



# EMPLOYMENT TRIBUNALS

## RESERVED DECISION

**Claimant:** A

**First Respondent:** B

**Second Respondent:** C

**On:** 1, 2 and 3 July 2024  
(Reserved decision meeting on 25 July 2024)

**Before:** Employment Judge Ahmed

**Members:** Ms K Srivastava  
Mr A Wood

**At:** Leicester

## Representation

**Claimant:** Miss Andrea Pitt of counsel

**Respondent:** Mr Russell Holland of counsel

## JUDGMENT

The unanimous decision of the Tribunal is that:

The Claimant's complaints of direct and indirect sex discrimination against the First and Second Respondents are dismissed.

## REASONS

1. In these proceedings the Claimant brings complaints of direct and indirect sex discrimination. Following ACAS early conciliation on 18 February 2023 and ending on 20 February 2023, the Claim Form was presented to the Tribunal on 11 April 2023. The Claimant has had the benefit of legal representation throughout.

2. The Claimant was employed by the Respondent as a Senior Teaching Assistant at a Primary School from 1 September 2021 to 12 December 2022. He therefore did not have the qualifying period of service to bring a complaint of unfair dismissal though such a complaint was actually brought but was dismissed by the Tribunal on 3 July 2023 for lack of qualifying service.

3. In these proceedings there is an anonymity order in relation to the Claimant, the first and second Respondents and the School where the Claimant was employed. The order is for them to be referred to as A, B, C and "The School". To avoid the Claimant from being identified from surrounding circumstances we have determined that it is appropriate not to mention any names in order to give effect to the order for anonymity even though they are not directly the subject of the anonymity order.

4. It was not possible to conclude the case in the three days allocated. Accordingly the Tribunal met on 25 July to consider its reserved decision. This document represents the views of all three members of the Tribunal.

### **THE FACTS**

5. The First Respondent is a School Trust employing 284 members of staff. There are 4 schools within the Trust. At the School where the Claimant was employed there were 36 staff with 189 pupils. The Second Respondent is the Head Teacher of the School.

6. At the commencement of his employment the Claimant underwent safeguarding training. As part of that training he was provided with a copy of the School's Code Of Conduct along with other safeguarding material. This included a document headed "Guidance for Safer Working Practice". The Guidance makes it clear, amongst other things, that staff should not be on their own with children .

7. There is also a reference in the document to the use of mobile phones whilst in the classroom. The School rules prohibit a mobile phone from being used or being visible whilst in a classroom setting by a member of staff. They also make it clear that staff should not be in a room with a pupil with the door closed.

8. In January 2022 two members of staff at the School raised concerns about the Claimant having his mobile phone outside of his pocket and visible though wrapped in tissue. In the investigation that followed the Claimant admitted that he did have his mobile phone out of his pocket but said that he needed to use it for medical reasons. The Claimant had made no reference to the need to do so in his pre-employment health questionnaire.

9. On 1 February 2022 the Claimant was sent what is referred to as a "Letter of Expectation". This sets out extracts by way of a reminder from the School's Code of Conduct, which the Claimant had already seen. The letter went on to make it clear that personal mobile telephones must not be used during lesson times when teaching was taking place or when supervising students outside of the classroom. The Claimant was told that if he need to access the phone for medical reasons he should step out of the classroom to do so.

10. On 21 September 2022 the Claimant was observed by the Deputy Head Teacher to be alone with a pupil in the computer room with the door closed. The Deputy Head Teacher reminded the Claimant that he must have the door open in such circumstances.

11. On a further occasion, the date of which is not clear, the Claimant was reported by a member of staff to have his mobile phone out of his pocket whilst in the classroom. The Claimant denied it and said it was in his jacket pocket. The Respondent accepted the Claimant's explanation and no further action was taken.

12. On 26 September 2022 a member of staff reported that the claimant's phone was noticeable, wrapped in tissue but with the camera lens visible. At the time children were getting changed for an after-school Tennis Club. The phone appeared to be pointing towards a child who was not wearing a top.

13. The day after the above incident the Head Teacher of the School contacted the Local Authority Designated Officer ('LADO'). She was advised by LADO that this particular incident did not meet the threshold of safeguarding concerns and no further action was necessary. It was however agreed that the Head Teacher should discuss the matter with the Claimant.

14. On 28 September 2022, the Head Teacher met the Claimant for a discussion. The Claimant denied having his phone out of his pocket and explained that he had a notebook in his hand. He said that he had recently purchased a sports watch to monitor his medical condition instead of using the mobile phone.

