EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y (1)

Z (2)

HELD AT: Manchester **ON:** 17, 18, 20, 21, 24 & 25 April 2023

BEFORE: Employment Judge Johnson

MEMBERS: Mr A Egerton
Ms H Sheard

REPRESENTATION:

Claimant: unrepresented
Respondent: Ms L Quigley (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of disability discrimination is not well founded, which means that the claim is unsuccessful.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as a teacher with the first respondent school (the school). As the first respondent was a community school, the claimant's contract of employment was actually with the second respondent local authority (the Council) with the school's governing body and Head Teacher being responsible for the recruitment and dismissal of staff and the day to management of staff respectively.

2. The claimant worked at the first respondent School (the school) from 1 September 2020 until 31 August 2021 when his employment was terminated. The claimant had actually only worked for the school for a few days before he began a lengthy period of sickness absence, following his arrest and subsequent investigation into a possible criminal matter by the Police. He ultimately was fit enough to return to work in 2021 but was suspended while the lengthy investigation continued and was eventually given notice of dismissal with effect on 31 August 2021.

3. He presented a claim form to the Tribunal on 30 November 2021 following a period of early conciliation from 12 November 2021 until 23 November 2021 and he brought a complaint if disability discrimination.

4. The respondents presented a response resisting the claim and arguing that the claimant was not disabled within the meaning of section 6 Equality Act 2010 (EQA).

5. The case was subject to case management hearings, initially before Employment Judge (EJ) McDonald on 22 April 2022 when the case was listed for a final hearing, issues identified, and case management orders made.

6. EJ Leach considered the question of disability at a preliminary hearing on 27 July 2022 when he determined that the claimant was disabled from on or about 10 August 2021 by reason of reactive depression and acute post traumatic stress state.

7. On 24 January 2023, EJ Ross heard a further case management hearing and rejected the claimant's application that the response should be struck out under Rule 37(1)(b). However, she noted that the claimant confirmed that he wished to remain anonymous in accordance with Rule 50 in relation to any promulgated decisions of the Tribunal, (being named as 'X').

8. This final hearing was listed over a 6-day period in Manchester before a full Tribunal. As the claimant was unrepresented, considerable time was spent at the beginning of day 1 in order that the claimant could understand the process to be followed, the order of witnesses, the importance of considering the list of issues when determining what questions to ask in cross examination and the rationale behind 'final submissions'.

9. The claimant raised issues regarding disclosure (discussed in 'Evidence Used' section below) and also said that he was interested in the anonymity order being extended to cover the respondents too. Ms Quigley confirmed that she would take instructions and it was ultimately agreed that the parties names would remain anonymous in accordance with Rule 50(3)(b).

Issues

10. The parties agreed a list of issues and it was identified and annexed to the case management order made by EJ McDonald on 22 April 2023, (pp49-50). The complaints involved direct discrimination and discrimination arising from a disability contrary to sections 13 and 15 Equality Act 2010 respectively. The

question of disability was resolved at a preliminary hearing before EJ Leach on 28 July 2022 when he determined that the claimant had a disability at the relevant time (on or about 10 August 2021) in that he had a mental impairment of reactive depression and acute post-traumatic stress state.

Evidence used

11. The claimant was the only witness who gave evidence in support of his case and his statement was produced and exchanged with the respondents before the final hearing.

12. The respondents relied upon the following witness evidence and heard in this order, (with the witnesses' names being redacted in accordance with further Rule 50 decision made by EJ Johnson on 11 August 2023 following consultation with the parties):

    a) A (Head Teacher from 1996 to 31 August 2021)
    b) B (Local Authority Designated Officer (LADO))
    c) C (Head of HR for the Council)
    d) D (HR Business Partner for the Council)
    e) E (acting Chair of Governors at material time)
    f) F (parent governor)
    g) G (current Chair of Governors)

13. The parties relied upon a bundle of documents which ran to more than 500 pages.

14. There were 2 additional emails which were permitted to be added and which had been relied upon by the claimant. These related to disclosures made by CPS to the respondents and requests made of the first respondent to obtain recordings of calls with Head Techer. The inclusion of both documents was not objected to by Ms Quigley, and they were added to the bundle as C1 and C2. As it turns out, they were not used during the hearing.

