EMPLOYMENT TRIBUNALS

Claimant: Mr R Karim

Respondents: London Borough of Southwark (1)
Ms M Williams-Pinnock (2)

Heard at: London South Employment Tribunal

On: 4 March 2025 - 7 March 2025 (inclusive)

Before: Employment Judge Macey
Mr Harrington-Roberts
Ms Leverton

Representation
Claimant: In person
Respondents: Ms Anderson, counsel

JUDGMENT having been given to the parties on 7 March 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

PRELIMINARY MATTERS

1. At the beginning of the hearing, before we heard any evidence, we had to deal with a few preliminary issues.

The name of the first respondent

2. The claimant had named the first respondent on the claim form as "Victory Primary School". Ms Anderson submitted that the first respondent should be substituted with the London Borough of Southwark as Victory Primary School was not part of an academy trust and the staff at Victory Primary School were employed by the London Borough of Southwark. The claimant did not object. Accordingly, under rule 35(1) of the Employment Tribunals Rules of Procedure 2024 we substituted London Borough of Southwark to replace Victory Primary School as the first respondent.

Applications to adduce further documents

3. The respondents applied to adduce a further copy of an email dated 20 June 2023 from Ms Peter to Ms Rooney. In the bundle of agreed documents this particular email was part of a chain of emails. The further copy showed on the face of it two attachments that were attached to the email. The claimant did not object to this additional copy of the email dated 20 June 2023 being included in the bundle. It was added to bundle and numbered 194.

4. The claimant applied to adduce an email from Ms Begum to the claimant dated 3 March 2025, an email from Ms Rooney to the claimant dated 4 September 2024 and an email from Ms Rooney to the claimant dated 6 September 2024. The claimant said that these emails explained why Ms Begum and Ms Rooney could not attend the Tribunal hearing. The respondents were only prepared to agree to these documents being included in the bundle on condition of an additional document being included dated 10 October 2024 from the claimant to London South Employment Tribunal explaining to the Tribunal why Ms Rooney and Mr Amdulmajid would not be able to attend the Tribunal hearing. The claimant did not object to the email dated 10 October 2024 being included in the bundle. Which meant that the respondents did not then object to the claimant's further documents being included in the bundle. These further documents were numbered 195-198 inclusive and were added to the bundle.

Application to amend respondents' grounds of resistance

5. The respondents made an application to amend their grounds of resistance. This arose from the respondents explaining that they did not concede that they had knowledge of the claimant's disability at the relevant time. The Tribunal noted that this was inconsistent with paragraph 5 of the grounds of resistance which stated:

   "*Following the seated interview, and as part of the recruitment process, the Claimant was also required to participate in a lesson observation exercise and teaching task. The Respondents submit that had they sought to treat the Claimant less favourably because of his disability, of which they had knowledge during the interview, they would not have proceeded past the stage of the interview, or offered the role to the Claimant*."

6. The respondents applied to substitute the word "anxiety" for the word disability in paragraph 5 of their grounds of resistance.

7. The claimant did not object to the respondents application. In further discussion with the claimant, it became apparent that it was not the claimant's case that the respondents had knowledge of his disability at the time of the interview. We allowed the respondents' application to amend their grounds of resistance.

CLAIM AND ISSUES

8. The claimant has made a complaint of direct disability discrimination against the respondents.

9. The respondents conceded that the claimant had a disability as defined by section 6 of the Equality Act 2010 at the relevant time prior to the Tribunal hearing.

10. The remaining issues which had been initially agreed during the case management hearing on 12 September 2024 and were further discussed and amendments agreed on 4 March 2025 are as follows:

    10.1. Did the respondent do the following things:

        10.1.1. Withdraw a job offer made to the claimant for the role of a teacher.
        10.1.2. Failed to take steps to secure a full reference.

    10.2. Was that less favourable treatment?

    The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

    If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

    The claimant has not named anyone in particular who they say was treated better than they were and the Tribunal will rely on a hypothetical comparator.

    10.3. If so, was it because of disability?

    10.4. Did the respondents' treatment amount to a contravention of section 39(1) of the Equality Act 2010?

Documents and evidence heard

11. There was an agreed bundle of 198 pages.

12. For the claimant the Tribunal heard evidence from the claimant. For the respondents the Tribunal heard evidence from Ms Williams-Pinnock (the second respondent and Head of Victory Primary School) and Ms Peter (office manager of Victory Primary School).

FACTS

13. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we have indicated how we have done so at the material point. References to page numbers are to the agreed bundle of documents.

14. The claimant is a qualified teacher. The first respondent is the local authority in which Victory Primary School ("School") is based and is the prospective employer for the purposes of the Equality Act 2010. The second respondent is the Head of the School.

