EMPLOYMENT TRIBUNALS

Claimant: Miss v G Bicknell

Respondent: Foster Park Primary School

Heard at: London South **On: 26, 27, 28, 29 and 30 June 2023**

Before: Employment Judge Khalil sitting with
Ms Oates-Hinds
Mr W Dixon

Appearances

For the claimant: Mr Kaihiva, Counsel
For the respondent: Mr Isaacs, Counsel

JUDGMENT WITH REASONS

Unanimous decision

The claimant's claim for constructive Unfair Dismissal under S.94 Employment Rights Act 1996 is not well founded and fails.

The claimant's claim for Direct Disability Discrimination under S.13 Equality Act 2010 is not well founded and is dismissed.

The claimant's claim for Discrimination arising from Disability under S.15 Equality Act 2010 is not well founded and is dismissed.

The claimant's claim for Breach of Contract is not well founded and fails.

Reasons

Claims, appearances and documents

(1) This was a claim for (constructive) Unfair Dismissal under S.94 Employment Rights Act 1996 ('ERA'), Disability Discrimination – Direct under S.13 and Discrimination arising from Disability under S.15 Equality Act 2010 and Breach of Contract.

(2) The claimant was represented by Mr Kaihiva, Counsel and the respondent by Mr Isaacs, Counsel.

(3) The Tribunal had a Bundle running to 414 pages. The Tribunal heard from the claimant, Mr Andrew Bond, Head of School, Forster Park Primary School (investigating officer), Mrs Michelle Fenniche, Executive Headteacher of the respondent Federation (dismissing officer), Ms Songul Dervish-Hassan, teacher at Forster Park Primary School and Ms Joanne Palmer, Head of Nurture and Inclusion for the respondent (the claimant's former line manager). The respondent also relied on the witness statement of Ms Loretta Reynolds, Executive Business Manager for the respondent, but who was not called to give oral testimony.

(4) At a Case Management Hearing in February 2022, the issues had been agreed and recorded in the Orders (pages 73-76).

(5) On day 1, the claimant renewed an application to postpone the Hearing due to a change in instructed Counsel. This application had in fact been made in writing on Friday 23 June on the basis of the sudden unavailability of retained counsel. No reasons had been provided. It emerged during the application, this was due to Counsel increasing fees which the claimant could not afford. It also emerged however, that this was known to the claimant early May 2023.

(6) The application was refused pursuant to the overriding objective to avoid delay and save expense. The claimant did mention that the respondent had previously had the case postponed more than once. During deliberations, the Tribunal checked the file from which it understood the respondent had applied for an earlier listing in October 2022 to be postponed due to a clash with inset/staff development training days. The application was granted. There was no Reconsideration of that decision or an appeal against that decision. The Tribunal also checked when a new 5-day case could be listed, which was not before February 2024. The issues in this case date back to matters in 2020 up to and including the claimant's resignation in September 2020. The Tribunal considered the prejudice to the respondent in further delay and cost outweighed the prejudice to the claimant in proceeding in this trial window. The claimant has been legally represented for a long time and it was not satisfactory that the application to postpone and/or the instruction of alternative counsel had not taken place a lot sooner than the last working day before trial.

(7) The Tribunal mitigated the impact of the claimant's new counsel's instruction by giving Wednesday morning as time for the provision of further instructions or further preparation for Counsel, before cross examination of the respondent's evidence would start at 1.00pm. This would be after the claimant gave evidence on day 2 (Tuesday).

(8) The Tribunal used day 1 to read the witness statements and documents referred to therein. It only read such further documents it was taken to or directed to read if these were relevant and necessary to an issue in the case. This was made clear at the outset of the Hearing.

(9) Both counsels provided written skeleton arguments which they supplemented orally.

Findings of Fact

(10) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents the Tribunal was directed to read at the outset and only those referred to in evidence and taking into account the Tribunal's assessment of the witness evidence.

