EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Spillett (formerly Ms S Tummon)**

Respondent: **Meadowfield School**

Heard on: **6th, 7th, 8th, 9th and 10th February 2023 by video**

Before: **Employment Judge Pritchard**
Members: **Mr S Huggins**
Mr S Corkerton

Representation
Claimant: In person
Respondent: Mr A Pickett, counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claim of direct disability discrimination is dismissed.

2. The claim of discrimination arising from disability is dismissed.

3. The claim of failure to make reasonable adjustments is dismissed.

4. The claim of victimisation is dismissed.

5. The Claimant's claim for notice pay is dismissed upon her withdrawal of that claim at a preliminary hearing on 3 October 2022.

REASONS

1. The Claimant claimed disability discrimination and victimisation under sections 13, 15, 20/21 and 27 of the Equality Act 2010. The Respondent resisted the claims. The Tribunal heard evidence from the Claimant and put forward a statement from her husband, Paul Spillett. Although Mr Spillett was unable to attend the hearing for personal reasons, the Respondent accepted the content of his statement and the Tribunal was able to give full weight to it. The Respondent's witnesses giving evidence were: Kate Trevor (HR Manager at relevant times), Liz Brobyn-Ross (Assistant Principal) and (Jill Palmer (Principal at relevant times). The Tribunal was provided with a bundle of

documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions.

The issues

2. The issues were discussed at a preliminary hearing before Employment Judge Ferguson on 3 October 2022 and set out in a case management order. The Claimant's claims for reasonable adjustments and victimisation could only proceed if she were successful in her application to amend her claim which she made at the preliminary hearing. Although Employment Judge Ferguson had proposed that the application would be considered on the papers, for unknown reasons that consideration had not taken place prior to the hearing. Accordingly, the Tribunal determined the application at the commencement of the hearing and granted the application in the Claimant's favour. Reasons for that decision were given orally at the hearing.

3. The Respondent conceded that the Claimant was a disabled person at relevant times by reason of three of the conditions upon which she relied, namely: Type 1 diabetes, Ehlers-Danlos Syndrome and Fibromyalgia. The Claimant confirmed that she relied on disability in relation to those three conditions and was not basing her claim on disabilities consequent upon Asperger's Syndrome or mental health difficulties including PTSD, anxiety and depression. Accordingly, the Tribunal was not required to consider whether the Claimant was thereby a disabled person.

4. It was agreed with the parties at the commencement of the hearing that the issues to be determined were as follows.

<u>Direct disability discrimination (Equality Act 2010 section 13)</u>

5. Did the Respondent do the following things:

   5.1. In a phone call on 21 July 2021, the Respondent's HR manager putting pressure on the Claimant to resign or to drop her request(s) for adjustment(s)?

   5.2. Assign the Claimant to the classroom that was furthest away from the reception area where the key card device for clocking in and out is located?

6. Was that less favourable treatment?

7. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant did not name anyone in particular who she says was treated better than she was.

8. If so, was it because of disability?

9. Did the Respondent's treatment amount to a detriment?

<u>Discrimination arising from disability (Equality Act 2010 section 15)</u>

10. Did the Respondent treat the Claimant unfavourably by:

    10.1. In a phone call on 21 July 2021, the Respondent's HR manager putting pressure on the Claimant to resign or to drop her request(s) for adjustment(s)?

    10.2. Assign the Claimant to the classroom that was furthest away from the reception area where the key card device for clocking in and out is located?

11. Did the following arise in consequence of the Claimant's disability:

    11.1. The Claimant's need for the adjustments outlined in the occupational health report in July 2021?

12. Was the unfavourable treatment because of the Claimant's need for those adjustments?

13. Was the treatment a proportionate means of achieving a legitimate aim?

14. The Tribunal will decide in particular:

    14.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    14.2. could something less discriminatory have been done instead;

    14.3. how should the needs of the Claimant and the Respondent be balanced?

15. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

<u>Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

16. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

17. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

    17.1. Assigning the Claimant to the classroom furthest from the reception area [PCP1];

    17.2. Holding the dismissal meeting on 5 October 2021 in the headteacher's office [PCP2]?

18. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it is difficult for the Claimant to walk long distances, to climb stairs and, as regards PCP2, it was particularly difficult because the Claimant had recently dislocated her kneecap?

19. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

20. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

    20.1. Assigning the Claimant to a classroom nearer the reception area [PCP1];

    20.2. Holding the meeting in another room that was easier for the Claimant to get to [PCP2].

21. Was it reasonable for the Respondent to have to take those steps?

22. Did the Respondent fail to take those steps?

Victimisation (Equality Act 2010 section 27)

23. The Respondent conceded that the Claimant did a protected act by bringing these proceedings.

24. Did the Respondent do the following things:

    24.1. Issue an unfair reference for the Claimant on or around 8 September 2022? (The parties agreed that the adjective of "poor" used to describe the reference in the case management order was inappropriate and should be substituted with the adjective "unfair").

25. By doing so, did it subject the Claimant to detriment?

26. If so, was it because the Claimant did a protected act?

27. The hearing considered the question of liability only. If the Claimant were to succeed in all or any of her claims, a further hearing would take place to consider remedy.

Findings of fact

28. The Claimant is a qualified schoolteacher. Among other things, she has Type 1 diabetes, Fibromyalgia and Ehlers Danlos Syndrome, the latter causing her joints to dislocate easily and making her vulnerable to knocks and injury. Although not expressly addressed in her impact statement, the Tribunal accepts that the Claimant experiences some mobility difficulties as a result of her disability: she sometimes walks with a walking stick, sometimes without. She takes various forms of medication, including that for pain relief.

29. The Respondent is a school which serves pupils with profound, severe and complex needs including autism.

30. Having made an online application for employment with the Respondent as a Teaching Assistant, the Claimant completed the Respondent's self-disclosure form in June 2021 and provided it to the Respondent. The Claimant answered *"No"* in reply to the question *"Have you been the subject of any investigation and/or sanction by a professional body (e.g. Teaching Regulation Agency) due to concerns about your behaviour towards children?"* She signed the document

to confirm that that the disclosure was full and correct and that she had not omitted anything that could be relevant to the appointment of someone who would work with children.

31. The Respondent provided the Claimant with written pre-interview information which included the following:

    - *The daily hours of work are 9.00 am to 3.30 pm*
    - *All non-teaching roles at Meadowfield School are subject to a 6 month probationary period. During this time your performance, attendance, conduct and punctuality will be kept under review and, if concerns are identified, then your contract could be ended without recourse to the normal school procedures*
    - *All Teaching Assistants are expected to be flexible in approach and may be asked to work in a range of classes and abilities at any time, and across our sites*
    - *A TA post in a Special School is physically and emotionally challenging, as well as incredibly rewarding. Our pupils are sometimes unable to express their needs and frustrations and this can manifest as physical behaviour such as spitting, shouting, hitting, pushing, biting and scratching. While we do all we can to support pupils' well-being and keep staff safe, occasionally staff may be harmed. If you have any concerns about this, please speak to the interviewers.*

32. At interview, the Claimant told the interviewers that her joints dislocate easily and that she had a "few more difficulties".

33. The Claimant completed, and submitted to the Respondent, a form titled Additional Information Required for HR as follows:

Medical Condition / Allergy	**Support / Adjustments Requested**
Type 1 Diabetes	Quiet place to inject at lunchtime
Ehlers Danlos Syndrome / hypermobility / Fibromyalgia	Lift access above ground floor No outdoor duties
Asthma	I use inhaler
Allergic to penicillin fungal allergy	School free from fungal spores
Allergic to latex	

34. By letter dated 29 June 2021, the Respondent made an offer of employment to the Claimant conditional upon pre-employment checks which included health clearance.