15. There was also an issue regarding transcripts of the calls between the former Head Teacher A and the claimant, they were included in the bundle, but claimant said not exhaustive record and disclosure had been selective. The delay in their disclosure arose from A's retirement and their location only became clear during the respondents' pre hearing case conference. We accepted A's evidence that he located all of the transcripts which he could find and there were other calls where the recordings had not been preserved.

Findings of fact

<u>The respondents</u>

16. First respondent (Y) is a community primary school ('the School') in a North West metropolitan borough council area ('the Council'). The School did not employ the claimant (X) but as he was a teacher they managed him on a day

to day basis and were responsible for deciding whether he not he should be dismissed.

17. Second respondent (Z) is the Council and is the employer of teachers and staff working in community schools which included the first respondent. Teachers and staff are subject to Teachers Pay and Conditions which are agreed nationally and known as the Burgundy Book

18. The second respondent has a HR team/Legal and services who provide employment advice and support and it is understood that these services are also provided to school though SLAs.

19. Like all large public bodies, the Council produces a number of Policies and Procedures and in this case, the bundle included the grievance procedure, disciplinary procedure and equality policy. It is understood that these policies and procedures were adopted by the School.

20. The School and the local authority have a responsibility for the safeguarding of children in the borough. Safeguarding is coordinated by the Local Authority Designated Officer (LADO). This is the person who should be contacted when there are concerns regarding someone who works with children and whom it is felt there may be safeguarding concerns.

21. The Head Teacher A of the School had been in post since 1996 and was planning to retire in the summer of 2021.

<u>The claimant and his appointment by the respondent</u>

22. The claimant was a qualified teacher and had 10 years' experience in the primary school sector. The Tribunal were not aware of any conduct or capability issues having arisen with previous schools where he worked.

23. The Head Teacher explained that for 2020/21 academic year, the School had two teaching vacancies which were advertised and which could have been offered as either fixed term or permanent.

24. The claimant applied for the temporary fixed term post and explained during the interview process which took place remotely by Teams that he was planning to return to the USA to work as a counsellor and only intended working for one more year as Covid has prevented him moving to the USA earlier. This suited the School and the Head confirmed that they needed a strong and experienced teacher, and they were happy for the claimant to work one year, but nonetheless offered a permanent contract beginning in September 2020.

25. The claimant attended a Pupil Progress Discussion one evening in July 2020 and voluntarily during the summer to set up his classroom for the new academic year.

26. The first day of the new School year was Tuesday 1 September 2020 being a professional activity day and the claimant worked the remaining 3 days that week with his class.

The claimant's arrest and bail

27. On Friday 4 September 2020, following the end of his day teaching, the claimant was arrested by the Police on suspicion of sexual communication with a child. That evening he was placed Police bail with the following conditions (recorded in the LADO B's email to the School and others on 16 September 2020), for an initial period of 28 days from 5 September 2020 to 2 October 2020 (p.B31):

    a) not to work with any child under age 18.
    b) Directed to reside at home address.
    c) No direct contact with the 'victim' in [their town of residence].

28. These conditions understandably affected the claimant's ability to return to working at the School the following week. He telephoned the Head on Sunday 6 September 2020 and informed him of his arrest and bail. It was decided by the Head that the claimant should not return to work, although the claimant argued in evidence that the bail conditions did not prevent him from working as a teacher.

29. The Head emailed B (LADO) on Monday 7 September 2020 explaining what had happened and asking that he be kept informed should the Police contact the LADO about the claimant's situation, (B34). B's deputy was covering for him while he was away on annual leave, and he returned to the Head on 14 September 2020 confirming that the Police had been in touch.

30. It the investigation was hoped to be completed quickly, but that in reality, investigations of this nature could take some time to resolve, (B47).

31. The bail conditions were renewed on a regular basis and continued for the duration of the criminal process which was still continuing at the date that the claimant's employment ended, ending on 4 November 2021.

32. The claimant argued during evidence that it would have been practicable for the School to allow him to return to work while subject to the Police Bail. He said that as teacher with a TA working alongside him, he would effectively have another adult with him at all times. In addition, he could have a School volunteer such as one who assisted children with reading or a family member present for the times when he had to leave the classroom to go to the staff toilets or to the staff break. He argued that it was analogous to the staff bubbles which were already in place as a result of Covid. While it was theoretically possible to put in place a system which complied with the Police bail conditions, we do not accept that it was reasonably practicable. To provide a sufficiently robust system to ensure compliance with the bail conditions at all times, this would have required appropriately qualified additional staffing at a further cost, it would not appropriate to rely upon volunteers given the significance of safeguarding in a School setting.