(11) Only findings of fact relevant to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was a document the Tribunal was directed to read or was taken to.

(12) The claimant was employed as a nursery nurse from 1 November 2017 until her resignation with effect from 18 September 2020.

(13) The respondent is a Federation of two schools, Forster Park Primary School and Rangefield Primary School.

(14) The claimant worked term time, 28 hours per week. She worked within a Reception class setting.

(15) The claimant is asthmatic. In a biographical form completed and signed by the claimant on 23 October 2017, there was no mention of any medical condition (pages 95-98). The Tribunal rejected the claimant's assertion that she had referred to her asthma (in writing) on this form at the time. The relevant box was blank and the form signed by her and her assertion to the contrary was quite inexplicable. However, on a further data capture form of this kind, the claimant did disclose to the respondent that she had asthma, though not stating it was a disability. This was on 8 February 2020 (pages 118-122). There was no other evidence before the Tribunal that the claimant had mentioned or disclosed her asthma or that it was disabling. At an absence review meeting on 28 February 2020, the claimant did mention she was on anti-depressants but there was no mention of her asthma. The absences related to the claimant's son and the claimant's stress.

(16) On 26 February 2020, Mrs Fenniche sent an email to all staff to allay fears about the spread of the emerging Covid-19 virus. Some members of staff, including the claimant, had travelled to Italy during the half term. In her email, Mrs Fenniche set out the Public Health England guidance for Schools (pages 125-127).

(17) On 11 March 2020, at 8.21am, Mrs Fenniche sent a further email about the spread of Covid 19. In this email, Mrs Fenniche referred to some members of

staff who were self-isolating: in one case because of symptoms in another, because the staff member had visited Italy in the half term break, although neither had tested positive for Covid-19. She also referred to 2 other members of staff who had symptoms who were awaiting advice from NHS 111. The key message in her email was if a member of staff feels unwell, to keep the school updated and to seek advice from 111 and to follow it, to keep everyone safe and well. A Public Health England leaflet was also attached (pages 135-137).

(18) Thereafter, the events of 11 March 2020 were central to the dispute between the parties and the issues in the case.

(19) The Tribunal found that on the respondent's case, the chronology was as follows:

- Ms Dervish-Hassan and Ms Halil, two of the school's teachers, observed the claimant looking unwell. The claimant had been on the phone to NHS direct, 111. The claimant, they alleged, had said to them that she had been told to self-isolate but she did not wish to do so, because she had had, in the previous week, an attendance review meeting. Both alleged that the claimant had said that she thought she had the virus. Ms Halil alleged that the claimant had said "we would all have got it by now if she had the virus." The claimant was informed she should tell the SLT and follow the advice she had been given.

- Subsequently, the claimant was observed being with one of the children's classes. The claimant informed Ms Dervish-Hassan, that she had asked Ms Louise Poulsom, Nursery nurse, to speak to NHS Direct on her behalf. Ms Dervish-Hassan then spoke with Ms Halil who spoke to Ms Poulsom, who informed her that she would be contacting Ms Jane Manoharan.

- Ms Manoharan was contacted by Ms Poulsom who informed her that the claimant had covid symptoms but was refusing to go home. She said she had been told to self-isolate. She had phoned NHS Direct on her behalf, but could not get through. As Ms Manoharan was off site, she tried to contact Mr Bond but was unsuccessful. She contacted Ms Joanne Palmer instead who said she would deal with it. Ms Manoharan had on the previous day had lunch with the claimant but was not told the claimant was feeing unwell.

- Ms Palmer, upon being informed of the concern regarding the claimant, went to find the claimant who was outside Parrott class. Ms Palmer observed her looking fatigued and coughing and leaning against a wall. The claimant informed Ms Palmer that she had been in Italy over the half term, that she had sought advice NHS Direct 111 about a week ago as she was concerned because she had asthma and that she had been told to self-isolate but did not want to. She was asked why but responded by shrugging her shoulders.