35. Following a consultation with the Claimant, the Respondent's Occupational Health Advisor informed the Respondent as follows:

> *The above named is fit with adjustments for employment in the above role, adjustments required are as follows: ST explained she had already made School aware of her conditions' needs, which she says she does not envisage being a problem for her full work capability. She was unsure about the playground/sports duties requirements of the role, which she feels unable to do and needs adjustments for, due to her joint condition and concerns. I advised her, as that might affect her new work*

fitness/capability, to contact School soon about this to give as much notice as possible to consider adjustments

36. Given the importance given by the school to pupils engaging in outside play and learning, and the requirement for teaching assistants to supervise such activities, Mrs Trevor, having consulted with Jill Palmer, was concerned that the Respondent might not be able to employ the Claimant with the adjustment she had requested. Mrs Trevor was also concerned that if the Claimant were to be at risk supervising in the playground, she might equally be at risk in the classroom.

37. On 21 July 2021, Mrs Trevor made a telephone call to the Claimant to discuss the adjustments sought by the Claimant. With the Claimant's permission, she recorded the telephone conversation.

38. Following the telephone call, Mrs Trevor held discussions with Jill Palmer and Liz Brobyn-Ross and, with the aid of the recording, Mrs Trevor composed an email summarising the substance of the telephone conversation and setting out the school's position. Having checked with Miss Palmer that she was happy with its content, Mrs Trevor sent the email to the Claimant on 23 July 2021. It reads as follows:

Dear Sophie

Further to our discussion this morning, I have spoken to Jill Palmer (Principal) and Liz Brobyn Ross (Assistant Principal) and I can confirm the school position below.

You previously requested, as an adjustment due to your joint condition, that you should be excused from outdoor duties. Occupational Health advised that you were 'unsure about the playground / sports duties requirements of the role, which you felt unable to do and needed adjustments for'. For clarity, there is not an expectation that you participate in sports or play activities; you are expected to actively supervise the pupils and support with behaviour incidents as you would in class.

When I asked you what specifically concerns you about outdoor duties, you explained that in other schools you had been excused from playtime duties due to the risk that your joints may dislocate if, for example, you were hit directly by a fast-moving football. I explained that much of the learning at Meadowfield takes place outside, and that covering PE and playground activities are important parts of the TA role here - due to the needs of the children at these less structured times we need all available staff to support. Therefore we would not be able to reasonably accommodate the permanent adjustment that you have requested.

We discussed other aspects of the role which could pose a similar risk of damaging your joints. Some of our pupils have difficulty regulating their emotions and may express their feelings physically, by hitting, punching, kicking, pushing, or otherwise hurting staff. While we do all that we can to train staff to prevent and deal with such incidents, they cannot always be avoided. You told me that you are confident that such physical behaviour would be unlikely to damage your joints.

> *You explained that you have a brace that you can use that protects your knees. You said that you will be able to act to avoid physical situations. You are confident that you understand the requirements of the role and are able to meet them without further adjustments.*
>
> *The outcome of our conversation, as I understand it, was that you withdrew your request for an adjustment of 'no outdoor duties' and agreed that you would be able to safely undertake such duties.*
>
> *…*
>
> *We will need to keep your fitness / capability under review during your probation period. If your health conditions have a significant impact on your ability to undertake your duties we will seek to make reasonable adjustments where this is possible. If the necessary adjustments cannot reasonably be accommodated, then we may have to consider ending your contract in her [sic] probation period.*
>
> *I would like to reassure you that as a Special School, fair treatment of individuals with disabilities and special needs is very important to us, and we do make adjustments where possible. However, we must prioritise the safety and well-being of pupils, staff and yourself.*
>
> *I can confirm that we have received satisfactory references, DBS results etc. So therefore, we can confirm your offer of employment, subject only to your confirmation that the content of this e-mail is correct, and that you believe that you can safely undertake the role in school, by reply to this e-mail.*
>
> *If you need any further information or clarification or support, please let me know.*
>
> *Kind regards*
> *Kate*

39. The Claimant did not ask for any further information or clarification but promptly replied:

> *Hello Kate, thank you for your email. I can confirm that this is correct.*
> *I look forward to meeting you on 31 August.*
> *Kind regards*
> *Sophie*