15. On 30 September 2022, a parent of one of the pupils reported to the Deputy Head that her child had disclosed that whilst she was reading with the Claimant in the computer suite, the Claimant had played a game which involved her bending over to touch her toes. The game involved her remaining in that position until she answered some questions correctly. In the subsequent investigation the Claimant admitted to engaging in a game with the pupils which he described as 'the frog game' or the 'Tippy Toe' game. This involved children bending over with their legs straight whilst touching their toes. Children were not permitted to adopt the usual standing position until they had answered a question correctly. The game was usually played when pupils were reading or studying text. Neither the Head Teacher nor any member of the teaching staff at the School were familiar with this method of teaching nor did they find anyone else who had ever used it in their classes.

16. On 3 October 2022 following advice from LADO the Claimant was required to temporarily work from home whilst a full investigation was undertaken into various allegations and concerns.

17. In the course of the investigation the School identified that from reading records some 8 pupils had read alone with the Claimant. Four female children stated that they had been asked to play the Tippy Toe Game.

18. It was also discovered that a female pupil had disclosed to her parents that she had seen the Claimant's mobile phone in his trouser pocket when the Claimant was taking a class. She described being able to see a camera sticking out of the Claimant's pocket. The pupil was not able to recall the date of the incident.

19. By 5 October 2022 various stories appeared to have circulated about the Claimant in the locality of the School and a number of parents had by now contacted the Police.

20. On 6 October 2022 a Strategy Meeting took place between Senior staff of the School, the LADO and Police as a result of the concerns raised by parents.

21. On 7 October 2022 the Claimant was interviewed by the Head Teacher. He was informed of his right to be accompanied and he brought along a family friend. In the interview the Claimant said that the Tippy Toe game was recommended by a mentor whilst he was at University. The purpose of it was to help pupils recall facts. He said

that touching the toes only lasted about 3 seconds. He denied having his mobile phone out in class after he had received the Letter of Expectation. Following the interview the Claimant was suspended from work to enable further investigations to take place.

22. On 26 October 2022 the Claimant attended a formal investigation meeting chaired by the Head Teacher. The Claimant was accompanied. It was explained to him that the initial allegations came from a parent regarding his conduct when talking to their child about a one-to-one reading. The Claimant was asked about the Tippy Toe game and asked to give further details. The Claimant was asked where he would sit when this was being played. He said that at no point did the children have their backs to him whilst playing the game. The Claimant was not willing to disclose the name of the mentor who had apparently taught him this teaching aid. Enquiries were made by the school both internally and on the internet as to the veracity of the Tippy Toe game but no solid information was found. The Claimant was asked if he wished to have anyone within the school who could verify the appropriateness of the game. The Claimant mentioned one particular Teacher, whom we shall refer to as 'P'. Teacher P was unable to verify this game when asked. She did however describe an incident where she had gone into the computer suite to set up an activity thinking that the room was empty. There was however a light on and she saw the Claimant was at the back of the room sitting part way along a row of computers reading with a pupil. She described the Claimant leaving quickly after she walked in.

23. In a letter dated 25 November 2022 the Claimant was invited to a disciplinary hearing. The allegations against him (paraphrased for the sake of brevity) were as follows:

23.1 That on 26 September 2022 he had a mobile phone in his hand which was visible to a member of staff while he was in a classroom when pupils were present changing for an-after school Club and at a time where one child did not have a top on;

23.2 That during September when he was covering a class his mobile phone was visible to a pupil with the phone being in the claimant's trouser pocket with the camera lens showing;

23.3 That on 30 August 2022 he had instructed at least five female pupils to engage in a game which could be perceived as being inappropriate when played during one-to-one reading sessions which involved the pupils being asked to bend down to touch their toes whilst he could potentially see them from behind;

23.4 That the Claimant had undertaken reading sessions with pupils on a 1:1 basis in a secluded area of the School;

23.4 That his actions and his conduct raised safeguarding concerns;

23.5 That by his actions the Claimant had caused a loss of trust and confidence.

24. On 12 December 2022 the Claimant attended a disciplinary meeting which took before a panel consisting of a School Trustee and two Governors. The Claimant was accompanied by a friend.

25. The panel found the allegations substantiated. In particular they were persuaded by the 'compelling' detail provided by a pupil relating to the mobile phone

being visible. They saw no reason why the various Teachers who had reported the incidents would falsify their accounts. They found that the Claimant had failed to follow reasonable management instructions following the Letter of Expectation. They found that the Claimant had instructed at least five female pupils to engage in a game which could be perceived as being inappropriate. They found the Claimant's conduct to have destroyed trust and confidence and that it was appropriate to dismiss him from his employment for gross misconduct.