15. Ms Peter although she is the office manager at the School, in respect of recruitment processes, only carries out the administration of the recruitment

process and is not involved in the decision-making process. Ms Peter arranges the interviews, obtains identification documents, obtains, arranges and collects the checks and references that are required and that are detailed in the provisional offers to applicants.

16. The second respondent has completed some training in counselling up to level three. The second respondent has also had experience of managing employees with anxiety of varying seriousness.

17. The 'Keeping Children Safe In Education' statutory guidance [166-167] states:

> "*217. Schools and colleges should:*
> *….*
>
> - *always verify any information with the person who provided the reference*
>
> *….*
>
> - *contact referees to clarify content where information is vague or insufficient information is provided*
> - *compare the information on the application form with that in the reference and take up any discrepancies with the candidate*
> - *establish the reason for the candidate leaving their current or more recent post, and.*
> - *ensure any concerns are resolved satisfactorily before appointment is confirmed."* [166-167].

18. The same guidance also says in relation to the provision of references:

> "218. *When asked to provide references schools and colleges should ensure the information confirms whether they are satisfied with the applicant's suitability to work with children and provide the facts (not opinions) of any substantiated safeguarding allegations. They should not include information about allegations which are unsubstantiated, unfounded, false, or malicious. References are an important part of the recruitment process and should be provided in a timely manner and not hold up proceedings*." [167]

19. In June 2023 an external advert for an Early Career /Newly Qualified Teacher/Class teacher role at the School was posted.

20. The claimant applied for the post on 8 June 2023.

21. The claimant completed an application form which included a monitoring form [91]. In response to the question on the monitoring form [91] "*Do you consider yourself to have a disability*" the claimant ticked "*no*". The second respondent says she did not have access to this monitoring form [91] during the recruitment process. In cross-examination the second respondent explained that the monitoring form [91] is removed from the application form prior to the recruitment panel seeing the application form. At the time of the claimant's

application the procedure at the School was for Ms Peter to detach the monitoring form [91] from the application form.

22. On 15 June 2023 the claimant attended an interview for the class teacher role at the School. The interview was conducted by the second respondent and Ms Beattie (the Deputy Head of the School) after the claimant had completed a lesson observation and a teaching task. During the interview the claimant confirmed that he was currently a Higher-Level Teaching Assistant ("HLTA").

23. The second respondent said that the claimant during the interview had explained that there had been a breakdown in relationship between the claimant and another staff member at the school where he was undertaking his NQT induction and that as a result he had taken a step back into the HLTA role whilst he recovered from a period of anxiety which the claimant had stated in the interview had caused the breakdown.

24. In cross-examination the claimant says he did not during the interview refer to having an anxiety disorder in the past and that he said in the interview that he had been stressed/ upset by the previous issue with the staff member not that he had had a period of anxiety. Also, in cross-examination the claimant said he had changed schools prior to completing his NQT induction because his tutor had advised him that if the claimant had doubts that his mentor would pass his NQT induction the best option would be to leave that school and do some supply teaching to get experience.

25. The second respondent completed interview notes [98-102]. The note at [99] states the claimant did not like supply teaching. Further that he decided to take HLTA role to get back into it. The note does refer to "*relationship breakdown*" and being misunderstood by staff (but does not say at which school or when) and does state "***anxious"*** and the word anxious has an arrow from the word "*sometimes*".

26. The second respondent conceded during cross-examination that in the interview as she was taking notes while asking questions she did not necessarily write everything down.

27. We find that in the interview the claimant did mention a relationship breakdown. On the balance of probabilities, we find that the word "anxious" was mentioned by the claimant in the context of the relationship breakdown. We do not find that he said during the interview that he had experienced a period of anxiety.

28. We also find that the claimant had said during the interview that he was not enjoying supply teaching and that he decided to take the HLTA role instead to ease himself back into a permanent post. We do not find that the claimant said he was using the HLTA role to recover from a period of anxiety.

29. On 16 June 2023 the second respondent telephoned the claimant and offered the claimant the class teacher role. The second respondent says this was expressly stated to be conditional on receiving a satisfactory DBS check, references and medical. The claimant accepted the offer immediately during the telephone call.

30. The second respondent was very pleased to be able to make a provisional job offer to the claimant because the School did not have many male teachers and both the claimant's gender and ethnicity would have made a great role model for the global majority population of the School.

31. The claimant resigned from his current position (HLTA) verbally to Ms Rooney after he was made the provisional offer, but he cannot recall the date.

32. On 20 June 2023 Ms Peter emailed the claimant. Including a link to complete the health placement questionnaire with Medigold [112].

33. On 28 June 2023 the School, in a letter from the second respondent, sent to the claimant a written job offer [120-121] conditional on satisfactory references, a satisfactory DBS check, receipt of medical clearance, confirmation of the claimant's qualifications and the claimant's right to work in the United Kingdom.