40. Mrs Trevor then deleted the recording.

41. The Tribunal prefers the Respondent's evidence that Mrs Trevor did not put pressure on the Claimant to resign or drop her request for adjustments. The Claimant's evidence was inconsistent in parts. In contrast, the evidence of the Respondent's witnesses was clear and consistent throughout. This includes Mrs Trevor's evidence that she wanted to be open an honest with the Claimant about the demands of the TA role and the adjustments the Respondent could reasonably make, and those it could not. The Tribunal finds it highly unlikely that Mrs Trevor would press the Claimant to resign in circumstances in which

she was not yet employed by the Respondent. The Tribunal finds nothing in the tone of the email, which the Tribunal accepts as an accurate and truthful summary of the telephone conversation, to be aggressive as the Claimant contends. The Claimant said she felt pressed to tell Mrs Trevor that she could do the job without the adjustment relating to outdoor duties because she was desperate for paid employment. In the Tribunal's view, any pressure the Claimant perceived came from her need for work rather than from Mrs Trevor.

42. The Respondent confirmed the Claimant's employment by letter dated 25 August 2021.

43. The Claimant's contract of employment included the following:

> *Performance and suitability for continued employment will be monitored. Should your performance and/or conduct and/or suitability be unsatisfactory, the School reserves the right to terminate your employment at any time during this period without recourse to the disciplinary, performance or capability procedures and statutory minimum notice*

44. The Claimant accepted that the Respondent made the following adjustments: to use the lift, to sit down when working with students, to keep her insulin within reach, and to eat during class in the event of hypoglycaemia.

45. In light of her previous work experience, which was mainly though not entirely in mainstream schooling at Key Stages 3 and 4, the Respondent assigned the Claimant to be one of the four teaching assistants in Peacock class. This is a Key Stage 2 'subject led' class. Subject led classes have pupils with greater abilities and less complex mental and physical difficulties than pupils in non-subject led classes.

46. The Respondent's decision to assign the Clamant to a subject led class at Key Stage 2 was also informed by her vulnerability to joint injury: pupils in a subject led class tend to demonstrate less challenging behaviours.

47. The Claimant underwent induction training on 31 August 2021 and commenced her duties shortly afterwards at the start of the school term.

48. Although most of the teaching took place in the same classroom, the Claimant would be required to walk with pupils to various other locations where lessons such as art or PE would take place.

49. Employees at the school were required to use an electronic clocking in and out system located at the reception area where they enter and exit the premises. Peacock class was located at the other end of the building requiring the Claimant to walk along a main corridor. Although not the furthest classroom from reception, it was one of them within the main building of the school. Miss Palmer's evidence was that it would take her about 20 to 25 seconds to walk from reception to the Peacock classroom. The Claimant's evidence was that it would take her about one minute.

50. The Claimant discussed with two teaching colleagues whether the school might be minded moving her to a Key Stage 3 or 4 class which she thought might be more appropriate in light of her previous work experience. She also suggested

in evidence that if she could work with Key Stage 3 or 4 pupils, it would avoid too much walking. The Claimant's evidence in this regard was most unsatisfactory: it was clear that the Claimant had little knowledge of the locations of the Key Stage 3 and 4 classrooms. The Tribunal prefers Mrs Brobyn-Ross's evidence that the Claimant did not ask her, as her line manager, to be moved to a classroom nearer reception.

51. On 5 October 2021, a pupil lunged for a musical instrument, accidentally knocking the Claimant's knee and, in doing so, caused her kneecap to temporarily dislocate. The Claimant received first aid. The Tribunal accepts the evidence of Mrs Brobyn-Ross that she visited the classroom, that the Claimant played the injury down, explaining that she often had dislocations and it was not an issue in terms of her being able to continue her duties that day, which she did.