26. On 14 January 2023, the Trust confirmed to the Claimant that it had referred the matter to the Teacher Regulation Authority (TRA) and the Disclosure and Barring Service (DBS). It is now accepted that the TRA are not the appropriate regulating authority for the Claimant.

27. In the hearing bundle we have been taken to a number of the documents that were produced in relation to the investigation. Within it (and this is not an exhaustive list) are the following:

27.1 A statement by a Teacher of the School dated 30 June 2022 in which we find the following statement of one particular incident that she witnessed:

*"[ A ] was sitting on a table at the front of the classroom facing and looking at the boys and talking to them. I saw that his hands were wrapped around something. His hands were between his legs.....I watched as he slowly placed his hand into his right pocket - I noticed a phone shape enter his pocket and then he zipped up his trouser pocket. I stayed until the boys were dressed."*

27.2 A Statement by the Deputy Head Teacher of 21st September 2022 contained the following passage:

*"Passing the computer suite I noticed that the Claimant was with an individual pupil alone in the middle row of the computers with the door closed. I opened the room door pulled a chair forward and propped it open and reminded him [the Claimant] that he must always have the door open when working with the children alone."*

27.3 A statement from a teacher dated 29 June 2022:

*" I had just finished a meeting with [ ] and we returned to our classroom as we knew pupils were getting changed for after school clubs. When I entered Y6 there were about 10 boys who had just got their kits from the cloakroom. They began to get changed. [ A ] and I were both present. I saw that he had a piece of paper in his hand and from behind this I saw him pull out his mobile phone in his left hand. It was wrapped in tissue but I could see the camera lens exposed. This camera lens was pointed at a boy who was topless and approximately one metre from him. It was positioned like this for a few seconds. The Claimant then caught my gaze and quickly put his phone into his pocket. He then left to go and retrieve the tennis equipment from the PE cupboard. This whole event was between 15:15 and 15:17."*

27.4 On 30 September 2022 there is a note of a safeguarding concern reported by a parent. The note is made by the Deputy Head Teacher and is as follows:

*"Parent waited until all parents had left the school football match and approached the sports coach to speak of a serious concern she had about her daughter and a member of our school staff."*

*Pupil said to her mum in the car as they were leaving the match: the member of staff had taken her into the computer suite today and the door remained closed. He had taken her to read her book to him. She had read a few pages and then he had instructed her to bend over and touch her toes then stay in that position. She said that she was not allowed to come up from this position until she had answered all the questions he was about to ask her. The questions were about her book. He said that if her neck ached she could lift her head up a bit and look forward so the blood would not rush to her head. She answered her questions and then she was asked to jump up and down and then she was able to return to her class.*

*Pupil said that he had done this on previous occasions and that she wasn't sure if other children had also been asked to do this as she confirmed that she was alone with him in the room.*

*Mum was visibly upset. She said she had overlooked a previous occasion when her daughter had told her that this member of staff keeps all the girls in the classroom and sends the boys out when they change for PE and then he remains in the classroom as they change but that she could not overlook this time.*

*She requested that her daughter is not in the same room as this member of staff - she said she has him cover her class twice a week - she no longer wants her daughter to be taught by him."*

27.5 During the internal investigation various children were interviewed who had allegedly been asked to play the Tippy Toe game. These were referred to in the investigation by initials from Child A - Child E. Child A said that they would go to the computer suite and play a game called the Tippy Toe where 'you bend over and touch the toes and come back and say the answer'. He was asked where the Claimant was sat when he played the game and he said he was at his side. Child B demonstrated standing in the gap between computers and this showed he had his back to the Claimant. Children C and D also described that they stood with their back to the Claimant. Child E could not remember where the Claimant was and there was no mention of bending over.

27.6 Within the bundle is a note of a discussion dated 4 October with one of the pupils. It is not clear who has made the note but it appears to be by a member of staff. It is as follows:

*"[ ] had just finished dance and we were waiting for [ ]. She seemed a little quiet. I asked her if she was OK. She replied Yes but some people in my class have said that Mr [ A ] has been looking at bottoms, it's a Tippy Toe game. I responded OK thank you for telling me. Is there anything else you want to talk about? She hesitated and then said: "I didn't play the Tippy Toe game but a few weeks ago in class I saw his phone in paper." I asked what she meant and she said we were sat at the table and [ ] said she could see Mr [ A ]'s phone. I looked and I could see it in his pocket with the camera bit looking at us." I gave her a hug and said she had done the right thing by telling me. I asked if she had spoken to anyone else about it today and she said 'no'.*

## **THE ISSUES**

28. The issues to be determined are agreed as follows:

28.1 Were the discrimination complaints made within the appropriate time limit and if not is it just and equitable to extend time?