34. The claimant provided two referees: Ms Rooney Head of John Donne Primary School and Mr Abdulmajid, Phase Leader of Key Stage 1 at John Donne Primary School.

35. On 20 June 2023 Ms Peter sent an email to Ms Rooney in reference to the claimant [118] stating:

> *"…I would appreciate if you could provide a Professional reference his behalf as soon as possible to myself or Makeda Williams (Headteacher).*
>
> *Please we would need the reference on letter head confirming how long you have known him and in what capacity.*
>
> *Please find attached Job Description and Person specification. Look forward to hearing from you soon."*

36. Another copy of the email [194] shows the attachments on the email.

37. Ms Rooney replied on 20 June 2023 [117-118] confirming she would provide a reference for the claimant and asked whether the School had a form for her to complete.

38. On 21 June 2023 Ms Peter replied [118] stating:

> "*Many thanks for response, However we do not have a form to complete. Can we please have a reference on a letter head.*
>
> *Confirming how long you have known him, and in what capacity."*

39. On 28 June 2023 Ms Rooney sent her reference to the School [122] by email [116] stating:

> *"I can confirm that I have known Rezaul Karim since 1st September 2022 when he was recruited as a Higher Level Teaching Assistant at John Donne Primary School.*

Should you need any further information please do not hesitate to contact me."

40. The second respondent did not see the email correspondence between Ms Peter and Ms Rooney between 20 June 2023 and 28 June 2023 [116-118] until the Grounds of Resistance [38-42] in the case was being prepared in early 2024.

41. At the end of June 2023, the claimant completed the Placement Health Questionnaire. The claimant's understanding was that the Placement Health Questionnaire would be sent to his GP for verification before being shared with the School.

42. The claimant says on or around 4 July 2023, the second Respondent telephoned Ms Rooney, but she was unavailable to take the call and that Ms Rooney called the second respondent back on the same day, but she was not available. Further the claimant says Ms Rooney left a message for the second respondent to call her back when she was available. However, Ms Rooney never heard back from the second respondent either by telephone or email and was never informed of the nature of the second respondent's call.

43. The second respondent says she attempted to telephone Ms Rooney on 18 July 2023 and in cross-examination the second respondent said that it was one of the first things she did on the morning of 18 July 2023. Further in cross-examination the second respondent was certain that it was on 18 July 2023 and not on 4 July 2023 or in the week commencing 4 July 2023.

44. An email dated 20 November 2023 from Ms Rooney to the claimant [187] states from what she can recollect it was after she had sent the School the reference on 28 June 2023 and that she thinks the second respondent tried to contact her in the week commencing 4 July 2023 and that she did try to return the call after school, left a message and no-one called her back. Further Ms Rooney says in this email, "*I am sorry that I can't be more help with the dates."* [187]. Also, we have taken judicial notice that in 2023 that particular week did not in fact commence on 4 July 2023, the Monday of that week was 3 July 2023.

45. We find that the second respondent did not attempt to telephone Ms Rooney on either 4 July 2023 or on any other day that week. We find that the second respondent in fact telephoned Ms Rooney in the morning on 18 July 2023.

46. Firstly, the email from Ms Rooney is second-hand evidence because she did not attend the Tribunal to give evidence in person. In comparison the second respondent's evidence is sworn first-hand evidence. Secondly, from our reading of the email it appears that Ms Rooney is not certain about the dates, which is highlighted not just by her saying "*from what I recollect" and "I think"* but also "*I'm sorry, that I can't be more help with the dates"*. Finally, the second respondent in cross-examination was certain that she had made the telephone call on 18 July 2023.

47. On 5 July 2023 by email attaching a letter dated 22 June 2023 Mr Abdulmajid sent his reference to the first respondent [126-127].

48. Ms Peter emailed Medigold Health on 14 July 2023 [129] requesting whether the claimant had been processed. The subject heading was "Missing reports".

49. Medigold Health emailed Ms Peter on 14 July 2023 [130] stating:

> *"We have reviewed the Placement health questionnaire for the above individual and we can confirm the employee is fit, however they have identified a health concern and would benefit from the following :*
>
> *• * Conditions*
>
> *o * Symptoms, Signs and Ill Defined Conditions*
> *o * Outcome Notes: This candidate reports they have mild anxiety which appears well managed with medication.*
>
> *• * Adjustments & Comments*
> *o * May require time to visit their GP to monitor health.*
> *o * Has a chronic condition which is well controlled with medication and stable at present.*
> *o * Has a condition but no adjustments are indicated at this time.*
> *o * Outcome Notes: He is fit to undertake the proposed role but if there are any concerns or changes in health status in the future, I would recommend a management referral is submitted.*
>
> *This is subject to any vaccination clearance/vaccination should this be a requirement of the role."*

50. The respondents say that the above email [130] is the only information that the School and the second respondent received from Medigold Health.