33. As a consequence, the School was forced to rely upon supply teachers during the claimant's absence to cover his class. This continued throughout his absence and was a necessary expense in order that his class had a teacher. Because the absence happened so quickly following his appointment, the School were unable to rely upon the insurance policy that is typically used to cover the costs of appointing a supply teacher during sickness absence.

34. This meant that the School not only had to pay the cost of the claimant's sick pay (and suspension pay later on), but also the cost of the supply teachers used which cost approximately a £1,000 a week. Although the School was able to afford this cost initially, it became clear that as the months progressed, the cost becoming increasingly onerous. Although this was challenged by the claimant on balance of probabilities, we accepted the Head A's evidence that a expense of this magnitude could not be sustained on a long term basis and that given the high number of SEN children in the School (and in the claimant's class), supply teachers had to be sufficiently experienced and therefore more expensive.

35. During the 2020/21 academic year, the School relied upon a series of 5 supply teachers and we accepted the Head's evidence that this disrupted the children's education and did not allow for continuity of teaching. Although there was some dispute in evidence as to overall impact and quality of supply teachers, we find that it is inevitable that primary school children learn best with dedicated classroom teacher and that it is not always easy to find a suitable supply teacher who is available for the entire school year.

<u>The claimant's sickness absence</u>

36. The claimant attended his GP on Monday 7 September 2020 and was signed off work. He was initially provided with a fit note lasting for two weeks confirming that he was unfit for work and describing 'acute post trauma stress state', (pB32). This sickness absence continued with further fit notes being issued with the next fit note describing in addition that the claimant had tested positive for Covid 19 as well as having post traumatic stress disorder, (pB33). The fit notes were renewed on a monthly basis with the fit note dated 24 March 2021 indicating that *'Acute post-trauma stress – starting to recover, feeling more positive, looking for phased return to work in 4 weeks.'* At this point the claimant would have exhausted his full contractual sick pay and any further absence would have been half pay which would last for a further 6 months, (pB169).

37. Unfortunately, he continued to experience health issues and remained absent on sick leave on 21 April 2021, but on this occasion, his absence was attributed to an *'excision of pilonidal sinus',* (B177). It indicated that a phased return to work should be explored with amended duties and workplace adaptations while he recovered from this surgery. No mental health issues were described. A further sick note describing the same condition was provided on 13 May 2021 signing the claimant off work until 24 May 2021 and recommending workplace adaptations, (B203). These adaptations although

unspecified, appeared to relate to the more recent physical illness rather than the earlier post traumatic symptoms described in earlier fit notes.

38. Regular telephone conversations took place between the Head and the claimant and at the first recorded catch up call on 1 October 2020, OH was offered by the Head and it was declined because the claimant felt that he would not be able to *'open up'* with an OH physician. Instead, he explained that he was paying privately to attend The Priory Hospital in Altrincham. No documentary evidence was included within the bundle concerning this attendance. The Head also explained that he was entitled to use his trade union solicitor in this process, if he was paying union fees. However, no evidence was available that such was support was sought. What the Tribunal noted from the regular calls between the claimant and the Head was that their conversations were friendly and supportive and that continued by and large until the claimant was suspended in May 2021.

39. The absence understandably would not go unnoticed by the teaching staff and to avoid any embarrassment to the claimant during his absence, the Head provided limited information within his periodic Head Teacher reports and it appeared that staff concluded that the reason for the absence was related to long term Covid symptoms. This was not surprising given that absence took place during late 2020 and 2021.

40. The claimant was subject to the Managing Attendance for Techers and Schools based Support Staff Policy and Stage 1 meeting took place on 2 March 2021. A letter was sent the following day confirming that he had hit the 20 continuous working days lost trigger point and that the reason for absence was Acute Post Traumatic Stress State. It was agreed to refer him to OH, (B158-9).

41. An Occupational Health ('OH') telephone management referral took place on 20 April 2021 with the relevant OH Manager. In her letter produced on 22 April 2021 she said that:

    'From the information [the claimant] provided his mental health has considerably improved but although he has contacted several counselling organisations he has not been able to access counselling support due to long waiting lists they have accrued as a result of the Covid19 pandemic.'