28.2 Did the Respondent do the following things (and if so did they amount to less favourable treatment by reason of sex):

28.2.1 impose upon the Claimant a requirement in relation to his mobile phone which female staff were not required to follow;

28.2.2 suspend the claimant;

28.2.3 did the Second Respondent passing false or misleading information to the LADO;

28.2.4 subject the Claimant to disciplinary proceedings;

28.2.5 fail to conduct a reasonable and proportionate investigation;

28.2.6 dismiss the claimant.

28.2.7 make an inappropriate referral to the TRA and DBS after dismissal but prior to disciplinary appeal and process being completed and failing to inform the Claimant of this referral.

28.2.8 reject the Claimant's appeal.

28.3 Did the Respondent apply the following PCPs to the Claimant:

28.3.1 Say to him: "Your phone must not be out in the classroom when any pupils are present and should be stored in a safe place, e.g. bag or cupboard, rather than concealed on your person. Should you need to access your phone for medical reason, you should step out of the classroom to do so?"

28.3.2 not to conduct 1:1 intervention in secluded areas of the school or not to be alone with any pupils.

28.3.3 not to conduct physically active games with the pupils.

28.4 Did the Respondent apply the PCPs to the claimant?

28.5 Did the Respondent apply the PCPs to women, or would it have done so?

28.6 Did the PCPs put men at a particular disadvantage when compared with in that:

28.6.1 The Claimant was unable to be an effective teaching assistant.

28.6.2 The Respondent subjected the Claimant to disciplinary and dismissal.

28.6.3 Were the PCPs a proportionate means of achieving a legitimate aim?

## **THE LAW**

29. In relation to direct discrimination section 13 of the Equality Act ("EA 2010") defines it as follows:

"(1) 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."

30. Section 13 EA 2010 refers to being treated “less favourably” which necessarily requires a comparison of treatment. Section 23 EA 2010 deals with comparators and states:

“(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.”

31. Section 19 EA 2010 states:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

32. Section 136 EA 2010 deals with the issue of the burden of proof and states:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

33. In **Madarassy v Nomura International Plc** [2007] IRLR 246, the Court of Appeal set out guidance on the correct application of the burden of proof provisions. In that case the Court of Appeal made it clear that the burden does not shift to the employer simply on the Claimant establishing a difference in status (for example a difference in sex) and a difference in treatment. Such ‘bare facts’ would only indicate a possibility of discrimination, not that there was in fact discrimination. “*Could conclude*” must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it. The first stage of the two-stage process envisaged by section 136 EA 2010 is therefore to consider whether the Tribunal could properly conclude from the facts whether discrimination is a possible explanation for the treatment. At the second stage once the Tribunal is satisfied that the Claimant has proved facts from which an inference of discrimination can be drawn, the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, on a balance of probabilities, the Respondent is not able to show that discrimination was not the reason for the treatment the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists, then the claim must fail.

## **CONCLUSIONS**

### **The time point issue**

34. The allegations of suspension and the second Respondent passing false or misleading information to LADO are potentially out of time. All of the remaining allegations are agreed as having been presented in time.

35. We do not accept that the suspension and the allegation of passing false or misleading information are acts extending over a period. They involve different



people, different circumstances and in reality are separate incidents. They are not an 'act extending over a period'. They have therefore been presented out of time.

36. We do however consider it appropriate to extend time on just and equitable grounds. The delay is relatively short. There is no prejudice to the Respondent by extending time. The cogency of the evidence has not been affected by the delay. The witnesses that the Respondents have called have been able to deal with the relevant issues.

#### The indirect sex discrimination complaint

37. Although this complaint has not been formally withdrawn, it has not been pursued with any vigour. It was not the subject of any oral submissions. In any event there are serious difficulties in relation to it.

38. First of all some of the PCPs relied upon refer to the Claimant's personal circumstances and one-off acts rather than a state of affairs. We would however accept that the Respondent applied a PCP that a worker must not have their phone out in the classroom when pupils were present and should be stored in a safe place.