51. The second respondent on being questioned by the panel about the fact that the anxiety was described as a chronic condition stated, "*it does say chronic but it does not then recommend any major adjustments that need to be made*" Then the second respondent on being questioned on what did she take from the word chronic stated, "*that is something I would possibly have to have a conversation with him about if he were employed, to delve more what was the chronic condition, devise a risk assessment based on what his needs are, and if I was not too sure what I should be doing next I would go back to occupational therapist for more information? In other situation it is a long list of recommendations. It says chronic but also says medication and being well-managed, and stable, it would not have made me want to rescind the provisional offer. I have seen far more complex Medigold reports."*

52. On being asked by the panel would it indicate to you that it is an ongoing situation? The second respondent stated: "*I would have said it was something that would promote a conversation but not something that would make me want to rescind the job offer. The occupational therapist at the time felt it was being managed*".

53. In cross-examination the second respondent stated that she knew from her counselling training that a person can have an anxious episode but usually it happens on a recurrent basis, especially if the trigger is recurring.

54. On being asked by the panel about the fact the report stated mild anxiety - while managed with medication - did that indicate to you there might be something going on here? The second respondent stated, "*it's well managed, and it's mild*".

55. The claimant says on 14 July 2023, he called Ms Peter to find out when he could come to the School to meet his new class, and to find out which year group he would be teaching in September. Further that during this call, Ms Peter stated that the second respondent had received his medical questionnaire verified by his GP. Further that Ms Peter stated that the second respondent had some 'concerns' and that they were 'a bit worried' that the claimant suffered from anxiety and wanted to meet with the claimant to discuss.

56. The respondents say the telephone call with Ms Peter took place because the claimant was pushing to come into the School to meet the class of children he would have been teaching. The respondents say Ms Peter updated the claimant on the status of his checks, confirming that she had received his medical check result, his two references, but that Ms Peter had not received a copy of the claimant's DBS certificate.

57. There are a number of documents that are relevant to this factual dispute.

58. There is an email from the claimant to the School office (and then forwarded to Ms Peter by the School office at 15.57 and then forwarded by Ms Peter to the second respondent at 16.33) on 18 July 2023 [132-133]. This states: *"Also, I will be happy to come in tomorrow or Friday to talk about medical declaration."* This email was sent at 15.40 to the School office on 18 July 2023 (this was prior to the withdrawal of the provisional job offer – see below).

59. Ms Begum (business manager at John Donne Primary School) completed a written statement [185]. Ms Begum states,

> *"This is to confirm that Rezaul Karim and I had a conversation on 17th July 2023 regarding concerns he had around the results of his medical check which he done with Victory Primary School. Rezaul asked me whether a school can discriminate and withdraw an offer of employment based on medical conditions…"*
>
> *"…Rezaul mentioned that Victory Primary School contacted him to let him know they had received his medical report and wanted to speak with him to discuss it further."*

60. This confirms that Ms Begum's conversation with the claimant happened on 17 July 2023. This statement [185] does not mention that the claimant informed the business manager about the specifics of the conversation on 14 July 2023 (i.e. that Ms Peter had said that the second respondent had concerns and was a bit worried that he suffered from anxiety).

61. In addition, the second respondent says that Ms Peter did not hand her or forward anything to the second respondent until 17 July 2023 (after school) and that Ms Peter handed the two references and the email from Medigold Health [130] to the second respondent in hard copy. In cross-examination both Ms

Peter and the second respondent were clear that references and the email from Medigold Health [130] were handed to the second respondent on 17 July 2023.

62. The second respondent says she also did not have any discussions with Ms Peter about the claimant or his declaration of anxiety. Ms Peter also says no discussion took place between the second respondent and herself about either what had been said in the interview by the claimant or the content of the Medigold Health email [130].

63. Firstly, we find that the second respondent had not seen either the references or the Medigold Health email [130] until 17 July 2023. In general, we found the second respondent to be a credible witness, and we believe her on this point despite there being no supporting documentary evidence. This, therefore, means that the second respondent and Ms Peter would not have had a conversation about the Medigold Health email [130] and Ms Peter would not have mentioned in the telephone call with the claimant on 14 July 2023 that the second respondent had some 'concerns' and that they were 'a bit worried' that the claimant suffered from anxiety and wanted to meet with the claimant to discuss.

64. However, we do infer from the email dated 18 July 2023 at 15.40 from the claimant to the School office (then forwarded to Ms Peter at 15.57) [132-133] that some type of discussion about the Medigold Health email [130] did take place between Ms Peter and the claimant on 14 July 2023 that went further than Ms Peter confirming receipt of it. There would be no reason for the claimant to indicate that he was happy to attend the School to discuss the medical declaration if Ms Peter had merely confirmed its receipt. Although we are not in a position to find the exact words used by Ms Peter, Ms Begum's reference in her statement [185] to the claimant informing her that, "*Victory Primary School contacted him to let him know they had received his medical report and wanted to speak with him to discuss it further"* is on the balance of probabilities closer to what occurred during the telephone conversation on 14 July 2023 than what either Ms Peter or the claimant have said. We find that in respect of what was said during the telephone conversation Ms Peter was on a frolic of her own and had not spoken with the second respondent about the Medigold Health email [130].