    The surgical intervention was mentioned, and a recommendation was made for a phased return over 4 weeks with some flexibility over the *'logistics'.* The adjustments recommended to the physical issues and involved a good adult sized chair and caution with manual handling, (B179).

42. A second OH report was prepared on 9 June 2021 following a telephone review on the previous day, (B230). The OH Manager explained that the claimant continued to *'recover both physically and mentally but informed me that due to an ongoing internal investigation he has not yet been able to return to work.'* He was described as being *'medically fit to return to work once the aforementioned investigation had been concluded'.* It was confirmed that he would now be discharged from OH and a phased return recommended.

43. Interestingly, although during the LADO strategy meeting a few days earlier on 4 June 2021, reference was made to the claimant attending Hospital the previous weekend with *'suicidal thoughts',* this did not appear to be mentioned in the OH report. We find that had the claimant referred to this incident with OH, on balance she would have recorded this as it would have clearly been relevant as to whether he should be discharged or not.

The claimant's return to work and suspension

44. The claimant was subject to regular reviews at meetings chaired by the LADO, attended by the Head and other relevant local authority/police staff. While he remained absent from work through ill health, the LADO's primary focus was upon the completion of the Police investigation.

45. Once it became clear that the claimant was likely to be declared fit for work following the initial OH letter, the Head expressed concern with the LADO about whether he would be allowed to return to work with the criminal investigation still in progress, (B18). HR began preparing a script to be used to suspend the claimant and an email exchanged concerning this issue too place between the LADO and D the Council's HR Business Partner (who provided advice to the School) on 6 May 2021, (pB201). The Head had a conversation by telephone with the claimant on13 May 2021 explaining that he had been discharged by the District Nurse and was now fit for work. The Head explained that he would now be suspended.

46. A suspension letter was sent to the claimant on 17 May 2021 and confirmed that the second respondent's governing body were suspending him *'whilst an investigation into the following takes place: That you have been arrested by [the Police] in relation to an allegation relating to the safeguarding of children', (*B209-11). Reference was made to *'Keeping Children Safe in Education'* and that an investigation would take place following the completion of the Police investigation. However, it was made clear that the suspension *'presumes neither innocence nor guilty'* which effectively explained that this was neutral act.

47. The suspension continued until the claimant was dismissed, however, given the safeguarding concerns involved in this matter it was entirely reasonable for a suspension to be imposed once the claimant was fit enough to return to work as the bail conditions remained in place and it was not practicable for him to return to work.

The governor's meeting and the decision to dismiss

48. The governors were informed of the claimant's suspension on 17 May 2021 by letter and that it related to *'…an investigation in regard to the safeguarding of children',* (pB212). Up until this point, the only people at the School who were aware of the actual safeguarding issues arising from this matter were the Head and his two Assistant Heads who formed the Senior Leadership Team, ('SLT').

49. B (LADO) emailed D (Council HR) and copied in A (the Head) on 27 May 2021 concerning the CPS decision that there was insufficient evidence to bring charges against the claimant and they wanted there to be no further action, (known as an *'NFA').* The Police were unhappy with the decision and were seeking to have it reviewed and in the alternative, were considering a civil *Sexual Risk Order.* B explained in his email that this civil sanction if granted, would prevent the claimant from teaching. Essentially, this email was explaining the process was far from over and whatever route was taken by the Police, it would be some time before the School would in a position to know whether he could return to work as a teacher or not, (B215).

50. A was understandably concerned about the lack of progress with the Police investigation and on 28 May 2021 he emailed B and D and explained his concerns as follows [215]:

    'We are not trying to push in from of the queue at [The Police's other] important cases but have got to employ a teacher for September and can no longer afford to pay for 2 as we have had to do this year as well as the educational damage of a string of supply teachers. The later we leave it the lower the calibre of candidates we will have to choose from. We have already missed the deadline for [recruiting] teachers in post.

    Would be useful to know how quickly we can act once we have the information'

51. The next LADO Strategy meeting concerning the claimant took place on 4 June 2021 chaired by B and attended by A, D, C (the Council's Head of HR) and the investigating detective from the Police, (ppB219-225). The meeting discussed the present position in the investigation and that the Police were appealing the NFA decision of the CPS which meant that the claimant's bail conditions remained in place. B noted that it could be a few months and up to a year before a decision was reached concerning the investigation. C was concerned that neither the School nor the Council would want to wait for all that time and would need to *'act before then'.* Although some discussion took place regarding the School waiting until the Police had concluded this investigation, in the minutes A said that *'the School simply cannot afford to carry on paying [the claimant's] salary plus a supply teacher to cover. Have to lose a teacher next year due to lower rolls/budget reduction.'* He also noted that *[a]s a community School [the Council] is employer but decision regarding dismissal etc, would be made by the board of governors.'* It was decided that for the moment, the suspension would remain in place, but that A would meet with C and D of the Council's HR service to discuss the next steps to take.

52. On 22 June 2021, the claimant emailed A, acknowledging that he remained suspended but asking what role he would be suspended from in the next academic year and what would be communicated to staff and parents, (B234). At the next LADO management meeting on 7 July 2021, the Police detective confirmed that there had not been any meaningful progress concerning the appeal to the CPS and it was confirmed that the claimant's suspension remained in place until 1 September 2021, (B248-251). The Tribunal noted that there was little prospect of this case being resolved for some time and on

9 July 2021, C emailed D to say that *'…I am proposing to write to him [the claimant] on behalf of the governing body and terminate his contract, giving him two months' notice',* [B258]. This was in reply to an email from D concerning the contractual under notice periods for Teachers Terms and Conditions, (known as the Burgundy Book). C accepted in evidence that he played a role in deciding when dismissal should be considered. The email which he sent was clumsy as it gave the impression that he was the decision maker, but what followed was the establishment of a governor's committee to consider whether the claimant could remain employed. What we did note however, was that C's view that the claimant's contract should be terminated was not connected with the claimant's health issues but by the unresolved investigation.

53. The Chair of Governors at this time was E who was also a councillor with the Council. D telephoned him on 26 July 2021 to explain the background to the case and in an email sent the same day, referred to the claimant, that he was suspended, that the criminal investigation remained outstanding and that even if their appeal against NFA was unsuccessful, there was likely to be prolonged period involving a civil process. C proposed that the claimant be dismissed, because it had been patient and reasonable but could not wait any further due to limited resources. He confirmed a panel of 3 governors chaired by E should consider this matter and confirm whether they agree with C's proposal, (B269).

54. C was clearly nudging the governing body into making this decision through his communications with the Chair. While this would be problematic in a case involving a complaint of unfair dismissal as it would blur the lines between the identity of the decisions makers and a fair dismissal procedure, in this case it was not as significant. More importantly, the email makes no reference to the claimant's health issues.

55. E asked two not teaching governors to form the committee and they were F and G, who were a parent governor and a teacher from another school respectively. E said the School *'was not awash with governors'* at the time and F and G were chosen because they would listen to the evidence and ask questions. There was no note or minute of the meeting and G said that this was unusual. However, all 3 governors gave evidence to the Tribunal and although G felt that upon reflection she should have asked more questions about the claimant's sickness absence, it was clear that collectively the governors were concerned about the duration of the investigation and the expense that this would cause the school in terms of ongoing staffing costs. None of them gave any evidence which suggested that the claimant's health was an issue of concern and indeed, their evidence was convincing that they were unaware of any health concerns. F said the panel had no knowledge of mental health issues and the reasons behind the sickness absence. The meeting took place without the claimant being invited to attend or to make any representations

56. Although the Tribunal felt that it would have been reasonable to expect that a note had been taken during this meeting, we found that the 3 governors were reliable in terms of the evidence given regarding the decision to dismiss and

that it was made because of ongoing suspension, the costs involved when the school had limited resources and this was having a negative impact upon the education of children.

57. The governors' decision was confirmed in a short outcome letter sent to the claimant on 10 August 2021, [B281]. The letter did not offer a right of appeal and the termination of employment was confirmed as being 31 August 2021 which was the end of the 2020/21 academic year.

58. The Tribunal understands that the Police investigation continued for some time after the claimant's dismissal and that it only concluded shortly before this final hearing, more than 2 ½ years after it began

Law

59. Section 6 of the Equality Act 2010 (EQA) provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

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

61. Ms Quigley referred the Tribunal to the following cases in relation to direct discrimination:

    a) In terms of knowledge of disability by the respondents, Ms Quigley referred the Tribunal to the following case of *Gallup v Newport City Council (No.2)* [2016] IRLR 395.
    b) *London Borough of Islington v Ladele* [2009] IRLR 154
    c) *Nagarajan v London Regional Transport* [1999] IRLR 572
    d) *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. – paras 7-12 comparators
    e) *Bahl v Law Society* [2004] IRLR 799.
    f) *Zafar v Glasgow City Council* [1998] IRLR 36 HL.
    g) *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439. ('reason why' each alleged purported discriminator acted).