52. Later that day, a middle manager informed Mrs Brobyn-Ross that a teaching assistant wanted to speak to her. Mrs Brobyn-Ross spoke to the teaching assistant who expressed concern about a physical interaction she had observed between the Claimant and a pupil (described as Pupil A in these proceedings). Mrs Brobyn-Ross asked the teaching assistant to record her concerns on the school's electronic safeguarding record. The teaching assistant did so as follows:

> *Today at around 10 o clock this morning I was escorting Glennie class to there [sic] lesson. As we went downstairs in blue corridor a peacock t a was in front of me her name is Sophie she was with a child in her class name of [Pupil A] she was gripping his wrist as she marched him down the stairs and on reaching the bottom of the stairs [Pupil A] was released from sophies grip and looked at his wrist and shouted help me help me.*

53. Following a meeting of the senior leadership team, Miss Palmer invited the Claimant to attend a meeting in her office which is situated above reception on the first floor of the building and accessed by both stairs and a lift. Miss Palmer's office is very close to the lift doors on the first floor.

54. The Tribunal heard conflicting evidence as to what happened in the arrangements which were made for this meeting. According to the Claimant:

- Mrs Brobyn-Ross visited the classroom and told her she was required to attend a meeting with the Principal;
- She was then escorted to Miss Palmer's office by Mrs Brobyn-Ross;
- She was still evidently in significant pain from her knee injury;
- Mrs Brobyn-Ross refused her request for the meeting to take place in a nearby room;
- Mrs Brobyn-Ross hurried the Claimant along the main corridor, tut tutting when she was struggling to keep up;
- The Claimant asked if Mrs Brobyn-Ross could collect crutches from the Claimant's car (and in submissions, for the first time, the Claimant said she asked if the school had a wheelchair she could use); and
- Mrs Brobyn-Ross told the Claimant she could not use the lift because it was out of order.

55. According to the Respondent:

- It was Miss Palmer who communicated the request for the Claimant to attend the meeting by way of a telephone call to the Peacock class teacher who duly informed the Claimant;
- Mrs Brobyn-Ross did not escort the Claimant to the meeting; rather, the Claimant made her own way to the meeting;
- Mrs Brobyn-Ross remained in Miss Palmer's office throughout;
- The Claimant did not ask for the meeting to be held in a different room or location;
- Although it is unknown how the Claimant ascended to the first floor, the lift was definitely working that day; and
- The Claimant did not appear to be in pain at the meeting, nor did she complain that she was.

56. The evidence of the Respondent's witnesses was clear and consistent throughout. In contrast, the Claimant's evidence demonstrated inconsistencies. With regard to the invitation to attend the meeting in the Principal's office in particular, the Tribunal notes the inconsistency in the Claimant's evidence; initially the Claimant said that Mrs Brobyn-Ross told her she was required to attend the meeting, only later appearing to acknowledge that the request came by way of a telephone call from Miss Palmer. Also, the Claimant said in evidence that she knew the location of the lift near her classroom but not the location of the lift near reception – while also alleging that Mrs Brobyn-Ross told her could not use the lift near reception because it was not working. In general, and in relation to this matter, the Tribunal prefers the Respondent's evidence.

57. At the meeting, Miss Palmer asked the Claimant for her version of events. The Claimant said that she had been holding Pupil A's hand to stop the pupil running off and that Pupil A was pulling her. Miss Palmer took the decision that the Claimant should be dismissed.

58. Although not before Miss Palmer at the time, a second member of staff made a safeguarding report that day following a concern she had initially raised verbally with Mrs Brobyn-Ross. It reads as follows:

> *Hi Liz*
>
> *Following on from our conversation earlier.*
>
> *Approximately 10am this morning I was escorting a few students to their next class when I saw the following:*
>
> *A teaching assistant, in blue corridor grabbing a child's [Pupil A]? can identify if need be) wrists and pulling him/dragging him (he was laying on the floor) out of the doorway.*
>
> *I can identify the teaching assistant if need be, not so sure of name.*

59. Pupil A's mother had been contacted by telephone and informed of the incident. After Pupil A returned home, Pupil A's mother called the school to say that Pupil A had told her *"The naughty girl hurt my wrists", "because I was touching the elevator".* Pupil A's mother reported that Pupil A had marks on his hand and

fingerprints on his arm. Pupil A came on the phone and repeated *"Naughty girl hurt my wrists"*.

60. Because it was a serious safeguarding concern, the Respondent notified the Local Authority Designated Officer (LADO).

61. By letter dated 6 October 2021, Miss Palmer confirmed her decision to dismiss the Claimant. The reason for the dismissal was not confined to the alleged inappropriate handling of Pupil A but also included more low-level issues of timekeeping, high level of absence and failure to follow school procedures relating to absence reporting. The letter confirmed that the Claimant's contract terminated on 5 October 2021 but, confusingly, stated that notice was being issued to end on 13 October 2021. The Tribunal finds that the Claimant's employment ended on 5 October 2021, with notice paid in lieu.

62. At a multiple agency strategy meeting which took place shortly after the Claimant's dismissal, also attended by the police, the Respondent was informed that the Claimant had been investigated in September 2020 when working at a previous school. The allegations on that occasion were that she had used derogatory language towards a pupil and also alleged to have *"held her hand out in an attempt to unnecessarily stop a child from running"* and *"threatened to punch a child in the face"*. Although the Claimant was aware when she made her application for employment by the Respondent that a warning had been issued, she was not advised by the previous school that the investigation against her had been concluded and substantiated.

63. The police concluded that the allegation relating to Pupil A did meet the threshold for a criminal conviction.

64. On 15 October 2021, a member of staff raised a concern with the Respondent that the Claimant, who was no longer employed by the school, had been present at a public swimming pool on two occasions when, as part of school activities, pupils had also been present. It was alleged that on 8 October 2021, the Claimant, in her swimming costume, hugged some of the children in the changing rooms. It was alleged that on a second occasion, 15 October 2021, the Clamant had stared at a child causing the child to be distraught and in tears on the bus home and worried that the Claimant might come to the school. The Peacock class teacher also reported the latter allegation stating that the child concerned needed encouragement to go into the pool the following week.

65. The LADO advised the Respondent to undertake its own investigation into the Claimant's alleged misconduct. This was undertaken by Mrs Brobyn-Ross who considered the alleged misconduct for which the Claimant was dismissed together with the matters arising following the termination of her employment. Mrs Brobyn-Ross also considered the allegation made against the Claimant when she worked at a previous school and the Claimant's failure to disclose it. Mrs Brobyn-Ross concluded her investigation on 17 December 2021 and found, on the balance of probabilities, that the allegations had been substantiated.

66. The Respondent subsequently issued a reference relating to the Claimant. Relevant extracts include the following:

Section B: Safeguarding, Disciplinary or Capability Issues	
1. Is the applicant (or were they at the date of leaving your employment) subject to any formal disciplinary procedures or formal sanctions, or subject to any ongoing disciplinary investigation? *There is no requirement to provide information about informal action or expired sanctions*	Yes
2. Have any allegations or concerns being raised about the applicant that relate to the safety & welfare of children & young people or the applicant's behaviour towards children and young people? (See keeping children safe in education, part 4) *Please state below whether an investigation took place, what was the outcome / conclusion and how the matter was resolved. Any allegations which have been found to be unsubstantiated, unfounded or malicious will not be included.*	Yes
3. In your opinion, is there any reason why the applicant should not be employed to work with children & young people or in a school setting?	Yes
4. In the preceding two years, has the applicant been subject to any formal capability procedures or formal sanctions? *Regulation 8A of the School Staffing (England) Regulations 2009 requires schools (maintained or academy) to provide this information in relation to teaching posts in maintained schools. For other posts, referees are asked to provide relevant information as part of their obligation to provide a fair and accurate reference.*	Yes – Disclosed by the LADO from a previous employer
If you answered 'yes' to any question in section B 1 – 5, please provide details: S Tummon was dismissed Meadowfield School for the following reasons: • Poor timekeeping • High levels of absence • Breaching school policy • Inappropriate physical contact or restraint of a pupil After being dismissed the school were made aware that Sophie withheld significant relevant information that the school reasonably required the employee to have disclosed, including information which could have brought into question her suitability to work with children in a school setting and/or which may bring the school into disrepute	
Section c: Please use this space to provide any further relevant information or comment:	
Please identify any areas in which the candidate has shown strong skills or capabilities, and any areas in which the candidate may need additional support or development.	