- Ms Palmer informed Mr Bond of the matter who then summoned a meeting with the claimant and Mrs Fenniche. Mrs Reynolds was also asked to join the meeting. When Mrs Fenniche arrived for the meeting, she observed the claimant was looking fatigued and was coughing. The claimant was asked if she had been asked to self-isolate and she confirmed she had - on 2 and 11 March 2020. She was asked why she had not followed the advice or informed a member of the SLT and responded that she did not know and shrugged her shoulders. She said she had not been tested and denied her actions were selfish. Mrs Fenniche told the claimant she needed to go home and self-isolate and update Mrs Fenniche about getting a test.

(20) Mrs Fenniche made brief notes of the meeting of 11 March 2020 (page 138). Her more detailed notes were at page 148.

(21) The claimant subsequently, on 15 March 2020, informed Mrs Fenniche, upon her enquiry, that she had been informed by NHS Direct that she did not need to self-isolate as she was not showing symptoms. She said she would thus discuss with Mrs Fenniche about returning to work (page 150).

(22) Mrs Fenniche had a conversation with the claimant on 16 March 2020 in which the claimant was informed she should (continue to) self-isolate. There was no evidence before the Tribunal about the duration of this instruction. The claimant was recorded as signed off as sick 12 to 18 March 2020 with cough and flu like symptoms (page 272).

(23) On 16 March 2020, Mr Bond wrote to the claimant inviting her to an investigation meeting on 25 March 2020 to discuss allegations that:

- the claimant had failed to follow a legitimate management instruction
- the claimant's actions had or could bring the school's reputation into disrepute
- the claimant had caused staff stress and anxiety

(24) These are cited as potential examples of gross or serious misconduct under the respondent's disciplinary policy - see pages 335-336 and a breach of the Code of Conduct in relation to personal integrity (page 304).

(25) On the same day, Mr Bond wrote to several other employees inviting them to investigation meetings too: Ms Ruth Osborne, Ms Collette Thomas-Johnson, Ms Donka Orefice, Ms Scott-Dotting, Ms Myers, Ms Pendry, Ms Ceylan Halil, Ms Songul Dervish-Hassan, Ms Jane Manoharan and Ms Louise Poulsom. Ms Palmer, Ms Loretta Reynolds and Mrs Fenniche were not sent emails/letters but were met with.

(26) Mr Bond met with the witnesses on 18 March 2020. Their accounts of the events of 11 March 2020 were set out in pages 139-148 of the bundle. The chronology of events as described by these witnesses is broadly as set out

above in paragraph 15. In addition, Ms Thomas-Johnson also stated that the claimant believed she had the Covid virus and further that she had been told 3 times by NHS Direct (111) to self-isolate. She said she remarked what was the claimant doing here, that she had old parents and young children. Mr Bond did not meet those witnesses who had expressed to him that they could not offer any direct information i.e. information beyond what they had been told by someone else.

(27) The meeting with the claimant planned for 25 March 2020 was cancelled on 24 March 2020 owing to travel restrictions and social isolating. Instead, the claimant was invited to submit a written account of her position instead.

(28) The claimant did so and provided a statement on 25 March 2020 (pages 174-175). In her statement, the claimant stated:

- She had travelled to Italy between 17 and 23 February 2020.
- Although she had felt unwell, she only had headaches, no other symptoms
- She had called NHS Direct (111), on 27 February and 9 March and her GP on 9 and 11 March
- She said she was advised that in order to have a Covid test, she needed to self-isolate first
- She didn't see why she should be discriminated against if there was no proven case that she had Covid
- She felt discriminated against because she had travelled
- She explained she was asthmatic but that this did not hamper her social, professional or economic life
- She felt other staff had misunderstood her and did not understand why they had not complained to the SMT earlier
- She said she did not have Covid or symptoms and thus denied causing any stress or anxiety to others or bringing the school into disrepute.