62. 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. However, this kind of

discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

63. Miss Quigley referred the following cases in relation to section 15 EQA:

    a) *A Ltd v Z* [2019] IRLR 952
    b) *City of York Council v Grosset* 2018 ICR 1492
    c) *Donelien v Liberata UK Ltd* [2014] UKEAT/0297/14.
    d) *Pnaiser v NHS England* [2016] UKEAT/0137/15/LA.
    e) *Herry v Dudley MBC* [2016] UKEAT/0100/16.
    f) *J v DLA Piper UK LLP* [2010] UKEAT/0263/09.
    g) *Ridout v T C Group* [1998] UKEAT/137/97.
    h) *Alam v Secretary of State for the Department for Work and Pensions* [2009] UKEAT/0242/09.

64. 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.

65. Ms Quigley referred the Tribunal to the following cases relating to the burden of proof:

a) *Igen Ltd v Wong and Others* CA [2005] IRLR 258.

b) *Brown v Croydon LBC* [2007] EWCA Civ 32.

c) *Anya v University of Oxford* [2001] IRLR 377.

Discussion

66. This case involved a relatively short list of issues which relied upon direct discrimination under section 13 EQA and discrimination arising from disability under section 15 EQA relating solely to the decision to dismiss the claimant.

67. The question of disability was resolved at a preliminary hearing before EJ Leach on 28 July 2022 when he determined that the claimant had a disability at the relevant time (on or about 10 August 2021) in that he had a mental impairment of reactive depression and acute post-traumatic stress state, (A51). The Tribunal noted that the date of 10 August 2021 was relevant in that it was the date of dismissal, which is of course the discriminatory act relied upon by the claimant in this case.

Direct discrimination

68. The claimant did not rely upon a named comparator in relation to this complaint and instead identified that any comparison should be made with a non-disabled hypothetical comparator.

69. The respondents accepted that the second respondent School dismissed the claimant. Despite the reservations described above concerning the role of C in the decision to dismiss, the Tribunal accepted that the decision makers for the purposes of this claim were the 3 governors, namely E, F and G. They agreed unanimously to dismiss the claimant.

70. Given that this is an allegation of direct discrimination by reason of the claimant's disability, it is essential that the governors who reached this decision knew that the claimant was disabled. Without this knowledge, it is not possible for this claim to succeed.

71. For the reasons which we gave in the findings of fact we were unable to find that any of the 3 governors had knowledge of the claimant's disability. They were aware that a male teacher had been absent from work for a period of time by reason of sick leave and this was evident from the redacted Head Teacher's reports and governing body minutes during the 2020/21 academic year. Although the claimant was not named as the absent teacher, it was likely that the governors would have been aware of who that teacher was given the small number of teachers employed by the School and that few men were employed as teachers. By the time the decision to dismiss had been made, the claimant was fit to return to work and was suspended. It was his suspension and the ongoing investigation which was identified by C when he asked E to arrange a governor's panel and none of the governors were aware of any health issues or the reasons behind the claimant's previous sickness absence.

72. While this does not assist the claimant in relation to his claim, it is to the credit of A that he ensured that as few people as possible were aware of the claimant's disability and thereby maintaining confidentiality. The claimant was unable to provide any evidence during the hearing which persuaded the Tribunal that the 3 governors could reasonably have been expected to know of his disability when they made the decision to dismiss. He did suggest in cross examination that there were documents which would suggest that the governors were aware of his disability, but he did not identify them to us during the hearing and we did not see anything to suggest that this was the case during our deliberations. Indeed, we agree with Ms Quigley that in cross examination the claimant *'reluctantly accepted' (*as she put it in her submissions) that he could identify any positive evidence to support his assertion.

73. For these reasons, this particular claim must fail because the alleged discriminating governors did not know that the claimant was disabled at the material time identified by EJ Leach in his judgment concerning disability.

74. However, even if the claimant had been able to convince the Tribunal that the governors were aware that he was disabled when they decided to dismiss him, we do not accept that this treatment was because of his disability. The information and documents available to the governors before they reached their decision was very much focused upon the lengthy investigation process by the Police, that the claimant remained suspended, and it was not clear when this investigation would conclude and when consideration could be

given to the claimant being able to return to work. Moreover, an ongoing consideration was the expense of having to pay for the claimant while absent through suspension and the impact of this cost upon the reducing school budget and also the disrupted education of the children in his class who had been taught by a series of supply teachers. This was confirmed in their decision letter confirming the dismissal. There was simply no evidence which suggested the claimant's disability played a role in the decision to dismiss.

75. In terms of the hypothetical comparator relied upon by the claimant, the Tribunal finds that a teacher who was not disabled but had been investigated in the same circumstances as the claimant would have been dismissed. The sick leave is irrelevant because in the same circumstances an employee who was fit to would have been suspended from September 2020 and by the time that the claimant was dismissed, he was fit for work and subject to a suspension, not sickness absence. Indeed, the claimant knew he remained suspended and before the summer term ended in 2021, he was emailing A to ask which class he would be suspended against in the next academic year. This suggested that he considered himself fit to return to work and the only barrier to this return was the suspension arising from the investigation by the Police.

76. For the avoidance of doubt, although we did express concerns regarding the role played by C in the dismissal process, even if he had been responsible for the decision and not the governors, it was clear from his email correspondent and the note of the meetings with the LADO, that the claimant's ill-health was not a material consideration. Instead, it was the ongoing investigation by the Police with no imminent resolution in sight and the likelihood that the claimant would remain suspended for the foreseeable future.

77. This is a case where the Tribunal has concluded that the evidence which we have heard discloses no discrimination in relation to the treatment alleged under section 13 EQA. For this reason, there is insufficient evidence to suggest a prima facie case of direct disability discrimination and there is no need for us to go through the two stage process identified in section 136 EQA and relevant case law. The reason for the decision to dismiss is clear and it is a non-discriminatory one, being unrelated to the claimant's disability and instead the unfortunate circumstances arising from the protracted Police investigation.

<u>Discrimination arising from disability</u>

78. It was accepted by the respondents that the second respondent dismissed the claimant and for the purposes of section 15 EQA, this amounted to unfavourable treatment.

79. The claimant alleges that the dismissal was due to something arising in consequence of his disability, namely his long term sickness absence or the triggering of his entitlement to contractual sick pay.

80. The Tribunal acknowledged that there can be more than one reason for a decision to dismiss and that we only needed to find that disability played a significant role in this decision for discrimination to exist.

81. The problem for the claimant in relation to both the sickness absence and the contractual sick pay allegations, is that at the time the decision was made to dismiss him in August 2021, he had ceased to be on sick leave and was no longer subject to sick pay having been confirmed as fit to work by his GP and discharged by OH by 9 June 2021. There was no suggestion that he was likely to recommence sickness absence and as Ms Quigley submitted, these were things which had happened in the past. Those involved in the decision to consider dismissal, whether it was the 3 governors or C, were very much concerned about the future prospect of an ongoing investigation and consequential suspension with no end in sight and with the ongoing impact arising to the School in having to pay for the claimant while absent, a supply teacher and the impact that this would have upon the children affected.

82. For these reasons, we are unable to find that these two allegations played a significant part in the decision to dismiss and in it questionable whether they could even have played any role in this decision.

83. As a consequence, no discrimination took place under section 15 EQA and there is no need for the Tribunal to consider the question of whether the treatment was a proportionate means of achieving the respondent's legitimate aim of ensuring pupils are provided with the best possible education and the fair distribution of the schools limited resources.

Conclusion

84. Accordingly, for the reasons given above the Tribunal must find that the complaint of disability discrimination is not well founded which means that it is unsuccessful.

85. The Tribunal recognised however, that this dismissal arose from a Police investigation which the parties had no control over and for which the timescales involved were unreasonably protracted.

86. The pressures faced by the criminal justice system as a result of many years of austerity and aggravated by the Covid pandemic have been well recognised across society and the Tribunal takes judicial notice of the unacceptable delays that victims and those under investigation experience in seeing their cases resolved.

87. This case illustrates perfectly the human consequences of these protracted delays upon the claimant, his employer and the provision of education to children more generally.

_____

Employment Judge Johnson
Date 19 June 2023
Amended 11 August 2023 (by reason of Rule 50 decision concerning anonymity of those persons and organisations named in the case)

JUDGMENT SENT TO THE PARTIES ON
17 August 2023

FOR THE TRIBUNAL OFFICE