65. In respect of Ms Peter handing the references and the Medigold Health email [130] all together in hard copy to the second respondent on 17 July 2023 (instead of forwarding these documents one-by-one as they were received) this was not a set policy of the School, but the second respondent deemed it to be best practice so that key pieces of information were not missed or lost. In cross-examination the second respondent said that she did not make an exception to this best practice despite it being close to the end of the summer term because it was important for everything to be looked at in its entirety.

66. The second respondent was unhappy with the reference from Ms Rooney. In her opinion it did not adhere to the 'Keeping Children Safe In Education' statutory guidance [166-167]. The second respondent considered that given that this reference was from a Head, who would have been aware of the expectations of a professional reference, she concluded that Ms Rooney had consciously chosen not to include the information required by the statutory guidance for some reason. The second respondent considered it was exactly

the sort of thing that recruiters are required to look out for in Safer Recruitment and it was a "red flag" for the second respondent.

67. The second respondent has undertaken Safer Recruitment training and safeguarding training.

68. The second respondent says that the expectation of references for those working in schools is different than in other sectors. The second respondent's expectation of a professional reference from a headteacher in a school, who would have received Safer Recruitment training, is that it would always include details on whether the referee considers the candidate to be suitable to work with children and to confirm that there were no safeguarding concerns.

69. In cross-examination the second respondent also confirmed that really it only could be the Head of the school who would be able to comment on the claimant's suitability to work with children and to confirm there were no safeguarding concerns, because they would have access to confidential information that would not be shared with other staff.

70. On 18 July 2023 the second respondent attempted to make contact with Ms Rooney by telephone and left a message at the start of the day.

71. The second respondent then contacted the first respondent's HR advisor for advice. The HR advisor's advice confirmed that the reference from Ms Rooney was unacceptable and that the second respondent could not proceed with the provisional offer to the claimant.

72. Ms Rooney called the second respondent back after school on 18 July 2023, but the second respondent only become aware that Ms Rooney had tried to call her back (after school on 18 July 2023) on the following day on 19 July 2023. This was via an email from the second respondent's secretary and the reason the email is not in the bundle is unfortunately it could not be found. In response to panel questions and further cross-examination the second respondent explained that an email to Ms Rooney would have been unlikely to reach her quickly because Heads are generally sent hundreds of emails each day. The second respondent considered that leaving a message via the telephone early in the day was the best way to reach Ms Rooney.

73. The second respondent did not consider asking Ms Peter or another member of staff to attempt to arrange a suitable time for a telephone conversation between Ms Rooney and the second respondent because she had telephoned and left a message early enough in the day for arrangements to be made for a telephone call between herself and Ms Rooney.

74. The second respondent also emphasised that it was a very busy time of the term for her, with many meetings on 18 July 2023 and whole-school events on 19 July 2023.

75. On 18 July 2023 at 16.40 the second respondent emailed the claimant [134] to withdraw the offer of employment stating:

> "*We have now received and reviewed all of your documentations, but one of your references is not satisfactory.*

The provisional letter states that if any of the checks proves to be unsatisfactory, the provisional offer of employment will be withdrawn.

After much consideration, I am afraid that the application process will now stop and the provisional offer of employment has been withdrawn.

I wish you every success in the future."

76. The second respondent also tried to telephone the claimant on 18 July 2023 to inform him of the withdrawal of the provisional offer of employment. An email was sent to the claimant by the second respondent explaining that she had tried to telephone him [134].

77. The measures the second respondent took to fill the rescinded provisional job offer was to re-arrange the classes; she looked at the class numbers and mixed year groups. This was not a simple task and one that the second respondent would have liked to have avoided doing. The second respondent says it actually would have been in the second respondent's interest to proceed with the provisional job offer to the claimant.

78. In cross-examination the second respondent said that she could not wait until 19 July 2023 to have a conversation with Ms Rooney, because if she had waited and Ms Rooney had not been able to confirm that the claimant was suitable to work with children it then would have been much more difficult to complete the administration of re-arranging the classes.

79. ACAS early conciliation commenced on 19 September 2023 and ended on 31 October 2023.

80. The claimant presented his claim form bringing a claim for direct disability discrimination on 22 November 2023.

LAW

81. The prohibition on discrimination against job applicants is found in s39(1) of the Equality Act 2010. Employers must not discriminate:
    (a) In the arrangements it makes for deciding to whom to offer employment;
    (b) As to the terms on which the employer offers the job applicant employment;
    (c) By not offering the job applicant employment.