39. We would also accept that the Respondent applied a PCP that Teachers should not be alone with pupils.

40. We do not however accept that the Claimant has established as a fact that the School applied a PCP that teachers should not conduct physically active games with the pupils. There has been no evidence led on this.

41. None of the PCPs however put men at a particular disadvantage compared with women. It is difficult to see how the PCPs rendered it difficult for the Claimant to be an effective teaching assistant. The Claimant was not subjected to disciplinary proceedings or dismissed because of the application of the PCPs but because of his conduct. The inappropriate reference to the TRA was because of a genuine mistake not because of the application of any PCP. The Claimant fails to establish any group disadvantage.

42. In any event we are satisfied that the Respondent's actions amounted to a proportionate means of achieving a legitimate aim. The legitimate aim was the protection of pupils and dismissal in all of the circumstances was a proportionate means of achieving it. The complaint of indirect sex discrimination, insofar as it is seriously pursued, is therefore dismissed.

#### The direct sex discrimination complaint

43. We have been conscious throughout the course of these proceedings that we are not hearing a claim for unfair dismissal. It has been necessary to remind the parties of that several times during the course of the hearing as we have been conscious not to fall into an unfair dismissal mindset.

44. The crucial issue is whether the Respondent treated or would have treated a woman differently in the same or similar circumstances? The Claimant has not identified an actual comparator and thus he is deemed to rely on a hypothetical comparator. In our view any employee, male or female, who had conducted themselves in the manner that the Claimant did would undoubtedly have been suspended, investigated and ultimately dismissed. There was ample justification for

the Respondent's concerns and to take the actions they did. The Claimant's gender played no part. The Claimant did not suggest in the entire process that it did. The nearest we come to any reference to it is in fact a comment by the Chair of the Disciplinary panel on 17 February when she says:

*"[ ] added that the panel had considered the possibility that [A] may have felt discriminated against as a minority as a male member of staff and this was taken into account."*

45. The Claimant had been told in very clear terms that he should not have his mobile phone out in the classroom. We do not accept his evidence that he did not do so after the Letter of Expectation. There is no reason for his colleagues to lie about it. There was no reason for them to make false allegations. Equally there was no reason for the children, some of whose accounts contradict that of the Claimant to lie either.

46. The Tippy Toe game that the Claimant refers was unheard of by the experienced members of staff at the School and there is no authoritative reference in any Teaching Guide to which we have been referred in which this is a valid teaching aid.

47. In any event there was no reason why this game should be played in a secluded area of the school and there was no reason why it should ever be undertaken on a one-to-one basis.

48. In relation to the specific allegations our findings are as follows:

48.1 the imposition of a requirement in relation to the mobile phone was one which all staff, male and female, were required to adhere to. It was not discriminatory;

48.2 the Claimant was suspended but the reason for the suspension was genuine and legitimate concerns about his conduct, not because of his sex or gender;

48.3 the Respondent did not pass false or misleading information to LADO. Whilst there are some slight (and materially inconsequential) inaccuracies in the LADO report, that was not the fault of the School. It is correct that the Head Teacher did not point these out but she had no obligation to do so. It was not her report.

48.4 the Claimant was subjected to disciplinary proceedings but that was justified and appropriate having regard to his conduct. A female worker who had also behaved in a similar way would have been treated exactly the same.

48.5 the investigation was reasonable and proportionate;

48.6 The Claimant was dismissed for his misconduct not because he was a man;

48.7 the Respondent made an inappropriate referral to the TRA and DBS but that was a genuine mistake in selecting the wrong regulatory body. LADO had concluded the allegations were substantiated. The Respondent relied on advice from LADO. The referral had nothing to do with the Claimant being a man.

48.8 the claimants appeal was rejected but that was because it was the appropriate decision on the facts.

49. We conclude that the Claimant has failed to demonstrate any facts from which an inference of sex discrimination may be drawn. The Claimant has failed to a prima facie case at the first of the two-stage test under section 136 EA 2010. If we are wrong in that respect we would be satisfied that the Respondent has provided a non-discriminatory explanation for their treatment of the Claimant. The explanation was that the Claimant had engaged in serious acts of misconduct. His behaviour had raised legitimate and justified safeguarding concerns.

50. For the reasons given the complaints of direct and indirect sex discrimination are dismissed.

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Employment Judge Ahmed

Date: 29 August 2024

JUDGMENT SENT TO THE PARTIES ON

.....05 September 2024.....

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FOR THE TRIBUNAL OFFICE

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