(29) As this statement was so different to the version of events observed and reported by several members of staff, Mr Bond elected to invite the claimant to an investigation meeting. That meeting took place on 3 April 2020. The claimant was accompanied by Mr Emmanuel Usikaro, who the claimant said was a family friend. It was not disclosed or known to the respondent that he was a para legal at Gans & Co, the Solicitors representing the claimant in these proceedings.

(30) The minutes of that meeting were at pages 177-178. At this meeting, the claimant dismissed the account of Ms Thomas-Johnson, Ms Dervish-Hassan

and Ms Halil as being incorrect, in particular that she had said she thought she had the virus and that she had said if she had it, they all would have got it by now. She said she only had a headache and was calling 111 because she could not get an appointment to see her doctor without having had a test. In relation to whether she had a discussion with Ms Dervish-Hassan, she said she did not have a direct conversation with her though she might have been there. Mr Usikaro challenged why the claimant was being investigated, stating "as you can see, the claimant is not dead, she called NHS because of the headache, not Covid." In response, Mr Bond replied "That is not the point of the investigation, this is about her actions on 11 March 2020, not her trip to Italy or her having Covid."

(31) Mr Bond added:

"*We are a school with vulnerable children and I have sent large number of my staff home as they or members of their families are vulnerable, If VB had come to the SLT with her underlying health issues, she would also have been sent home. This investigation is to clarify events on and around 11 March 2020*."

(32) Mr Bond produced an investigation report and concluded that the claimant had a disciplinary case to answer (pages 186-191).

(33) By a letter dated 22 June 2020, the claimant was invited to a disciplinary hearing to take place on 29 June 2020. The claimant was provided with all of the documentation with this letter. These were attached as appendices (a) to (r) (pages 185-191). The claimant was forewarned that action up to and including dismissal was possible. The charges were considered to be possible gross misconduct. The claimant was advised of her right to be accompanied and was informed that the hearing would be chaired by Mrs Fenniche, Executive Headteacher.

(34) The Hearing proceeded on 2 July 2020. It was postponed to accommodate the claimant's union representative.

(35) At the Hearing, Mr Bond, Ms Dervish-Hassan, Ms Halil, Ms Manoharan and Ms Palmer were called as witnesses for the respondent and Ms Poulsom was called by the claimant. The claimant and her union representative were entitled to ask questions of the witnesses and did so.

(36) At the hearing, Mr Bond accepted the school had not made it clear that Covid related absences would not be treated and recorded as sickness but said this had been conveyed to individuals who had been shielding. Ms Palmer was asked by the claimant if she was aware that she, the claimant, was asthmatic and she replied she was not until today, the day of the disciplinary hearing. Ms Poulsom stated that when she mentioned to the claimant that she had told her that a (doctor) friend of hers had said the claimant should self-isolate, that this was not true. The Tribunal found however that notwithstanding, Ms Poulsom did so to help the claimant to make the decision *to go home* (see her Whats App message page 198). She confirmed the rest of her statement was correct. In his summing up, the claimant's union representative said the school was right to

question the claimant's actions on 11 March 2020. He also stated that the problem with Covid was that 'we did not have a cure.' He also said that 'constant' reference to the claimant saying she had covid could be dark humour (pages 211-228).

(37) Mrs Fenniche's decision was reserved. Her decision, after deliberation, was to issue a final written warning. She upheld the allegations that the claimant had not complied with a legitimate instruction by not discussing her health concerns with the SLT and had caused stress and anxiety to other staff and as such had breached the expectation of personal integrity in the code of conduct. The allegation about placing herself in a position of disrepute with her colleagues and placing the school in a position of potential disrepute was partially upheld – as the potential disrepute was limited by the confidentiality of the matter. The claimant was given a right of appeal (pages 239-241).

(38) The claimant did appeal but the appeal was submitted outside of the 10-day period. The claimant said Mr Bond should not have been part of the disciplinary hearing; the warning was too harsh; the 18-month period of the warning was unjust; that the case had not been proved against her; challenged the allegations constituted serious misconduct.

(39) The appeal was submitted on the last day of term. It was not actioned/acknowledged until 28 August 2020 when Mrs Fenniche said the Governors would receive the appeal on their first day back in the new term (1 September 2020) (page 261).

(40) On 19 August, Mrs Fenniche received a reference request for the claimant from Reed. The request stated the claimant's employment period as 15 August 2018 to 19 August 2020 (page 249-250). This was chased on 24 August 2020 (page 253).

(41) Mrs Fenniche emailed the claimant explaining she had received a request from Reed asking if the claimant would be back at school on 1 September 2020 and if she wanted the reference request completed. The claimant replied stating that she had not given anyone Mrs Fenniche's email address and requesting a reference. The Tribunal found that it was more likely than not that the claimant had provided some information to Reed, particularly around a contact name and email address.

(42) The claimant was signed off for 2 weeks on 2 September 2020 (page 271- 273) and again to 20 September 2020 (276) for headaches.

(43) The claimant resigned from her employment on 18 September 2020. She cited bullying, harassment and discrimination and a breakdown in the employment relationship. She said she had been treated as someone with covid and being sent on an indefinite suspension. She added that she was now having to take medication for depression consequent on her treatment.

(44) On 18 September 2020, Mrs Fenniche wrote back to the claimant asking her to reflect on her decision to resign and offering to meet with her (page 279). On 24

September 2020, the claimant (re) confirmed her decision to resign and withdrew from the appeal process (page 285).

Applicable Law

Constructive Unfair Dismissal – S.94 ERA

(45) Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

(46) The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***

(47) The correct test for constructive dismissal was set out and established in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*** as follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

(48) In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence was repudiatory.

(49) In ***Ishaq v Royal Mail Group Ltd UKEAT/0156/16/RN, the EAT***, following a review of relevant authorities, approved the principle that it is enough that an employee resigns in response, at least in part, to a fundamental breach by the employer citing the Court of Appeal decision in Nottinghamshire County Council v Meikle 2004 EWCA Civ 859.

Direct discrimination – S.13 EqA

(50) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Discrimination arising from disability – S.15 EqA

(51) 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.

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

(52) The general burden of proof is set out in S.136 EqA. This provides:

"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."

(53) S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(54) The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(55) In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

(56) In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

(57) In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

(58) In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN*** the EAT stated:

"*26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

(59) In ***Pnaiser v NHS England & Anor UKEAT/0137/15/LA the EAT*** stated, in reviewing the authorities:

"*31 (a) A Tribunal must first 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.*

31 (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. 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."

(60) In ***Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ*** the EAT stated:

"*15. In those circumstances, I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an*

effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established.

16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in Weerasinghe. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?"

Conclusions and analysis

(61) The following conclusions and analysis relate to the issues in the case and are based on the findings which have already been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Issue 1.1.1 - being accused of having Covid and as a consequence, being bullied.

(62) The Tribunal concluded the claimant was not accused of having covid and as a consequence bullied. The Tribunal found that the overwhelming and corroborated case against the claimant from multiple witnesses was that it was the claimant herself who had informed them, that she thought she had Covid; that she had been told to self-isolate and that she looked, visibly unwell including symptoms of coughing and leaning against a wall to stay standing. The accounts of Ms Dervish-Hassan, Ms Halil and Ms Thomas-Johnson were in particular consistent and the Tribunal found that Ms Dervish-Hassan was present at the time during a dialogue with the claimant as summarised by her. It was remarkable that the claimant's counsel did not put to her that no such conversation took place. There was no evidence before the Tribunal that any of these witnesses were operating with ill motive or had any axe to grind. Neither was it asserted that there was a conspiracy. On the contrary, the claimant's own evidence was there were good relationships before these events between her and the other teachers. The Tribunal concluded that there was an element of fear and/or anger amongst the respondent's teachers about the claimant's actions and irresponsibility. Such emotion amongst them however, had a reasonable and proper cause. The Tribunal concluded that their accounts were not exaggerated or over-stated and were truthful.