82. Under s13(1) of the Equality Act 2010 read with s6, direct discrimination takes place where a person treats the claimant less favourably because of their disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

83. "*The issue of knowledge of disability has to be considered in a slightly different way for the various types of conduct proscribed by the EqA 2010. There is no reference to knowledge in section 13 EqA 2010, however, as the less favourable treatment must be because of the protected characteristic, which generally requires consideration of the mental processes of the putative discriminator, there can generally only be direct disability discrimination if the*

putative discriminator knows of the disability". Per HHJ Tayler paragraph 37 **Seccombe -v- Reed in Partnership Limited UK EAT/0213/20/OO**.

84. What is required is knowledge of the facts constituting the employee's disability i.e. a physical or mental impairment, that has a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities and that is long term.

85. Direct disability discrimination can also be by perception, i.e. the respondent perceived the claimant as having a disability. **Chief Constable of Norfolk Constabulary v Coffey 2020 ICR 145, CA** considered direct disability by perception.

86. Paragraph 35 states*: "The starting-point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label "disability" to them. As Judge Richardson put it succinctly, at para. 51 of his judgment: "The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation." Per Underhill LJ.*

87. Disability is defined by section 6 of the Equality Act 2010:
(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. …

88. Paragraph 5 of Schedule 1 to the Equality Act 2010 states:

(1) 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:

(a) measures are being taken to correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

89. Section 212 of the Equality Act 2010 defines 'substantial' as meaning more than minor or trivial.

90. Schedule 1, part 1, paragraph 2 of the Equality Act 2010 defines "long-term" as follows:

(1) The effect of an impairment is long-term if -

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

91. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the claimant's disability. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

92. In **Aitken -v- Commissioner of Police of the Metropolis [2012] ICR 78** the Court of Appeal upheld the Employment Tribunal's decision that the proper hypothetical comparator was someone who did not have the claimant's disability but used aggressive words and behaviour frightening to a reasonable person.

93. In **Cordell -v- Foreign and Commonwealth Office (UKEAT/0016/11)** the Employment Appeal Tribunal (EAT) stated it was better to look at the reason why rather than getting bogged down with constructing a hypothetical comparator.

94. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**).

95. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

96. S136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (**Hewage v Grampian Health Board [2012] IRLR 870, SC**).

97. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

98. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the respondent to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.

99. The Court of Appeal in **Madarassy v Nomura International plc EWCA Civ 33**, a case brought under the then Sex Discrimination Act 1975, states: 'The

burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

CONCLUSIONS

100. The respondents have conceded that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the relevant time.

Did the respondent withdraw a job offer to the claimant for the role of class teacher?

101. The second respondent made a provisional job offer of class teacher to the claimant in a telephone conversation on 16 June 2023 which was conditional on receiving a satisfactory DBS check, references and medical. A letter was sent by the second respondent on 28 June 2023 [120-121] offering the job of class teacher to the claimant in writing conditional on satisfactory references, a satisfactory DBS check, receipt of medical clearance, confirmation of the claimant's qualifications and the claimant's right to work in the United Kingdom.

102. The second respondent later withdrew the provisional job offer of class teacher by email on 18 July 2023 [134] and the second respondent attempted to telephone the claimant to inform him of the same.

103. We conclude that the respondent did withdraw the provisional job offer for the role of class teacher that had previously been made to the claimant.

Was that less favourable treatment?

104. The claimant has not identified an actual comparator.

105. The hypothetical comparator would be someone who was in the same circumstances as the claimant but who did not have the claimant's disability.

106. On these particular facts that would be someone whose two referees had provided the same information to the School as the claimant's referees but who did not have the claimant's disability, and whose Medigold health information did not disclose the health information provided about the claimant on the Medigold Health email [130].

107. When deciding whether a hypothetical comparator would have been treated differently it is sometimes more helpful to look at the reason why the second respondent (the decision-maker) decided to withdraw the provisional job offer.

108. The email dated 18 July 2023 from the second respondent to the claimant [134] informed the claimant that "*one of your references is not satisfactory*".

109. This referred to the reference from Ms Rooney which simply stated how long Ms Rooney had known the claimant and what his job position was at John Donne Primary School.

110. We found above that the second respondent was unaware of the email exchange between Ms Peter and Ms Rooney between 20 June 2023 and 28 June 2023. This means the second respondent was expecting to see a professional reference that was more than job title and dates, and that complied with any statutory guidance.

111. We have read the extracts from the "Keeping Children Safe in Education" statutory guidance [166-167]. We conclude this guides referees to ensure that in any reference the referee should confirm the applicant's suitability to work with children and provide the facts of any substantiated safeguarding concerns. We conclude that the second respondent's expectation that the reference from Ms Rooney should have included this information (amongst other information) was correct.