For teachers, please comment on the quality of their teaching and ability to lead a team of adults in class.
Meadowfield's investigation into S Tummon's conduct revealed that safeguarding concerns were investigated and upheld in one of her previous roles. S Tummon, after leaving Meadowfield, Continued to demonstrate behaviours of concern which confirm that she lacks an understanding of expectations regarding conduct, safeguarding and professionalism

67. The Claimant commenced these proceedings on 13 October 2021.

Applicable law

Direct discrimination

68. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

69. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (disability in this case), A treats B less favourably than A treats or would treat others.

70. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council's motive, which had been benign, was beside the point. In that case the council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

71. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

72. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. Comparison may be made with an actual individual or a hypothetical individual. The circumstances

relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Discrimination arising

73. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The provision thus requires an investigation of two distinct causative issues, see Pnaiser v NHS England [2016] IRLR 170.

74. A tribunal must identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

75. The tribunal must determine what caused the impugned treatment, or what was the reason for it. Considering whether A treated B unfavourably because of an (identified) something involves an examination of the putative discriminator's state of mind and mental process to determine what consciously or unconsciously was the reason for any unfavourable treatment found; see Dunn v Secretary of State for Justice [2019] IRLR 298 and Robinson v DWP [2020] EWCA Civ 859. It is not enough for B to show that 'but for' his disability he would not have been in the unfavourable situation complained of, even if he was not well-treated by A and had an understandable sense of grievance. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for, or cause, of it. Motives are irrelevant.

76. The expression 'arising in consequence of' could describe a range of causal links. This stage of the causation test involves an objective question – a question of fact rather than belief - and does not depend on the thought processes of the alleged discriminator.

77. As to constructive knowledge, the Code of Practice on Employment (2011) provides:

> *"5.14 It is not enough for the employer to show they did not know that the disabled person had a disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they reasonably can be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially"*

78. It is not incumbent upon employer to make every enquiry where there is little or no basis for doing so.

Duty to make reasonable adjustments

79. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

80. In Environment Agency v Rowan [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

    80.1. the provision, criterion or practice applied by the employer;

    80.2. the identity of non-disabled comparators where appropriate; and

    80.3. the nature and extent of the substantial disadvantage suffered by the claimant.

81. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: see Ishola v Transport for London 2020 EWCA Civ 112, CA. Mr Pickett referred the Tribunal to the following passage from that judgment (per Lady Justice Simler at paragraph 37):

> *In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*

Victimisation

82. Section 27(1) of the Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. Bringing proceedings under this Act is a protected act under subsection (2)(a).

83. The words 'because of' have the same meaning as described under direct discrimination above.

Burden of proof

84. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold

that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Conclusion and further findings of fact

85. In giving evidence, the Claimant wished to speak about aspects of her employment that might reasonably be considered relevant in the context of an unfair dismissal claim. The Tribunal has reminded itself that there is no unfair dismissal claim falling for consideration in this case.

Direct disability discrimination

86. The Tribunal has concluded that the Respondent's HR Manager did not put pressure on the Claimant to resign or to drop her request for adjustments and the Claimant was not thereby treated less favourably.

87. The Respondent did assign the Claimant to a classroom which happened to be one of those furthest away from the reception area where the key card device for clocking in and out is located.

88. As to the question of less favourable treatment, the comparator will be a teaching assistant who does not have the Claimant's disability but who has similar visible mobility problems, but does not otherwise disclose them, and is assigned to a classroom situated a similar distance from reception. There was no credible evidence before the Tribunal to suggest that the Claimant was treated worse than the comparator would have been treated or, to put it another way, that the comparator would have been treated better.

89. If the Tribunal is wrong in that conclusion, assigning the Claimant to Peacock class, which happened to be located in one of the furthest classrooms from reception, was not because of her mobility problems. The decision to assign the Claimant to Peacock was because of her past work experience and, in part, to reduce potential risk to her joints. The Claimant was certainly not placed in Peacock *"deliberately to make my employment there more of a challenge with regard to my disability"* as she alleges in her witness statement. Apart from knowing that the Claimant sometimes used a walking stick, the Respondent was unaware of the extent of the mobility difficulties the Claimant now relies on for the purposes of her claim. In particular, the Respondent was unaware that she had any difficulties walking from reception to the Peacock classroom which, based on either party's evidence, was not far. In this regard, any less favourable treatment would not have been because of her disability.

Discrimination arising from disability

90. As above, the Tribunal has concluded that the Respondent's HR Manager did not put pressure on the Claimant to resign or to drop her request for adjustments and the Claimant was not thereby treated unfavourably.

91. As concluded above, the Respondent did assign the Claimant to a classroom which happened to be one of those furthest away from the reception area where the key card device for clocking in and out is located.

92. The Tribunal finds on the balance of probabilities that, notwithstanding the short distance involved, it placed a hurdle in front of, or created a particular

difficulty for, the Claimant given her mobility problems as now understood. The Claimant was thus treated unfavourably.

93. The Respondent sensibly conceded that the need for adjustments outlined in the occupational health report of July 2021 arose in consequence of the Claimant's disability.

94. The adjustments referred to in the occupational health report relate to the Claimant's joint conditions and possible vulnerability working outside; there is no mention in the report of problems walking short distances or any mobility difficulties giving rise to the requirement for adjustments. The Claimant was assigned to the classroom in that particular location because it happened to be where that subject led class was taught. The assignment to the Peacock class location had nothing whatsoever to do with the Claimant's need for those adjustments.

95. For completeness, there was no credible evidence to suggest that the Respondent assigned the Claimant to Peacock class because of its location or distance from reception or because of any difficulty the Claimant might have had walking there and back.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

96. Although the Respondent was aware of the difficulties the Claimant experienced with her joints, the Respondent was unaware that the Claimant had particular mobility problems such that she was likely to be placed at a disadvantage walking to and from class.

97. The Tribunal has carefully considered whether the Respondent ought reasonably to have known that the Claimant had mobility problems which were likely to have placed her at a disadvantage, especially since she was observed sometimes using a walking stick. The Claimant said nothing about her mobility difficulties at interview, she said nothing to Mrs Trevor about such difficulties despite the long telephone conversation, she failed to mention the difficulties in her impact statement in these proceedings. As the Tribunal has found above, she did not ask to move class because of its location. The Tribunal accepts the Respondent's evidence that the Claimant was never observed having mobility difficulties. The Claimant herself assured the Respondent that she could undertake her full duties without further adjustments. The Tribunal concludes that it was not incumbent upon Respondent to make further enquiry in the circumstances of this case.

98. The Tribunal would in any event find that the Claimant has failed to identify a provision, criterion or practice (PCP). The said PCPs relied on by the Claimant allege acts of unfair treatment against her; they do not carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated again. The concept of a PCP does not apply to every act of unfair treatment of a particular employee and it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

Victimisation

99. The Claimant did a protected act by bringing these proceedings.

100. Given the allegations raised in her previous employment, the allegations raised and found substantiated in her employment with the Respondent, the failure to disclose the sanction previously imposed, and the Claimant's alleged contact with pupils at the swimming pool, the Tribunal is of the view that the reference, while clearly unfavourable to the Claimant's interests, was factual and accurate.

101. But even if that is wrong, there was insufficient evidence whereby the Tribunal could conclude that the reference was issued because the Claimant had brought these proceedings. The weight of evidence strongly suggested that the Respondent, Miss Palmer in particular, caused the reference to be issued in compliance with the statutory guidance "Keeping Children Safe in Education" issued by the Department for Education.

102. The Tribunal finds the Claimant's assertions that there was a conspiracy to concoct allegations against her, and that the Respondent fabricated documents, unfounded. Notwithstanding this finding, the Tribunal wishes to make it clear that it has not been required to consider whether the various acts of misconduct alleged against the Claimant took place and the Tribunal has made no such findings.

Notes

Employment Judge Pritchard

Date: 10 February 2023