that whilst childcare may have been a factor in the claimant's decision to resign on 18 September 2019, the reason for her resignation was that the projector and white board had been removed from her classroom, that she sought to resolve this matter with the respondents, and after her conversation with Ms Knapp she concluded that there was no intention on the part of the respondents to replace that technology.

Submissions

44. Mr Peck, for the respondents, noted that there are two respondents to the claimant's claim of failure to make a reasonable adjustment and in that regard, they must be treated separately. He noted that the second respondent's case was that there was no decision to remove the projector before the end of the summer term. Mr Peck said that first respondent's position is that whichever employee made the decision, the decision was made by first respondent as the employer, and the first respondent accepts liability on the part of the school. Mr Peck noted that the respondents did not seek to argue that the stated PCP, as a one -off act, could not constitute a PCP for the purposes of this claim. He said that the PCP was not applied in any event until 3 September 2019 because the claimant was not aware of it until that time and that any disadvantage can only have begun at that time. Mr Peck said that the correct comparator in this case was other Year 1 teachers and not all teachers in the school, as teachers in other years taught a different curriculum. Mr Peck said that the disadvantage suffered by the claimant was not substantial and, as she had been advised to work with the other Year 1 teacher to resolve lesson planning issues, any disadvantage was suffered by them both. He said also that any impact was limited, and the respondents had been clear that it was temporary. Mr Peck said the respondents were taking steps to find a solution and the claimant resigned precipitously. Mr Peck said that if the tribunal found that there was a failure to make a reasonable adjustment this did not inevitably mean that the first respondent had breached the implied contractual term of trust and confidence. This would depend on all the circumstances, and the reason for the claimant's resignation was her child care issues rather than the removal of the projector. He noted the claimant's comment to Mr Rode that the projector would last until December as evidence she intended to resign then and had simply decided to leave early. On remedy Mr Peck said that a Polkey reduction of 100% should be applied after December 2019 if the tribunal found in the claimant's favour, and that there should be a 25% reduction in compensation due to the claimant's failure to follow the ACAS code on disciplinary and grievance procedures.

45. The claimant said that she was a good and respected teacher working at a school close to her home, which her two children attended. She said that her seizures are devastating and can result in life changing damage. The claimant noted that there was three years of evidence concerning the health and safety concerns over the use of touchscreens that she raised with the respondents. She said that the respondents had three years to plan for the removal of the projector, not the two weeks relied upon. She noted that she had been totally unaware of the plan to remove the projector and not to replace it, and she was simply left to discover it at the beginning of the autumn 2019 term. She said her trust in the first respondent was broken by these actions as the first respondent was failing to keep safe the claimant or the children she taught. She said that she resigned because of the alleged breach and not because of childcare issues.

Decision and reasons

Failure to Make a Reasonable Adjustment – first respondent

46. The tribunal's task is first to consider the provision, criteria or practice (PCP) relied upon and determine whether there was such a PCP, and if so, secondly, whether that PCP placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not suffer the disadvantage. If there is a PCP and the employer has knowledge of the disability and its effects, the tribunal will move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage.

47. The claimant relies on the PCP of removal by the first respondent of an old projector and installing a new touchscreen. The first respondent accepts that they implemented this PCP. Mr Peck noted that it was a one-off act but said the first respondent did not seek to argue against the PCP on that ground. The tribunal heard evidence that the first respondent planned a technology replacement programme in 2014 and this was implemented throughout 2016 to 2019, ending in 2019 when the last projector was removed from the claimant's classroom and replaced with an Illyama touchscreen. The tribunal finds that there was a PCP of removing an old projector and installing a new touchscreen.

48. The claimant says that she was placed at a substantial disadvantage in that all lessons were displayed on a digital screen device which she could not use, so the expected curriculum was not available to her. She explained in evidence that this led to extra work in replanning lessons and transferring lesson content to a different format. The tribunal finds that this is a substantial disadvantage, and the PCP placed the claimant, as a disabled person, at a substantial disadvantage

49. When considering substantial disadvantage the tribunal must give thought to the identification of a non-disabled comparator. The EHRC Code of Practice states as follows at paragraph 6.16 'The purpose of the comparison with people who are not disabled is to establish whether it is

because of disability that a particular [PCP] … disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's'

50. Mr Peck suggested the comparator was other Year 1 teachers rather than all teachers in the school as there were different curricula and requirements to use technology. He said that the other Year 1 teacher, Ms Gahan, suffered the same disadvantage in that she was asked to amend her lesson planning. It is the decision of the tribunal that comparison only with Year 1 teachers is an overly restrictive comparator for the purposes of a comparator exercise in a reasonable adjustments claim and the comparison is with other teachers in the school who were not disabled. As the claimant could not use the new touchscreen because of her disability which led directly to extra planning requirements being placed upon her, the tribunal find that in comparison to non-disabled teachers the PCP put the claimant at a disadvantage. Even if the comparator used is Year 1 teachers, there is no evidence that during the relevant time the other Year 1 teacher suffered the disadvantage suffered by the claimant.

51. The first respondent was aware that the claimant would be placed at a disadvantage if the PCP was implemented. Whilst the first respondent put forward that the claimant had said she was fine after she tested the Ilyama screen, the tribunal has found that she did not. The first respondent also put forward that the claimant had workarounds in place for problems she encountered such as teaching in the IT suite and attending staff meetings, also that she was aware that the projector had a shelf life. It was suggested that she had accepted that when the projector was no longer viable, she would continue without one. The fact that the claimant tried hard to find her own solutions to problems cannot in the tribunal's view be used as an argument by the first respondent that it was not aware of the disadvantage she would suffer if the projector was removed. The tribunal did not accept that the claimant had agreed she would not have a projector when the one she was using became unviable. Instead, there is clear evidence, even of events close to the time the decision to remove the equipment was taken, that the first respondent was aware that the claimant could not use a touchscreen and therefore that she would suffer a disadvantage in terms of teaching and planning her teaching.

52. The tribunal must consider what steps the first respondent could have taken to obviate the disadvantage and whether it was reasonable for them to do so. The tribunal heard evidence that it was possible to purchase a replacement projector. The tribunal finds that it was reasonable for them to do so and notes that Ms Douglass said in oral evidence that finance was not a concern in this situation.

53. Finally, the tribunal must consider whether the first respondent did take such steps as were reasonable. The first respondent's position is that it was acting promptly when the matter was raised with it on 4 September 2019,

that it was taking the necessary steps to resolve the matter and the claimant, for other reasons, decided to resign without giving adequate time for the first respondents to provide a solution. The tribunal has found that the decision to remove the projector was made on or around 1 July 2019. No action was taken by the first respondent until 6 September when an OH referral was made. Thereafter some temporary workarounds were suggested whilst the first respondent awaited the outcome of the OH report. The tribunal finds that the first respondent failed to take such steps as were reasonable to avoid the disadvantage. Evidence was given that replacement projectors were available. The decision to remove the old projector was made on or around 1 July 2019 and no action to replace it had been taken by 18 September 2019 and indeed at that point the process of obtaining a replacement or taking some other step had not begun.

54. The claimant's claim that the first respondent failed to make a reasonable adjustment is upheld.

Failure to Make a Reasonable Adjustment – second respondent

55. Mr Peck has confirmed that the first respondent accepts liability, as the employer of the second respondent, for any decisions made by the second respondent relative to this claim. Furthermore S109 (4) Equality Act 2010 sets out that there is a defence to an employer's liability where the employer has taken all reasonable steps to prevent the employee carrying out the act complained of. The first respondent has not relied on that defence. It is the tribunal's decision that the claimant's claim against the second respondent relates entirely to actions carried by the second respondent as a head teacher and an employee of the first respondent and it does not find a failure on the part of the second respondent personally to make a reasonable adjustment.

56. The claimant's claim that the second respondent failed to make a reasonable adjustment is dismissed.

Constructive Unfair Dismissal

57. In order to succeed in a case of constructive unfair dismissal the claimant must show that a fundamental breach of the employment contract took place and that she resigned because of that breach without delay. The claimant relies on the breach of the implied term of trust and confidence. She relies on the failure to make a reasonable adjustment as being the cause of that breach.

58. The tribunal has found that there was a failure by the first respondent to make a reasonable adjustment. Mr Peck brought to the attention of the tribunal that such a failure does not necessarily constitute a breach of trust and confidence. It is the decision of the tribunal that in this case that failure did constitute a breach of contract that entitled the claimant to rely on it for the purposes of s95 (1)(c) Employment Rights Act 1996 (ERA) as a dismissal in that the removal of the projector without sourcing a replacement or alternative seriously affected the claimant's ability to carry out her role and showed a

disregard on the part of the first respondent for her health and safety concerns.

59. The tribunal does not find that the breach was calculated to damage the relationship between the first respondent and the claimant, but it finds that it was likely to do so, and the first respondent cannot have been unaware of this. Ms Knapp said in evidence that she raised her concerns over how the claimant would react to the decision when she discussed the removal of the equipment with Ms Douglass on or around 1 July 2019.

60. The tribunal must consider whether the first respondent had proper cause for its actions. The first respondent had a plan and implemented a policy to replace old technology with new. The first respondent had the right to decide that equipment was not fit for purpose. The tribunal takes no issue with the policy or the first respondent's right to decide on what is the appropriate quality of equipment for classroom use. The tribunal finds that the respondent did not have proper cause to leave the claimant without alternative technology to the touchscreen, which it knew she could not use. The tribunal has already set out that it does not accept that the first respondent could conclude from the claimant's actions that she accepted that she could use the Illyama screen and be without a projector.

61. Mr Peck said, for the first respondent, that the claimant resigned for reasons other than the first respondent's decision to remove the projector. The tribunal found that the removal of the projector without an alternative having been provided was the reason she resigned. It finds therefore that she resigned in response to the first respondent's breach of contract.

62. To succeed in a claim of constructive unfair dismissal the claimant must also show that she resigned without delay. The claimant discovered that the projector had been removed and no replacement provided on 4 September 2019. The actual removal took place on 3 September 2019. The claimant liaised with various colleagues over the next two weeks in an attempt to resolve the matter. It is clear from the evidence that resignation was in her mind but it was not until the claimant's conversation with Ms Knapp on 18 September 2019 from which she understood that there was no plan to source a replacement projector, that she resigned. The tribunal finds that the claimant did not delay in her resignation. The fact that the claimant spent a brief period trying to resolve the problem before concluding that it could not be resolved after speaking to Ms Knapp, was not a delay sufficient to amount to an affirmation of the contract.

63. The claimant's claim of unfair dismissal is upheld.

64. Submissions were made by Mr Peck in relation to remedy in two matters, with further matters to be addressed separately depending on the conclusions of the tribunal on liability:

    a. Mr Peck submitted that the claimant had planned to leave the employment of the first respondent at the end of December 2019. He submitted that a 100% Polkey reduction should be applied from that

date should a finding of unfair dismissal be made. The tribunal found that the claimant did not state that she was leaving at the end of December 2019 and declines to apply a Polkey reduction of 100% to any compensation that may be awarded from that date onwards.

b. Mr Peck submitted that the claimant had failed to follow a proper grievance procedure and a full 25% deduction to compensation should be imposed for failure to comply with the ACAS code on disciplinary and grievance procedures. The tribunal accepts that the claimant did not raise a formal grievance either at all, or until four minutes before she resigned. It was unclear from the evidence whether the letter of 18 September 2019 was meant to be a grievance. However, the tribunal finds that where the claimant considered the first respondent's actions to have constituted a repudiatory breach of contract, and the tribunal has found in her favour, no deduction for failure to follow the ACAS code will be made where she decided that immediate resignation was necessary.

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Employment Judge Anderson

Date: 16 September 2022