112. We also conclude that the second respondent's expectation that this information could not be provided by the claimant's other referee was correct, as a Phase Leader at a School would not have access to confidential information about the claimant and any safeguarding concerns about him at John Donne Primary School or at his previous employers.

113. We also conclude that the reference was unsatisfactory, it was not a professional reference, and it did not comply with the "Keeping Children Safe in Education" statutory guidance.

114. We conclude that a hypothetical comparator would have been treated in the same way as the claimant was treated. We conclude that a hypothetical comparator would also have had their provisional job offer withdrawn.

Did the respondents fail to take steps to secure a full reference?

115. The second respondent first viewed the references after school on 17 July 2023. The next morning (18 July 2023) the second respondent called Ms Rooney and left a message.

116. We found on the facts that the second respondent did have a secretary. We can see no reason why the second respondent could not have asked her secretary to contact John Donne Primary School to arrange a mutually convenient time for Ms Rooney and the second respondent to have a telephone conversation on 18 July 2023.

117. We have also taken into account the contents of paragraph 217 of "Keeping Children Safe in Education" [167] which guides schools that are in receipt of references to always verify any information with the person who provided the reference, contact referees to clarify content where information Is vague or insufficient information is provided and ensure any concerns are resolved satisfactorily before appointment is confirmed. This was clearly pertinent in this case as the second respondent had viewed the reference from Ms Rooney as a "red flag" and the information in the reference was so sparse. We conclude this meant that the second respondent should have made more effort than simply leaving one telephone message on 18 July 2023 for Ms Rooney.

118. We have also taken into account the last sentence of paragraph 218 which states that references are an important part of the recruitment process and should be provided in a timely manner and not hold up proceedings. Although this particular paragraph is directed towards those schools and colleges providing references the obvious result of providing a reference in a timely manner is that it should also be looked at in a timely manner to allow any follow-up as envisaged by paragraph 217 of the statutory guidance to happen.

119. We accept the second respondent's reasoning for waiting for all the relevant documents before looking at any of them in situations where there is no time pressure. We do conclude, however, that in this particular situation where the unsatisfactory reference had been received on 28 June 2023 (and the second reference on 5 July 2023) the outcome of the second respondent's practice meant that she was now placed into a position in which time was running out to clarify any issues. In those circumstances making only one telephone call to Ms Rooney without a follow-up leads us to conclude there was a failure to take steps to secure a full reference by the respondents.

120. We conclude, for the reasons set out above that the respondents failed to take steps to secure a full reference.

Was that less favourable treatment?

121. The claimant has not identified an actual comparator.

122. The hypothetical comparator would be someone who was in the same circumstances as the claimant but who did not have the claimant's disability.

123. On these particular facts that would be someone whose two referees had provided the same information to the School as the claimant's referees with the same time pressure on the second respondent to take steps to secure a full reference but who did not have the claimant's disability and whose Medigold health information did not disclose the health information provided about the claimant on the Medigold Health email [130].

124. When deciding whether a hypothetical comparator would have been treated differently it is sometimes more helpful to look at the reason why the second respondent failed to take steps to secure a full reference.

125. The main reason why the second respondent failed to take steps to secure a full reference was because her own practice (as discussed above) had put her into a time pressurised position of there only being three days left of the summer term. In addition, she was also very busy on those last three days, particularly on 18 July 2023 and 19 July 2023. The busyness of the second respondent, however, would not have prevented her from asking her secretary to arrange a mutually convenient time for herself and Ms Rooney to speak on 18 July 2023 for example.

126. The question for the Tribunal is whether the information in the Medigold Health email [130] operated on the second respondent's mind (either consciously or subconsciously) when she made the decision to only leave one telephone message for Ms Rooney and not take any further steps prior to withdrawing the provisional job offer.

127. We have taken into account the second respondent's evidence that it would have been in her interest to proceed with the provisional job offer provided to the claimant because by not being able to proceed with it meant that she had to undertake a difficult administrative re-organisation of year groups to re-arrange the classes for the next academic year. In addition, we have also taken into account how pleased the second respondent was when she made the provisional job offer to the claimant because his gender and ethnicity would have provided a great role model to the global majority population of the School.

128. With that in mind we conclude that there appears to be no sound reason why she could not have taken more steps to secure a full satisfactory reference given how much it was in the School's and her interest to proceed with the provisional job offer. This leads to the conclusion that on a subconscious level the information in the Medigold Health email [130] did operate on the second respondent's mind in respect of deciding how much effort to take to secure a full and satisfactory reference.

129. We conclude that the claimant was treated less favourably than a hypothetical comparator would have been treated.

If so, was it because of disability?

130. Firstly, we need to decide whether the second respondent had knowledge of facts constituting the claimant's disability or perceived the claimant to have a disability.