Issue 1.1.2 – On 11 March 2020 being indefinitely suspended.

(63) The Tribunal concluded that the claimant was not indefinitely suspended on 11 March 2020. The most contemporaneous account of the basis upon which the claimant was asked to go home on 11 March 2020 was in the emails exchanged between the claimant and Mrs Fenniche on 12 and 15 March 2020 (pages 149-152). From these emails, the Tribunal concluded that the claimant was being asked about whether she had taken a Covid test and its result. In the claimant's email of 15 March 2020, she said she had been told that as she was not showing any symptoms, she would not be tested. She went on to say that she had also discussed about returning to work and was informed it was ok for her to do so and she would call Mrs Fenniche about this tomorrow. That was not evidence of an indefinite suspension of the claimant, far from it. Even if the claimant's case was wider and was about whether there was a de facto indefinite suspension from 11 March 2020, this went against the express statement in the respondent's letter of 7 April 2020 (page 179), reporting on the outcome of the investigation, in which the claimant was informed that whilst waiting for a (disciplinary) hearing date, she should continue to work from home.

(64) Furthermore, the school went into lockdown shortly after and the claimant completed online training courses on 27 March, 7 April (x 2), 30 April and 2 May 2020 (pages 389-393). Whilst the claimant had raised an issue about access to a course on 29 April 2020, the Tribunal concluded that the claimant sent and received emails on 29 and 30 April 2020 using her work email address. The claimant's assertion to the contrary was rejected and the claimant offered no credible explanation for why the respondent's production of the emails showing these as sent/received from her work address were not truthful. The claimant stopped short of saying these had been 'doctored' but neither did she concede that she had been mistaken about these emails.

(65) The claimant, as a nursery nurse, was given no more or less work to do than other nursery nurses. The Tribunal accepted the evidence that 3 other nursery nurses were also working from home doing very little other than comparable online training. Whilst teachers of other classes were subsequently set up to do some virtual learning (from around end of April 2020 onwards), the nursery was not set up to do virtual learning. Mrs Fenniche's evidence was not challenged and was accepted by the Tribunal.

Issue 1.1.3 – subjecting the claimant to a disciplinary process.

(66) The claimant was subjected to a disciplinary process. The Tribunal concluded however that the respondent did so for reasonable and proper cause. The case against the claimant was at its highest very serious and at its lowest, serious. At the investigation stage, the evidence against the claimant for her alleged wrongdoing was comprehensive. The Tribunal concluded that by the disciplinary stage, Mrs Fenniche was in particular concerned by the claimant's lack of remorse and the claimant's persistence in maintaining her position. The claimant simply did not back off. Mrs Fenniche's contemporaneous thoughts

were captured in her disciplinary checklist where she cited a lack of remorse and admittance (page 236). The Tribunal concluded that it was hard to think of anything else the respondent ought to have done in these circumstances. This was a school setting at a time when there was heightened anxiety about Covid nationally and beyond. Even on the claimant's own case as advanced by the claimant's union representative, the respondent was right to question the claimant's actions on 11 March.

Issue 1.1.4 – issuance of a final written warning

(67) The claimant was issued with a final written warning on 6 July. The Tribunal concluded that the respondent did so with reasonable and proper cause. The claimant was arguably fortunate that she was not dismissed. The Tribunal concluded that on the information and evidence before it, any such express dismissal, would more likely than not be within the range of reasonable responses and not one with which the Tribunal could have interfered with by some distance. The imposition of an 18 month warning was within scope of the disciplinary policy (see page 329) and it was clearly commensurate to the nature and severity of the wrong doing. It was imposed after a substantial investigation and disciplinary process. The claimant was accompanied by a union officer at the latter and a family friend who was also a para legal in a law firm at the former. The claimant did appeal against the final warning but that was not in scope of the claimant's pleaded case. The Tribunal mentions in passing however, that that appeal was submitted out of time but in any case, it was reasonable and proper that for an appeal lodged on the last working day of term, not to be acted upon until the commencement of the new term. The claimant also alluded to impropriety of Mrs Fenniche chairing the disciplinary hearing having sent the claimant home on 11 March 2020. This too, was not pleaded as part of the claimant's alleged breaches of the implied term of trust and confidence. The Tribunal mentions in passing however, that it would have been slow to reach a conclusion that this was procedurally improper – Mrs Fenniche had not been involved in the investigation, it is not uncommon for senior personnel to be involved at the outset of a matter of importance but then to distance themselves from any subsequent investigation. Furthermore, the claimant had instigated an appeal which could have cured any alleged procedural defect.

(68) Thus, the Tribunal concluded that the respondent did not breach the implied term of trust and confidence. If the Tribunal was wrong about any of its conclusions, the Tribunal concluded the claimant did not resign because of any alleged breach, but because she had lost face with/felt unable to return to work with individuals, in particular Ms Monoharan, who had held the claimant responsible for her actions in spreading stress and anxiety about the possibility of her having covid (based on the claimant's own say so) and refusing to self-isolate, which affected the actions and decisions of others. The claimant when asked about the key reason why she resigned in questions from the Tribunal, cited the comments of Ms Monoharan in this regard. Ms Monoharan's comments were reasonable and proper and not a breach of the implied term of trust and confidence.

Direct Disability Discrimination

(69) The Tribunal concluded that the claimant's case in this regard was extremely weak. The reason why the respondent treated the claimant as it did was because the claimant had informed other employees that she thought she might have covid, she had been told more than once to self-isolate but had not done so and because she was showing some symptoms of possible covid ('the material circumstances'). The reason why had nothing to do with the claimant being asthmatic. Put differently, the claimant was not treated less favourably than a hypothetical comparator whose material circumstances were the same (as set out herein) but who did not have the disability of asthma. Such a person would have been treated no differently. In addition, the claimant had asserted that the reason she felt discriminated against was because of her travel to Italy – she said this in her statement for the investigation (page 174a). There were no or insufficient facts from which the Tribunal could conclude a prima facie case of direct disability discrimination. The burden of proof did not shift.

Discrimination arising from Disability

(70) The Tribunal concluded that this claim was equally tenuous as the direct discrimination claim. In closing submissions, the Tribunal tried to extract the claimant's case as her case before the Tribunal in testimony was that she only had the symptom of headaches which she said was in consequence of her disability of asthma. The Tribunal was not taken to any evidence to support this causal assertion. Neither did the claimant give any evidence about this. In fact, the claimant's case was that her headaches were connected to medication she was taking (page 3 of her witness statement, 7th paragraph from the bottom). This was consistent with her assertion that her headaches were in consequence of depression medication she had been taking since January 2020 – see 16 March 2020 entry (page 154). In addition, the unfavourable treatment of being subjected to a disciplinary process and receiving a final written warning was not because of the claimant having a headache – it was for the reasons set out above under direct discrimination.

Knowledge of Disability

(71) Given that the Tribunal has concluded both discrimination claims fail, the Tribunal did not need to determine whether or not the respondent had actual or constructive knowledge of the claimant's disability of asthma. Without reaching a conclusion, it is likely that the Tribunal would have concluded that whilst the claimant did disclose on an employer form in February 2020 that she had asthma, this did not amount to knowledge that she was thereby disabled by reason of asthma. There was no assertion that the respondent knew the claimant used an inhaler or how frequently or that she had had any cause to raise any concern or need about her asthma at work. In the last paragraph on page 3 of her witness statement, the claimant had said that her asthma had not in any way hampered her social, economic or professional life.

(72) In pursuance of the foregoing analysis, all the claims are not well founded and are dismissed. The Tribunal's findings and conclusions were unanimous.

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Employment Judge Khalil

06 July 2023