131. The key evidence here is the content of the Medigold Health email [130] and what the second respondent said during evidence about the content of the Medigold Health email [130]. We do not consider the information provided by the claimant to the second respondent in the interview to be relevant to this assessment as he simply mentioned "anxious" in the context of a relationship breakdown and did not refer to a period of anxiety.

132. The respondents have conceded that the second respondent knew about the impairment of anxiety at the relevant time.

133. In respect of whether the second respondent knew of facts that his anxiety was long-term the Medigold Health email [130] confirmed the condition was chronic. The second respondent on being questioned by the panel about this description focused more on what she may have to do in response to knowing that the anxiety was chronic. However, taking that together with the second respondent's previous knowledge from her counselling training that anxiety is more likely to happen on a recurrent basis we conclude at the very least that the second respondent's perception was that the claimant's impairment of anxiety was not a once-off and hence potentially long-term (i.e. was likely to last for at least 12 months at the time of the Medigold Health email [130]).

134. In respect of whether the second respondent knew of facts that the claimant's anxiety had a substantial adverse effect upon his ability to carry out normal day-to-day activities the Medigold Health email [130] stated that the claimant was taking medication, and his chronic condition was well controlled with medication and stable at present. The second respondent on being

questioned by the panel about this focused on the fact it was well-managed and mild.

135. Of course, when looking at whether someone has a disability the assessment of whether the impairment is having a substantial adverse effect focuses on what would be the situation if the individual was not taking their medication.

136. The fact that the claimant was on medication at the time of the Medigold Health email [130] indicates that he would have been suffering at least an adverse effect on his ability to carry out normal day-to-day activities if he were not to take the medication. We conclude that at the very least the second respondent would have perceived at the time that the claimant would suffer an adverse effect on his ability to carry out normal day-to-day activities if he did not take his medication.

137. For an adverse effect to be substantial it must be more than minor or trivial. The Medigold Health email's [130] description of the anxiety as mild does not provide enough information to conclude that the second respondent had actual knowledge of facts that the anxiety had a substantial adverse effect on the claimant's ability to carry out his normal day-to-day activities. The question then becomes did she perceive from the information facts demonstrating a substantial adverse effect?

138. We conclude that her responses to the panel questions on the description of the anxiety as mild but that he was taking medication in conjunction with her own experience of managing staff members with varying degrees of severity means that the second respondent did not in fact perceive the claimant as having an impairment with a substantial adverse effect upon his normal day-to-day activities.

139. Without actual knowledge of the facts constituting the claimant's disability or the second respondent perceiving that the claimant had a disability the less favourable treatment cannot be because of the claimant's disability.

140. The respondents did not subject the claimant to direct disability discrimination and his claim is not upheld. This means that the claimant's claim for direct disability discrimination fails.

141. If we are wrong about this and the second respondent did have knowledge of the facts constituting the claimant's disability or perceived that the claimant had a disability then the next step would be to apply the statutory burden of proof.

142. The first question is whether the claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that the respondents had failed to take steps to secure a full reference because of the claimant's disability.

143. Our answer to that question in our view is yes.

144. As explained in our conclusions above under the issue of whether there was less favourable treatment the fact that it was in the interests of both the School

and the second respondent to proceed with the provisional job offer to the claimant (due to the administrative burden of not doing so and the claimant potentially being a role model for the global majority population of the School) it seems to us very strange that the second respondent did not make more effort to speak to Ms Rooney on 18 July 2023.

145. We conclude that this is sufficient to shift the burden of proof to the respondents.

146. It is then for the respondents to prove that the respondents' failure to take steps to secure a full reference was in no sense whatsoever because of the claimant's disability.

147. As explained above, the respondents' reason (being the second respondent's reason) was because the second respondent's own practice (as discussed above) had put her into a time pressurised position of there only being three days left of the summer term. In addition, the second respondent was also very busy on those last three days, particularly on 18 July 2023 and 19 July 2023.

148. As we concluded above, the respondent's busyness does not appear to be a sufficiently sound reason to have not made more effort to arrange a time to speak with Ms Rooney.

149. We conclude that explanation is not sufficient to prove that the respondents' failure to take steps to secure a full reference was in no sense whatsoever because of the claimant's disability.

Did the respondent's treatment amount to a contravention of section 39(1)(a)

150. Yes, the treatment would amount to a contravention of section 39(1)(a) that an employer must not discriminate in the arrangements it makes for deciding to whom to offer employment.

151. However, the discussion above is only in the alternative if our conclusions on knowledge or perception of disability are incorrect.

152. We, therefore, conclude that the claimant's complaint of direct discrimination on the grounds of disability (as described in section 13 of the Equality Act 2010) is not well-founded and is dismissed. This means that the respondents did not contravene section 13 of the Equality Act 2010.

Employment Judge Macey
Date: **11 March 2025**

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE