EMPLOYMENT TRIBUNALS

Claimant:	**Ms Assana Mounkpoupouonkoui**
Respondent:	**Brampton Manor Trust**
Heard at:	**London East Employment Tribunal (By CVP)**
On:	**28, 29, 30, 31 (am only) October 2024, and 26 March 2025 (31 October 2024 and 25 March 2025 in chambers)**
Before:	**Employment Judge B Beyzade** **Mrs G Forrest, Tribunal Member** **Ms J Isherwood, Tribunal Member**

Representation

For the Claimant: In person
For the Respondent: Mr Stefan Brochwicz-Lewinsky, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1.1. The claimant does not have title to present the following complaints on grounds that they were not presented to the Tribunal within the time limit set out at section 123(1)(a) of the Equality Act 2010; they do not form part of conduct extending over a period under section 123(3)(a) of the Equality Act 2010; and it is not just and equitable to extend time in terms of section 123(1)(b) of the Equality Act 2010:
1.1.1 Direct disability discrimination complaints set out at paragraphs 13. (a) and 13. (b) of the Agreed List of Issues;
1.1.2 Direct disability discrimination complaints set out at paragraph 13. (c) of the Agreed List of Issues to the extent that they relate to any acts or omissions between April 2019 and prior to 01 May 2023;
1.1.3 Harassment related to disability complaints set out at paragraphs 21. a) insofar as it relates to any acts or omissions that

occurred prior to 01 May 2023, 21. b), and 21. c) of the Agreed List of Issues; and
1.1.4 Indirect sex discrimination set out at paragraphs 23. a., 23. b., 23. c., and 23. e. (insofar as they relate to any PCPs as applied prior to 01 May 2023) of the Agreed List of Issues.

1.2. The claimant does not have title to present and the Tribunal does not have jurisdiction to consider the claimant's complaints of indirect disability discrimination contrary to section 19 of the Equality Act 2010 that are based on the claimant's association with a person holding a particular protected characteristic (as set out at paragraphs 15 to 20 of the Agreed List of Issues).

1.3. the claimant's complaint of constructive unfair dismissal is not well founded and it is hereby dismissed.

1.4. the claimant's complaints of direct disability discrimination contrary to section 13 of the Equality Act 2010 as set out at paragraphs 13. (c) insofar as it relates to any acts or omissions between 01 May 2023 to 19 May 2023, 13. (d) and 13. (e) of the Agreed List of Issues are not well founded and they are hereby dismissed.

1.5. the claimant's complaint of harassment related to disability contrary to section 26 of the Equality Act 2010 as set out at paragraph 21. a) of the Agreed List of Issues insofar as it relates to any acts or omissions between 01 May 2023 and 25 May 2023 is not well founded and it is hereby dismissed.

1.6. the claimant's complaints of indirect sex discrimination as set out at paragraphs 23. a., 23. b., 23. c., 23. e. (insofar as they relate to the PCPs as applied between 01 May 2023 and 19 May 2023) and paragraphs 23. D. and 23. f. of the Agreed List of Issues are not well founded and they are hereby dismissed.

REASONS

Introduction

1. The claimant presented complaints of unfair dismissal (constructive), direct disability discrimination, indirect disability discrimination, harassment related to disability and indirect sex discrimination, which the respondent denied.

2. A final hearing was held on 28, 29, 30 and 31 (morning only) October 2024 before Employment Judge Beyzade, Mrs Forrest (Tribunal member) and Ms Isherwood (Tribunal member). The Tribunal convened in chambers (in

private) on the afternoon of 31 October 2024 and on 25 March 2025. This was a hearing held by Cloud Video Platform ("CVP"). We were satisfied that it was just and equitable to hold the final hearing by CVP, and that the Tribunal could see and hear parties, and any representative.

3. The parties prepared and filed a Joint File of Documents in advance of the hearing consisting 281 pages (pages 273-281 were added to the second version of the Joint File of Documents by consent subject to parties addressing the Tribunal on matters of relevance in terms of evidence and submissions during the hearing).

4. At the outset of the hearing the Tribunal held detailed discussions with the claimant and the respondent's representative in relation to the draft List of Issues and a number of amendments were agreed. Following those discussions, the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both the claimant and the respondent's representative being in agreement with these (the issues below relate to liability only):

Please see Annex A – below

5. It was agreed that the Tribunal would determine the issues relating to both liability and if appropriate, remedy during the final hearing.

6. The claimant and the respondent's representative were asked by the Employment Judge to confirm if they or any witnesses required any reasonable adjustments. Neither party nor representative requested any reasonable adjustments, other than the claimant who requested the ability to take breaks on an as needed basis.

7. It was agreed that the claimant could request a break at any time, and in particular that she would be able to take a break when she were giving evidence or talking about her children's disabilities if she needed to.

8. It was also agreed that the claimant would be provided with breaks as needed during the hearing both to address any issues that may arise concerning her children (although the claimant confirmed that she had made childcare arrangements) and in order to speak to her legal representative.

9. It was agreed that the claimant would let the Tribunal know when she required a break, following which she could be away from her computer and take a break. In addition to the usual breaks, the claimant was permitted to take breaks as required and as requested by the claimant during the hearing.

10. The claimant gave evidence at the final hearing on her own behalf and had provided a written witness statement prior to the hearing.

11. Mr Jamie Brooks, Principal at Langdon Academy gave evidence on behalf of the respondent, who provided a written witness statement in advance of the hearing.

12. In addition, Dr Saphina Asong attended the Tribunal to give evidence pursuant to a witness order. Dr Asong gave oral evidence (no written witness statement was provided by Dr Asong or on her behalf). As the witness order was requested by the respondent's representative, the respondent's representative was permitted to undertake examination in chief only of her and the claimant was able to ask any questions to Dr Asong thereafter by way of cross examination.

13. The claimant appeared before the Tribunal in person whereas the respondent was represented by Mr Stefan Brochwicz-Lewinsky of Counsel.

14. A timetable and a reading list were agreed with the claimant and the respondent's representative at the outset of the Hearing to ensure that the evidence and submissions could be completed within the allocated time.

15. The claimant prepared a Chronology, which was not an agreed Chronology. The respondent's representative did not object to the Tribunal reading the same on the basis that some of the points were in dispute and would be dealt with in evidence.

16. Both the claimant and the respondent's representative made closing submissions in writing, which were supplemented by oral submissions.

17. Both the claimant and the respondent's representative were on the whole mindful of the overriding objective and worked together to ensure that the evidence and submissions were completed within the allocated time. This ensured that the Tribunal were able to carry out deliberations in private and thereafter to deliver their oral Judgment in public on 26 March 2025 (this being the first available date that the Tribunal could reconvene in public following the conclusion of evidence and submissions). The Employment Judge apologises to parties for the length of time it took to deliver the oral judgment and these written reasons thereafter.

Findings of fact

18. On the witness evidence and the documents to which it were referred, the Tribunal makes the following essential findings of fact:

Introduction

19. The respondent, Brampton Manor Trust, is an academy comprising 2 schools. The claimant was employed at Langdon Academy, which is one of the two schools within Brampton Manor Trust.

20. Mr Jamie Brooks was the Principal at Langdon Academy at all material times. Dr Sophina Asong was appointed to lead Langdon Academy's Modern Foreign Languages department in January 2023 and in order to

improve pupils' GCSE results she was trying to embed a culture where staff were accountable for their performance.

21. The claimant, Ms Assana Mounkpoupouonkoui, was employed by the respondent between 01 July 2016 and 31 August 2023. She was employed as a French and Spanish teacher on a full-time basis from the outset of her employment. Due her experience as a teacher, the claimant was placed on an Upper Pay Scale.

22. A copy of the claimant's contract of employment can be found at page 81 of the Hearing Bundle. Clause 5 of the claimant's contract stated:

"*5. HOURS OF WORK*

• You are employed on a full time basis.

• During term time, you are expected to be on-site by 8.30 am in the morning and not to leave site before 3.30 pm. You are entitled to a rest break (outside of directed time) of 20 minutes per day if working over six hours.

o You will only normally be expected to attend the Academy site during term time; however, your working time is not limited to these periods. In addition to the above days, and in accordance with the STPCD, you are expected to work such reasonable additional hours as may be necessary to enable the effective discharge of your professional duties, including in particular planning and preparing courses and lessons; and assessing, monitoring, recording and reporting on the learning needs, progress and achievements of assigned pupils. The Academy does not determine how many of the additional hours must be worked or when these hours must be worked.

• Furthermore, the Academy reserves the right to require you to attend work outside these periods on reasonable notice and for reasonable periods. This may include attending meetings under any of the Academy's policies, or any other tasks on behalf of the Academy, as may in the Academy's opinion be reasonably necessary.

o You are also expected to carry out the Professional Responsibilities of a Teacher as set out in the STPCD from time to time in force. This may involve working as reasonably required by the Academy during the Academy closure periods,

o A statement will be provided, setting out the hours of designated management time, teaching time and other time which the Academy directs you to work, and such a statement will be issued to you at the start of each academic year .

o The arrangements in place as to your days and hours of work upon commencement of this appointment are not contractual and may be varied by the Academy upon reasonable notice to you at any time.

o You are required to keep your working hours flexible to a reasonable extent, depending on the operational, academic and pastoral requirements of the Academy. At certain times the needs of the Academy and its pupils may require these hours to be modified and you will be expected to vary your hours of work accordingly to meet these needs."

Claimant's children and their disabilities

23. The Tribunal accepted that both of the claimant's two children were disabled for the purposes of section 6 of the Equality Act 2010 ("EqA") at all material times, both having the condition of haemophilia and the claimant's younger son being diagnosed with autism in May 2022. This matter was not disputed by the respondent.

24. The claimant had informed Jamie Brooks of her younger son's diagnosis of autism by email dated 20 May 2022 in the following terms:

"*As mentioned during our last meeting, I am writing regarding my working hours for the next academic year. Unfortunately, my younger son has been diagnosed with autism. I mentioned his speech delay during our last meeting. This diagnosis adds further pressure and the need for me to continue working on a part time basis. I do not know what next year will look like but already we are having weekly private speech therapy sessions for him.*

I understand the pressure the department is on and I can only apologise for not being able to offer more to the school. I hope the school understands my situation as I do love working here."

25. The claimant sent a further email to Jamie Brooks on 20 October 2022 in the following terms:

"*Just to give you an update regarding my leave. This incoming Friday I will be in school as I have started treating my son myself at home. Sometimes I have to try a few times but with practice I will get better. My son will have the operation this half term to remove the device. Thank you for granting me the leave. I would also like to teach my new year 11 this Friday as I need to give them work for half term. I will email Ms Khan for that*."

26. We noted the terms of the claimant's flexible working applications. By way of example the letter dated 28 May 2021 referred to a letter from a Clinical Nurse Specialist at Great Ormond Street Hospital's Haemophilia Department explaining how reduced hours of working would continue to benefit the care of the claimant's children.

Departmental meetings from 18 January 2023

27. There were meetings arranged from January 2023 scheduled to start 3.15pm which the claimant and members of the claimant's department were expected to attend, that were likely to overrun beyond one hour.

28. On 18 January 2023 Dr Saphina Asong raised her voice at the claimant during the first departmental meeting. She raised her voice when the claimant got up to leave the team meeting at around 4.25pm. Dr Asong said that they needed to discuss professional expectations. Thereafter we find that it is likely that Dr Asong said that she could drop the claimant off or words to that effect. However, the claimant said that she would take the train and that the train was faster (due to traffic on the road). After Dr Asong had raised her voice at the claimant, the claimant did not leave the meeting. The claimant remained until the end of the meeting.

29. An email was sent to the claimant from Dr Asong on 18 January 2023 at 4.42pm stating: "*chauffering was a genuine offer. Meant from the heart. we will need to talk about professional expectations (meetings - blame free)*."

30. In the claimant's email response sent the following day at 08.26am, the claimant asked her to let the claimant know in advance if the meeting was to overrun so she could try to make arrangements accordingly and she stated that she was always happy and available to discuss at lunchtime:

"*I was on the meeting on time. The meeting is expected to last an hour and we were almost 15 min later. I think Lucienne was concluding. If meetings will be lasting more than an hour please do let me know I can make arrangements accordingly. I am always happy and available to discuss on my lunchtime*."

31. On 03 March 2023 Erica Halley, Head of KS3 Languages suggested meeting as a team for five minutes once a week in order to discuss where they all are with their respective subjects/year groups and what they should be doing the following week. It was stated that this was to ensure that they would be more together as a team and that their reasons for turning to a centralised system in the first place would be realised. She proposed meeting on Friday lunchtimes at 1.40pm in the MFL office although she requested that if this was a problem for anyone they should propose an alternative time. Dr Asong replied at 09.11am stating that this was a "Brilliant idea." The claimant replied to Dr Asong and Erica Halley and others as follows:

"*Does it have to be every Friday? I do not want to sound negative but I think having a meeting on our free time is not sustainable. Instead, we should have regular CT meetings to discuss our planning. I am already using my lunches to work. If it is a one or once in a while, yes I am willing to attend but I cannot commit to a lunch meeting every Friday*."

32. Erica Halley replied that morning stating that they needed to meet every Friday and that it would be a short meeting. It was explained that one of the aims were to help resolve issues so centralised resources could work for everyone. Erica Halley stated that Friday lunchtime at 1.40pm was chosen to enable teachers time to get some lunch and prepare for their lesson afterwards. The claimant was asked to put forward other suggestions for a regular meeting time.

33. Dr Asong replied on the same day advising that they needed to make time to talk to each other if they wanted to solve problems in the department and that 4 minutes with a cup of tea with each other would kill no one.

34. On 11 May 2023 Dr Asong sent an email to the claimant and others detailing the agenda for a meeting taking place on 17 May 2023 from 3.15pm to 4.15pm, advising that the meeting was likely to overrun by 15 minutes.

35. On 18 May 2023 Dr Asong sent the notes of the meeting to the claimant and other attendees at that meeting including David Hull (a male teacher), Lucienne Grandman, Erica Halley, Alice McMahon, Adila Nalla, Claudia Hulpoi, and Dr Asong. A copy of the notes from that meeting (which ended at 4.30pm) are at pages 249-251 of the Hearing Bundle, which we accept are an accurate record of the meeting. Under the heading "1. centralised planning who does what? How we plan?" the following was recorded:

"*1. Agreed Lesson Planning Protocols (Rosenshine/Content/Leadtimes) - We agreed the following*

- *David is responsible for planning Year 8 and Year 9 Spanish lessons for all.*
- *That all of us will use the Lesson Planning Structure aligned to Rosenshine Principles of Education*
    - *Do it Now Task (Daily Review) – 5 mins*
    - *Intro of New Material by the Teacher (I do – We do) – Max 15 mins*
    - *We Do/You Do Task (Guided and Independent Practice) – Max 15 mins*
    - *Check Student Understanding Task – Usually a Speaking/Listening task, never writing*
    - *Verify success rate and Plenary – Set tasks that cater for varying rates of work completion*
    - *Model target language throughout*
- *We agreed that shared planning lessons must be filed in KS3/KS4 Shared drive under Week 123 etc. no later than 1 week in advance*

- *We agreed that every lesson must contain enough materials for 1h 15 mins and include at least 3 skills*

- *How to plan and file lessons correctly was repeated for deliberate practice*

- *Here are the updated allocations: Changes are Alice will be understudy with Asana for Year 10 Spanish and Claudia takes on Year 9 Spanish from David. David remains with Year 8 Spanish per below:*

STAFF INITIALS	*YEAR GROUPS YOU ARE PLANNING FOR*
DAVID	*Y8 SPANISH*
LGR	*Y11 FRENCH I YEAR 10 FRENCH*
AMO	*Y10 SPANISH I YEAR 11 SPANISH I* Y11 ITALIAN*
CHU	*Y9 SPANISH*
EHA	*Y7 FRENCH I Y7 SPANISH I Y9 FRENCH*
ANA	*Y8/9/10/11 GERMAN (With Anila) Y8 FRENCH (understudy YEAR 10 SPANISH)*
AMC"	

36. On 23 May 2023 Dr Asong sent an email detailing the agenda and timings for a further meeting on the following day, which suggested that the meeting would overrun beyond an hour.

37. On 25 May 2023 Dr Asong sent an email to the claimant copied to Addela Khan with the subject "*Re: Year 10 and 11 Spanish Planning*". Dr Asong explained "*This is why as a department we agreed to centralise planning so that only those who were most capable planned for everyone and everyone did not have to plan all their lessons*." The aim she stated was to work as an effective MFL team, raising student achievement in MFL and reducing planning in relation to teacher workload. She confirmed that the claimant's allocated groups are Year 10 Spanish and Year 11 Spanish. She further advised that as there were no Year 11 teaching going on at that time (all Year 11 planning was done), all the claimant needed to do was to plan Year 10 Spanish (with Alice being the understudy for the purpose of her professional development). The email advised "*This is because in a highly technical department, you are the most technically proficient teacher in Spanish*." The chart contained in the email dated 18 May 2023 (set out above) showing the distribution of planning in the MFL Department was repeated in that email with no material changes.

38. A copy of the Teaching Standards (sections 4 and 8 highlighted) was attached to that email, and Dr Asong stated this was so that the claimant did not feel that what was required was unreasonable. In addition, the claimant's appraisal documentation was attached to assist to contextualise why the claimant is more than best qualified to help achieve this. The email ended, "*As you know from our past interactions, I will happily work with you on a plan which supports you in achieving these outcomes. I deeply regret having caused you any discomfiture. Please lets talk as needed. Thanking you.*"

39. On 13 June 2023 Dr Asong sent an email detailing the agenda and timings for a further meeting on the following day, which suggested that the meeting would overrun beyond an hour.

Staff Appraisal

40. The respondent conducted a staff appraisal with the teaching members of staff including the claimant. In the meeting with the claimant on around 28 February 2023, Dr Asong and the claimant discussed the claimant's strengths and set targets.

41. The feedback received on the claimant's appraisal form (see pages 181-185) included the following:

Teachers' Standards	**Areas of strength**	**Areas for development**
Demonstrate core values and behaviours (see	Behaviour for learning noted in all	Urgently increase availability and /or

preamble to the Teachers' Standards above)	observations/learning walks as pupils on task and engaged throughout. -building positive relationships with students during my Italian club. - Lessons observations show that I establish positive learning environment	output for use to pursue extra curricular activities such as intervention, parental contacts, and professional dialogues Increase the number of parental contacts and calles geared to elicit parental involvement in student achievement
Set high expectations which inspire, motivate and challenge pupils	Consistent use of behaviour policy e.g. IRIS to maintain positive behaviour for learning across all lessons -Making positive phone calls each term for to parents.	

42. Whilst the performance appraisal document indicated that the claimant was required to increase availability and/or output to pursue extra-curricular activities, we noted that the specific examples provided were interventions, parental contacts and professional dialogues.

43. There was also reference to general issues being experienced in the department on the appraisal document titled '*Mid-Year Review 2022/2023*' in terms that "*teacher availability for intervention and the effectiveness of intervention groups (attendance, parental contact) is currently a cause for concern*."

44. The claimant ran an Italian club for students which she initiated during Wednesday lunchtimes. Italian was not a language taught by the school, it was a community language and students would register to sit their examinations at the school.

45. Furthermore, during the claimant's last months working at the school, one day after school while she was getting ready to leave, the claimant agreed to assist Jamie Brooks within his office to help interpret during a meeting with a Portuguese speaking parent. The claimant carried out ad hoc interpreting tasks across the school in Spanish and Portuguese.

46. The claimant also undertook other voluntary tasks at certain times to support the department including relating to the Spanish scheme of work for GCSE.

Easter Holiday period 2023

47. The claimant was asked to work during Easter (on or around 28 March 2023). The claimant declined to do so. Accordingly, she did not work during Easter. We did not find that any pressure was placed on the claimant to work during the Easter Holiday period within 2023. In terms of any offer to buy pizza for the claimant's children, we find that it is likely that there was such a suggestion that was made by Dr Asong in a supportive manner in order to persuade the claimant to attend work at the relevant time. The claimant did not have to accept the offer, and indeed, she did not accept it.

Flexible working Request in relation to 19 May 2023

48. There was a requirement to make an application to request part time or flexible working annually. The claimant made various applications between April 2019 and the date of her resignation on 26 May 2023, and her requests for part time working were approved albeit on a temporary yearly basis.

49. The outcome letter of the claimant's flexible working request dated 19 May 2023 advised the claimant that she had been granted part time working for the next academic year starting on 01 September 2023. Whilst there was no permanent part time working arrangement agreed, the claimant's requests to work part time were granted since her initial application was made in 2019.

50. The letter dated 19 May 2023 from Mr Peter Whittle, Associate Principal explained the reasoning behind the decision to grant the claimant's request on a temporary basis for one year as follows. He firstly summarised the content of the meeting on 11 May 2023 including that the claimant had indicated at the meeting that if a permanent part time working arrangement were not possible, the claimant were happy to seek a further extension. The letter stated that the claimant had said that she continued to need one day per week to support her children, who had complex medical conditions and although both were progressing quite well the claimant provided a letter from the Clinical Nurse Specialist at Great Ormond Street Hospital's Haemophilia Department explaining how reduced hours of working would continue to benefit the care of the claimant's children. The letter stated:

"*As with your previous flexible working requests, I suggested that some of the reasons that prevented approval for a permanent change were still likely to pertain. In particular, issues regarding cost and the inability of the school to reduce your hours permanently whilst maintaining our capability to deliver the full range of MFL GCSE courses, were obvious areas where obstacles might exist.*

I asked whether, in the event of a permanent change being rejected again, you would want the school to consider a further one-year extension of the present arrangement. You have previously expressed a preference for a temporary arrangement and your intention to return to full-time working in the future.

A curriculum change, taking place for next year's Year 10 cohort increases the overall requirement for MFL teaching hours, and will do so again one year later when that change applies to the whole of KS4. This structural change restores the allocation of five hours per fortnight for GCSE option subjects and therefore also increases the number of days per week that GCSE groups have lessons.

I undertook to discuss the timetabling implications with Sultan Hussain, Assistant Principal in charge of timetabling, and with Jamie Brooks in relation to overall staffing levels."

51. Mr Whittle stated that he had consulted with Jamie Books and Sultan Hussain first to confirm that they would have sufficient teacher hours in MFL to fulfil delivery of the curriculum in the next academic year and secondly to confirm that this would include sufficient expertise and experience to deliver GCSE Spanish without splitting classes. He confirmed that even with the claimant's reduced hours the school would be able to fulfil those requirements. However in relation to subsequent academic years, he stated that the answer was not so positive. He further explained:

"*When the increased hours for GCSE applies to Years 10 and 11 (from September 2024) the strong likelihood is that we would be short of capacity to teach GCSE Spanish effectively thereafter. It is also likely that we would be short of teacher hours in MFL overall, in future years*."

52. He stated that he had consulted Langdon Academy's Business Manager, Husna Haque regarding cost implications and with a range of teacher recruitment agencies regarding the availability of staff to replace permanently the shortfall in the claimant's hours in future years, in light of the structural change to GCSE. He set out the outcome of those consultations in twelve separate bullet points (see pages 253 to 254 of the Hearing Bundle). The feedback included that splits would be likely to occur in Key Stage 4 if the claimant were allocated classes in both years 10 and 11 (although they may be avoided for the next academic year they would be likely to occur in subsequent timetables as the number of Key Stage 4 MFL lessons increases), these structural changes made a permanent change impossible at this time, a non-specialist teacher could not be allocated to lead any GCSE years, yearly timetables do not feature split classes as the school believed this to be detrimental to high quality teaching and learning and to student outcomes, there was insufficient specialist capacity in the school to redistribute the proposed shortfall in the claimant's working hours to other colleagues if the permanent change were made, and if they had to employ a new teacher to cover any shortfall in the claimant's hours a number of other complications would arise (including agencies advising that one day per week placements were rarely deliverable and almost never sustainable). The consultation feedback showed that the appointment of a new staff member to fill any shortfall in hours appeared undeliverable and would add significant cost to the school, and that there was no scope within the agreed staffing budget to increase staffing costs in the claimant's curriculum area at this time.

53. The claimant's flexible working request for a permanent reduction in her working hours was rejected for those reasons which were detailed in the outcome letter.

54. However, the letter offered the claimant a one-year extension of the reduction in working hours to part time hours (0.8 - as in previous years) and stated the following "*It should be noted that this offer represents a temporary arrangement only and that you would return to your substantive, full-time (1.0) role from 1st September 2024*." (see page 255 of the Hearing Bundle).

55. The claimant was advised in that letter that the claimant is a teacher in the Upper Pay Range and she was expected to be "*highly competent in all elements of the relevant standards*," but also her "*achievements and contribution to the school [to be] substantial and sustained*" and reference was made to the Pay Policy in this regard. The letter stated that the claimant had given an assurance that she understood these expectations and that she remained happy to contribute fully to the life of the department and the school, including through her involvement in intervention strategies and extra-curricular provision.

56. The claimant was further advised that if she wished to accept the offer she should write to Jamie Brooks, or alternatively, she had a right of appeal and that any appeal should be sent to Dr Olukoshi, Executive Principal of the respondent within 10 working days of receipt of the letter setting out her grounds of appeal.

57. The claimant was open to make an application to the respondent to work part time at any time during the next academic year. Any such application had to be made prior to the start of the next academic year (if she wished to work part time in the following academic year). We noted that the claimant's requests to work part time were granted fairly quickly each year.

58. Therefore, if the claimant wished to work part time in the following academic year, the claimant could have made a further application (flexible working) to work part time. The respondent may have agreed to the claimant's request. We noted that the respondent had accepted the claimant's applications that were made in previous years.

59. When the school (now called Langdon Academy) became an academy, there were some teachers that transferred to the respondent on a part time contract (including Ms Nash). Apart from Ms Nash, it is not clear who those teachers were. Except in relation to those teachers, all other teachers who wanted to work part time were required to make a flexible working application pursuant to the respondent's policy.

60. Jamie Brooks stated in his evidence that there was risk that the claimant's application would not be accepted in any particular year as it depended on how many exam entries the school had received for languages, but this risk had never materialised. He further explained in his evidence that the claimant was proficient in teaching both French and Spanish which were the two most popular languages and that the claimant could have been offered a role teaching a role teaching either of those languages.

<u>Lesson planning</u>

61. An email was sent on 10 May 2023 advising the year groups that the claimant was planning for in terms of lessons which included the following:

"*Yl0 SPANISH I YEAR 11 SPANISH I Year 11 ITALIAN**"

62. In the same email, the claimant was also informed about the year groups that other individuals would be undertaking lesson planning work for. The year 11 Italian work related to a lunchtime club and the claimant was already undertaking planning work relating to this.

63. A further email was sent from Dr Asong on 11 May 2023 providing an agenda for the CT meeting on 17 May 2023 which included discussions around planning and timings in respect of each discussion. She stated on item number 5 of the agenda:"*5. USE OF YEAR 11 RELEASE TIME FOR PLANNING (per item 1) 5 mins*" This email also stated: *"This meeting is likely to overrun by 15 mins at most. Thanking you for planning for this*."

64. As indicated earlier, there was a meeting that took place on 17 May 2023, which the claimant and Dr Asong attended. An email was sent dated 18 May 2023 setting out the lesson planning allocations and the claimant's allocation remained the same save that it was noted that a member of the MFL teachers named Alice was to be an understudy with the claimant for year 10 Spanish.

65. The claimant sent an email to Dr Asong and Addela Khan stating, "*As you are aware, Sophina has informed me that I will be planning lessons for both year 1-0 and yea111-Spanish. I do not agree with it as it will increase my workload enormously. Claudia was planning lessons, Alice asked if she could plan and I was happy to assist her. During the last meeting, it was mentioned that Alice and I would be overseeing the lessons. However, today it has emerged that I will be planning it alone. Lucienne is planning year 10 and 11 French because she has a TLR, Erica is planning most KS3 because she has a TLR. I am on a part time because I have personal circumstances for which I have to work less. I believe the planning should according to your timetable (part time or full time). Planning a year 11 lesson is equal to planning 2 lessons a week as supposed to those planning the year 8 and year 7. For these reasons, I believe it is unfair for you to impose the planning of all KS4 lessons a a part time member of staff. I would urge you to reconsider your decision as I will be contacting my union*." (see page 258 of the Hearing Bundle)

66. Dr Asong sent an email to the claimant in reply (copied to Addela Khan) on 25 May 2023 at 09.56am (referred to above). The allocations for the claimant were confirmed as follows: "Yl0 SPANISH I YEAR 11 SPANISH I Y11 ITALIAN*" (Alice denoted as AMC was to be an understudy).

67. On 13 June 2023 Dr Asong sent an email to the claimant and to her team setting out details of the CT meeting agenda on 14 June 2023 and the gained time jobs which included the claimant reorganising all the SOWs and lesson plans for Key Stage 4 Spanish by 29 June 2023. It was noted that Claudia was undertaking Key Stage 3 French and Spanish whereas Lucienne was preparing year 10 and year 11 in French.

68. Jamie Brooks had explained in his evidence that it was expected that gained time would be used to undertake this work.

69. Whilst the claimant states that she may have needed to take work home and she undertook marking on the train journey home, we noted that the claimant had administration time ("PPA") according to her timetable and gained time (year 11 students were undertaking exams at the material time). We accepted that the claimant's PPA time was not pro rata'd (according to her part time working hours) and the claimant had the same PPA time as full-time teachers.

70. We also noted the contents of the staff timetables which included the claimant's timetables and other department members that were before us.

Team meeting 24 May 2023

71. As indicated earlier, a departmental meeting took place on 24 May 2023, during which the claimant was informed that she would be planning the Spanish lessons for years 10 and 11, and year 11 Italian lessons (per email communication at page 286 of the Hearing Bundle).

72. Dr Asong pointed out during the team meeting in the presence of the claimant and other colleagues on 24 May 2023 that the claimant was on the Upper Pay Scale/Upper Pay Range ("UPS/UPR").

73. We noted that the information about the salary bands for UPS/UPR are available online (this did not appear to be in dispute). A teacher would apply for the UPS/UPR after around six years' teaching experience. If this were achieved a teacher would need to contribute to the school on a regular basis (in accordance with the relevant policy which we were referred to).

74. The claimant sent an email to Jamie Brooks on 24 May 2023 at 7.17pm with the subject '*complaint*' advising that she had left the school in tears that day following an incident with Dr Asong. She stated:

"*Lately, our meetings have been running late, finishing as earliest as 16:30. We have learnt to get used to it although many people do not agree or like it. Today, I had a telephone appointment with my GP at 16:30. Around 16:28, I informed Sophina that I was going to have to go at 16:30 or as soon as I receive my call. She started shouting at me, telling me off in front of everybody how unprofessional I have been. I do not need to disclose the reason of my call, but she made me feel embarrassed in front of everybody. She said things like she also had things to do but she will not leave before the end of the meeting.*

Everyone in the department is doing what they can, but to be reminded constantly how I am not staying enough in school is having a huge impact on my wellbeing. This is the view of many in the department, but they are scared to speak out." (see page 257 of the Hearing Bundle)

75. Jamie Brooks sent an email in response to the claimant on the same evening at 8.41pm stating "*Thank you for your email and I'm sorry that you felt uncomfortable with how you were spoken to.*
In the first instance, I will ask Adella to pick this up in the morning to try to resolve the issue and ask her to appraise me of the outcome."

76. Thereafter, Jamie Books referred the matter to Addela Khan to deal with. He forwarded the claimant's complaint to Addela Khan on the same evening at 8.43pm by email advising "Please see the email from Assana and my initial response. Can you pick this up first thing in the morning please." The claimant advised that Addela Khan had agreed to speak to Dr Asong about this matter (and we accepted her evidence in this regard).

77. No further complaints were raised or conveyed to Jamie Brooks about the matters contained in the claimant's email dated 24 May 2023 thereafter.

Claimant's resignation

78. The claimant sent a letter dated 26 May 2023 to Jamie Books advising that she wished to resign her position as a French and Spanish teacher at the respondent effective after the summer term 2023. The claimant stated in that letter as follows:

"*It has been a difficult decision to make, but due to the recent, unexpected, and higher workload demand put on me as a part-time staff, I feel like I will not be able to fulfil those responsibilities I believe should originally be for postholders.*

As you are aware, my personal circumstances have not allowed me to work full-time for a while. Ideally, I would have loved to work for 3 days a week at Langdon, but I had to compromise to accommodate the needs of the school. I believe the recent decision to make me responsible for planning all KS4 lessons for Spanish (including homework), in addition to tasks that I have voluntarily taken to support the department (Spanish scheme of work for GCSE, various booklets including speaking and vocabulary) is unfair and will lead me to a breaking point where my part-time job would effectively no longer be part-time. I feel like that decision is unfair as planning responsibilities should be proportionate to your timetable and your responsibilities across the department (those in receipt of TRL and without form class).

I want to personally express my gratitude to you and the school for accommodating my genuine need to work part-time over these years. I have enjoyed my time at Langdon and I will cherish the memories I have gained here. It has been an honour to serve as a teacher here at this school and I appreciate the opportunity."

79. The claimant also advised that in accordance with the terms and contract relating to her role, she will ensure that her teaching responsibilities were

fulfilled until the last day of the summer term and she further stated, "*Once again, thank you for the opportunities*."

80. Jamie Brooks responded to the claimant's letter acknowledging and accepting her resignation from her post as Teacher of MFL from the respondent by way of a letter dated 26 May 2023. The claimant was advised that her last day for salary purposes would be 31 August 2023 and that he would arrange for P45 details to be sent to the claimant. The claimant was also advised to return any property by 21 July 2023. In addition Jamie Brooks stated:

"*In the meantime, on behalf of Brampton Manor Trust, and myself, I would like to thank you for your hard work and contribution to the Academy, and the Trust.*

I wish you all the best for the future."

Employment Tribunal procedure

81. The claimant started ACAS Early Conciliation on 31 July 2023 and the ACAS Early Conciliation Certificate was issued on 11 September 2023.

82. The claim form was presented to the Tribunal on 30 September 2023.

83. A Preliminary Hearing for Case Management purposes took place before Employment Judge Gardiner on 08 January 2024, and the record of the same is at pages 44 to 50 of the Hearing Bundle.

Observations

84. On the evidence before the Tribunal, the Tribunal made the following essential observations:

85. The Tribunal was able to make a number of findings of fact from documents including correspondences to which it was referred.

86. The Tribunal made its findings of fact on the balance of probabilities.

87. In relation to any disputed matters, the Tribunal accepted the evidence of the relevant witness whose evidence set out the position most clearly and consistently and whose evidence was most closely aligned with the documents before the Tribunal. The Tribunal found that on the whole the evidence given by the respondent's witnesses were consistent with the documents in the Bundle to which the Tribunal were referred.

88. We found that the respondent's reasons provided for not agreeing to make a permanent change to the claimant's working hours following the

claimant's most recent flexible working request made in 2023 were genuine, logical and rational. The decision was made following information that was collated in terms of the impact of granting the claimant's request on a permanent basis. Jamie Brooks's evidence was both clear and consistent with the terms of the letter dated 19 May 2023.

The Law

89. To those facts, the Tribunal applied the law:

Constructive unfair dismissal

90. The Tribunal had regard to the terms of section 95(1)(c) of the Employment Rights Act 1996 ("ERA") which provides that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is known as constructive dismissal.

91. The Tribunal also had regard to the case of *Western Excavating Ltd v Sharp 1978 ICR 221* where it was stated that:- "*if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*."

92. An employee pursuing a claim of constructive dismissal must establish that:-

- there was a fundamental breach of contract on the part of the employer;
- the employer's breach caused the employee to resign and
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

93. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. This term is implied into all contracts of employment, and means that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (*Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84*).

94. In the case of *Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666* it was stated that "*to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a*

whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

95. This was developed further in the case of *Malik v BCCI 1997 IRLR 462* where it was stated that "*in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively*."

96. In *Hilton v Shiner Limited [2001] IRLR 727*, it was held that the implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus, in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts.

97. In *London Borough of Waltham Forest v Omilaju [2005] IRLR 35*, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. However, the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer.

98. In *Wright v North Ayrshire Council [2014] IRLR 4*, the Employment Appeal Tribunal ("EAT") found that the Tribunal had been wrong to rely on the principle that, where there was more than one cause, it was only the main (i.e. effective) cause of the resignation which should be considered to decide whether there had been a constructive dismissal.

99. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 of the ERA. This requires the employer to show the reason for the dismissal (i.e. the reason why the employer breached the contract of employment) and that it is a potentially fair reason under Sections 98 (1) and (2); and where the employer has established a potentially fair reason, then the Tribunal will consider the fairness of the dismissal under Section 98 (4), that is: (a) did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and (b) was it fair bearing in mind equity and the merits of the case. A constructive dismissal is not necessarily an unfair dismissal: *Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166*.

100. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, relying on an argument that there was no dismissal, then a Tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it: *Derby City Council v Marshall [1979] ICR 731*.

Discrimination complaints

101. The claimant makes complaints alleging discrimination on the grounds of protected characteristics under the provisions of the Equality Act 2010 ("EqA"). The claimant complains that the respondent has contravened provisions of part 5 (work) of the EqA. The claimant alleges direct discrimination (disability), indirect discrimination (sex and disability) and harassment (disability).

102. The protected characteristics relied upon are disability and sex as set out at sections 6 and 11 of the EqA respectively.

Disability discrimination

Section 6 – definition of disability

103. Disability is one of the protected characteristics identified in Section 4 of the EqA. It is further defined in Section 6(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-today activities. Section 212(1) defines "substantial" as meaning "more than minor or trivial"; while Schedule 1, paragraph 2, further defines "long-term effects".

104. 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. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. The word "likely" has been interpreted by the then House of Lords to mean "*could well happen*": *SCA Packaging Ltd v Boyle [2009] IRLR 746*.

105. The time at which to assess the disability is the date of the alleged discriminatory act (*Richmond Adult Community College v McDougall [2008] ICR 431* (para 24) and *Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT*). In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken.

106. A Tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a

substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

107. It is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. In the case of mental impairments, however, the value of informed medical evidence should not be underestimated.

108. Appendix 1 to the Equality and Human Rights Commission ("EHRC") Code of Practice of Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause: *Ministry of Defence v Hay [2008] ICR 1247*.

109. In *Aderemi v London and South Eastern Railway Limited [2013] ICR 591*, the EAT held that the Tribunal "*has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other*."

110. An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there has been a substantial adverse effect over the relevant period (*Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA*).

111. Likelihood of the effect lasting 12 months or more is to be assessed at the time of the alleged contravention as confirmed by the Court of Appeal in *All Answers Ltd v W & R [2021] EWCA Civ 606* at paragraph 26: "*The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph*

2(1)(b) of the Schedule. We note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood"."

Direct disability discrimination

112. By section 13 of the EqA a person discriminates against another if because of a protected characteristic, in this case disability, he or she treats the employee less favourably than he or she would treat others.

113. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: "*On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case*."

114. The effect of section 23 of the EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

115. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In *Amnesty International v Ahmed [2009] IRLR 884* the Employment Appeal Tribunal ("EAT") recognised two different approaches from two House of Lords authorities - (i) in *James v Eastleigh Borough Council [1990] IRLR 288* and (ii) in *Nagarajan v London Regional Transport [1999] IRLR 572*. In some cases, such as *James*, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as *Nagarajan*, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in *R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15*.

116. It is unusual to have direct evidence as to the reason for the treatment [discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions] (*Nagarajan*). The Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of *Anya v University of Oxford [2001] IRLR 377*. "*Most cases turn on the accumulation of multiple findings of primary fact, from which the court or Tribunal is invited*

to draw an inference of a discriminatory explanation of those facts" (*Madarassy v Nomura International Plc [2007] IRLR 246*).

117. In *Glasgow City Council v Zafar [1998] IRLR 36*, a (then) House of Lords case, Lord Browne-Wilkinson stated in his leading judgment "*The Act of 1976 requires it to be shown that the claimant has been treated by the person against whom the discrimination is alleged less favourably than that person treats or would have treated another*."

118. Lord Browne-Wilkinson also stated "*I cannot improve on the reasoning of Lord Morison [sitting in the same case in the Court of Session in Scotland] who expressed the position as follows: "The requirement necessary to establish less favourable treatment which is laid down by section 1(1) of the Act of 1976 is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances*.""

119. The reason for the treatment need not be the main or sole reason. Lord Nicholls sitting in the (then) House of Lords stated in the case of *Nagarajan* as follows "*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out*."

120. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory *R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15*.

121. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind.

122. In *Shamoon v Chief Constable of the RUC [2003] IRLR 285*, a (then) House of Lords authority, Lord Nicholls said that a Tribunal may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was

treated as she was. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than was or would have been afforded to others.

123. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The Tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred.

124. The EHRC Code of Practice on Employment (last updated 04 September 2015) states, at paragraph 3.5 that, "*The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have been treated differently from the way the employer treated – or would have treated – another person*."

125. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "…but does not need to be the only or even the main cause." (paragraph 3.11, *EHRC: Code of Practice on Employment*). The protected characteristic does however require having a "…*significant influence on the outcome,*" (*Nagarajan, above*).

126. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "*by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*" (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL*).

127. Since *EBR Attridge LLP (formerly Attridge Law) and anor v Coleman [2010] ICR 242, ECJ*, a person may bring a claim for direct discrimination if they are treated less favourably because they are associated with a protected characteristic, such as disability or race, even if they do not share that characteristic. The facts of *Coleman* provide a good example of permissible associative direct discrimination in that Ms Coleman was subjected to less favourable treatment because of her disabled son, for whom she was the primary carer, and that role directly and negatively impacted on her employment relationship.

128. At para 3.19, the EHRC Code of Practice on Employment states that this form of direct discrimination can occur in various ways - "*for example, where the worker has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one*".

Indirect disability and sex discrimination

129. Section 19 of the EqA 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*."

130. The list of relevant protected characteristics per section 19(3) of the EqA includes disability and sex.

131. As indicated above, s23 of the EqA states: "*On a comparison of cases for the purposes of section…19 there must be no material difference between the circumstances relating to each case*."

132. Lady Hale in the Supreme Court gave the following guidance in *R (On the application of E) v Governing Body of Jewish Free School [2010] IRLR 136*: "*Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins*."

133. In the more recent case of *Essop v Home Office; Naeem v Secretary of State for Justice [2017] IRLR 558 SC*, at [25] Lady Hale stated:

> "'*Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot*."

134. The EHRC Code of Practice on Employment at paragraph 4. 5 states as follows:

"*The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a 'one off' or discretionary decision*."

135. The PCP must have been applied or would have been applied to the worker and others. Indirect discrimination may therefore arise where a PCP has not yet been applied.

136. It is for the claimant to identify the PCP relied upon in making the complaint. The words "*provision, criterion or practice*" are cumulative and do not require an absolute bar (*British Airways plc v Starmer [2005] IRLR 862, EAT*) but do not include every act that results in inequality (*Ishola v Transport for London [2020] EWCA Civ 112*).

137. A one-off decision may amount to a practice if that decision would be applied in similar situations in the future (*Ishola*).

138. Group disadvantage arises where the application of the PCP did or would put persons who share the claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it. The disadvantage does not require to be serious, obvious or significant and includes any type of disadvantage.

139. Paragraphs 4.17 and 4.18 of the EHRC Code state:

"*4.17 The people used in the comparative exercise are usually referred to as the 'pool for comparison'.*

4.18 In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider."

140. The comparison is with persons whose relevant circumstances are the same, or not materially different from the claimant, apart from the protected characteristic (Section 23(1) EqA 2010). However the pool must not be artificially restricted by reference to the characteristic itself (because "*such an approach would drive a coach and horses through the indirect discrimination provisions*") (*Spicer v Government of Spain [2004] EWCA Civ 1046, Court of Appeal*). The pool must suitably test the discrimination

complained of and "*the pool should not be so drawn as to incorporate the disputed condition*" (*Naeem v Secretary of State for Justice [2017] UKSC 27*). Once the PCP has been identified "*there is likely to be only one pool which serves to test its effect" as a matter of logic* (*Allonby v Accrington and Rossendale College and others [2001] ICR 1189*).

141. All the workers to whom the PCP is applied should be included within the pool. In general the pool for comparison should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively (4.18 EHRC Code) (*Essop*). The pool is all persons who would satisfy the relevant criteria apart from the PCP in question (*University of Manchester v Jones 1993 ICR 474, CA*). The pool may be external where the PCP affects potential applicants for work, or it may be internal where the PCP only affects a section of an existing workforce, provided it is properly representative.

142. The EHRC Code states "*Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic, and its impact on people with the protected characteristic*" (paragraph 4.19 EHRC Code).

143. "Particular disadvantage" essentially means something more than minor or trivial. That was determined in *R. (on the application of Taylor) v Secretary of State for Justice [2015] EWHC 3245 (Admin)* where the following comments were made:

"'*The term 'substantial' is defined in section 212(1) to mean 'more than minor or trivial'. I do not perceive any significant difference between the phrase 'substantial disadvantage' and the phrase 'particular disadvantage' used in section 19 of the Act*."

144. Particular disadvantage may be established by quantitative and/or qualitative means e.g. by statistical evidence, personal testimony or expert evidence (*Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15*). However, "*Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic*" (paragraph 4.10 EHRC Code).

145. The application of the PCP must put the claimant to the same disadvantage as the group. There must be a causal link between the PCP and the disadvantage suffered by the individual (*Essop*)

146. A particular disadvantage may be objectively justified if it is a proportionate means of achieving a legitimate aim.

147. The onus is upon the respondent to establish justification. The test is objective and is therefore not limited to what the respondent considered at the time of its application. Although judged at the time of application the

justification does not have to have been consciously and contemporaneously considered by the respondent. Justification may be established by reasoned and rational judgement (*Chief Constable of West Yorkshire Police and anor v Homer 2009 ICR 223, EAT*).

148. The EHRC Code states, "*The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence*." (paragraph 4.28 EHRC Code). In addition the EHRC Code states "*Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination*." (paragraph 4.29 EHRC Code).

149. In deciding whether the means adopted to achieve the legitimate aim are proportionate the Tribunal must apply an objective test based upon a fair and detailed analysis of the working practices, business considerations and needs of the employer and the discriminatory effect of the means adopted (*Hardy and Hansons plc v Lax 2005 ICR 1565, Court of Appeal*).

150. The Tribunal must conduct a balancing exercise between the discriminatory effects of PCP against the employer's legitimate aim taking into account all relevant facts (paragraph 4.30 EHRC Code). An objective balance must be struck between the discriminatory effect and reasonable need (*Hampson v Department of Education and Science 1989 ICR 179, Court of Appeal*) The PCP must be justified having regard to the quantitative and qualitative effective on the disadvantaged group (including the claimant) rather than just the individual claimant (*University of Manchester v Jones 1993 ICR 474, Court of Appeal*).

151. As the EHRC Code explains, EU law views treatment as proportionate if it is an appropriate and necessary means of achieving a legitimate aim (paragraph 4.31 EHRC Code). "Necessary" means reasonably necessary – the employer does not have to demonstrate that no other means are possible (*Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 590*) but there must not be a less discriminatory measure which would have achieved the legitimate aim. An exception may be made to accommodate a protected group but not if doing so would undermine the aim (*Blackburn and anor v Chief Constable of West Midlands Police 2009 IRLR 135, Court of Appeal*).

152. Cost can only be taken into account as part of the employer's justification if there are other good reasons for adopting the PCP (paragraph 4.32 EHRC Code). It is an objective test. Unlike the test for unfairness of dismissal, there is no range of reasonable responses (*Hardy*). The Tribunal must make its own fair and detailed analysis of the working practices and business considerations in order to determine whether the PCP was reasonably

necessary. As such a discriminatory dismissal may nevertheless be fair and a non-discriminatory dismissal may nevertheless be unfair.

153. Thus, the burden of proof is on the claimant to prove the PCP, group and individual disadvantage. If established, the burden of proof is on the respondent to prove objective justification.

Same disadvantage indirect discrimination

154. Although there is currently a new provision in the EqA governing associative discrimination (section 19A Indirect Discrimination: Same Disadvantage of the EqA which took effect from 01 January 2024), this was not in force at the relevant time and, as such, the Tribunal must look at the law at the time relating to the claimant's claim.

155. It is clear from the wording of s.19(2)(b) and (c) that in order to establish indirect discrimination the claimant must not only suffer the disadvantage personally, but also personally possess the relevant protected characteristic.

156. However, this requirement that a claimant share the protected characteristic is not found in the EU Directives which the EqA implements. For example, Article 2(2)(b) of the EU Race Equality Directive (No.2000/43) provides that, "*indirect discrimination should be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*."

157. This distinction was further shed light upon following the decision by the Grand Chamber of the Court of Justice, in a Bulgarian reference, *Chez Razpredelenie Bulgaria AD v. Komisia Za Zashtita OT Diskriminatsia [2015] IRLR 746, ECJ*. The Grand Chamber says that in order for a measure to be capable of falling within the Race Discrimination Directive's definition of indirect discrimination, "*it is sufficient, that although using neutral criteria not based on the protected characteristic it has the effect of placing particular persons possessing that characteristic at a disadvantage*."

158. *Chez* was a case concerning the supply of goods and services but we were satisfied it is apposite to the present case. The main focus of this decision is on "*associative discrimination*". The claimant runs a shop in a predominately Roma district of a Bulgarian town. The electricity company, CRB, put meters in Roma districts considerably higher than in other districts, ostensibly so as to avoid tampering, making them less visible to consumers. The claimant brought a complaint that she was unable to check her electricity meter which meant that she paid more by way of estimated charges and that this amounted to discrimination. However, the claimant is not Roma herself. The issue, therefore, was whether she could complain about discrimination based on ethnic origin in those circumstances, applying the associative discrimination principle set out by the Court of

Justice in *Coleman*. When the ECJ handed down its decision it avoided using the words "association" or "associative discrimination". However, the ECJ held that it was clear that the concepts of direct and indirect race discrimination under the Directive extend to persons who, although themselves not a member of a specific race or ethnic group, nevertheless suffer less favourable treatment or a particular disadvantage on the ground of that race or ethnic origin. The ECJ held at paragraph 56 that:

"*56. In that regard, the Court's case law, already recalled in [42] of the present judgment, under which the scope of Directive 2000/43 cannot, in the light of its objective and the nature of the rights which it seeks to safeguard, be defined restrictively, is, in this instance, such as to justify the interpretation that the principle of equal treatment to which that directive refers applies not to a particular category of person but by reference to the grounds mentioned in art.1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds (see, by analogy, judgment in Coleman [2008] 3 C.M.L.R. 27 at [38] and [50]).*"

159. Since the words "*less favourable treatment*" come from the Directive's definition of discrimination and "*particular disadvantage*" from the definition of indirect discrimination, this appears to extend the right to claim associative discrimination into indirect discrimination.

160. Directive 2000/43 Article 2(2)(b) does not contain a requirement that the claimant in an indirect discrimination claim shares the protected characteristic of the disadvantaged group.

161. Thus two separate classes of associative indirect discrimination have arisen. Those which are 'friends and family' cases where the person at the disadvantage is someone who associates with a person who has the protected characteristic. The other class is referred to as the 'same disadvantage' where there is no personal link and the person does not have the protected characteristic but suffers the same disadvantage. *Chez* was a 'same disadvantage' case.

162. In *Rollett & others v British Airways Plc (ET case number: 3315412/2020)* the Employment Tribunal held that, "*after Chez [section 19 EqA] was not adequate to properly implement what is now the Equal Treatment Directive*" (paragraph 21). The Tribunal interpreted EqA section 19 to give effect to the Framework Directive and found that the Tribunal had jurisdiction to hear claims of indirect discrimination where the claimant suffered the same disadvantage from the application of the PCP but did not share the same protected characteristic. We are not bound by the *Rollett* decision at first instance, but we agree with its rationale and conclusions on this issue. In *Rollett* "neither party suggested that [the Framework Directive] made a material difference to the position in Chez" (paragraph 15).

163. In the EAT, in *British Airways v Rollett and others [2024] EAT 131*, it was concluded that the decision of the Tribunal on 'same disadvantage' cases, i.e.. those where the claimant did not share the protected characteristic could progress under s.19. The headnote of the EAT's decision states "*The Employment Tribunal made no error of law in concluding that it had jurisdiction to consider indirect discrimination claims under section 19 EqA where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage, where the claimant in such a case must also suffer that disadvantage, but where that claimant need not have the same protected characteristic as the disadvantaged group*". We noted that the EAT was not asked to consider those cases which are 'friends and family' type associative discrimination.

164. We accept the fact that the Equality Act 2010 (Amendment) Regulations 2023 (which were not in force until 01 January 2024) and the accompanying Explanatory Note are of assistance in determining the effect of *Chez* on section 19 EqA, even though the planned amendment is not binding on the Tribunal. The Explanatory Note states that a new section 19A EqA (indirect discrimination: same disadvantage) is to be added by Regulation 3 to reproduce the principle in *Chez*. The new section 19A EqA will apply to all protected characteristics, including disability. There is no suggestion there that, as sections 20-21 EqA implement Article 5 of the Framework Directive, Article 2(2)(b)(ii) removes the requirement to prohibit indirect disability discrimination.

165. In the circumstances, we find that the Tribunal has jurisdiction to hear a claim of same disadvantage indirect discrimination. Applying the *Marleasing* principle, we apply section 19 EqA to give effect to the wording and purpose of EU Directives in accordance with retained EU case law: namely Article 2(2) of the Framework Directive in accordance with Chez. We find that section 19 EqA does not properly implement the Framework Directive. Applying the guidance in *Vodafone 2 v Revenue and Customer Commissioners [2009] EWCA Civ 446 at [37]* any changes must go with the grain or thrust of the legislation, ensuring that any changes do not remove the core meaning or infringe the cardinal principle of the legislation. Adopting this approach, we find that section 19 EqA should be read as if it includes the wording in the, as yet not in force (at the material time to which the claimant's claim relates), section 19A of the EqA. This gives effect to the Framework Directive and is consistent with the purpose of the EqA.

<u>Friends and family indirect discrimination</u>

166. We then proceed to consider the case of *Follows v Nationwide Building Society, 2201937/2018*. A Tribunal decided that s.19 would provide protection for a 'friends and family' case. The Tribunal there said it was following *Chez*. The Tribunal read "relevant characteristic of B's" in section 19 EqA as applying to employees who are associated with a person with a relevant protected characteristic (paragraph 99).

167. We note that the Tribunal did not consider the fact that *Chez* itself was a case on 'same disadvantage'.

168. We are not bound by the case of *Follows* and we do not follow it. *Follows* sought to interpret section 19 EqA to be consistent with Chez. However, we prefer the reasoning in *Rollett*, *Harvey's*, and the *Explanatory Note to the Equality Act 2010 (Amendment) Regulations 2023*, that *Chez* covers a different situation: of same disadvantage indirect discrimination.

169. We find that the Tribunal does not have jurisdiction to hear a claim of friends and family associative discrimination. Firstly, in terms of vertical effect of the Framework Directive, Article 2(b) does not refer to persons being associated with the person who has the protected characteristic. The provisions of the directive are not sufficiently clear, unconditional and precise to have vertical direct effect. Secondly, to the extent that the claimant submits that the Tribunal should disapply section 19 EqA as it is inconsistent with general principles of EU law, that is precluded by paragraph 39(5)(b) of schedule 8 EUWA, as explained in *Secretary of State for Work and Pensions v Beattie and others [2023] IRLR 13 at paragraph 137*. Thirdly, whilst the Tribunal is required to apply the EqA as far as possible to give effect to the wording and purpose of EU Directives in accordance with retained EU case law, this does not require section 19 EqA to be interpreted to allow this type of indirect discrimination. There is no ECJ jurisprudence that supports this reading of the Framework Directive. *Chez* deals with a different situation (same disadvantage indirect discrimination).

<u>Harassment related to disability</u>

170. Harassment is defined in s26 of the EqA:-

> *"(1)A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *(5) The relevant protected characteristics are—*

…..

disability"

171. There are accordingly three essential elements of a harassment claim under section 26(1) of the EqA, namely (i) unwanted conduct, (ii) that has the proscribed purpose or effect and (iii) which relates to a relevant protected characteristic.

172. In *Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)* it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

173. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the "related to" question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard [2018] IRLR 730; Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*).

174. At paragraph 22 of *Richmond Pharmacology Ltd v. Dhaliwal [2009] IRLR 336*, the EAT stated:

> "*We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*."

175. The EHRC Code states at paragraphs 7.7 and 7.8

> "*7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.*
>
> *7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment*."

176. In *Pemberton v. Inwood [2018] EWCA Civ 564*, Underhill LJ gave the following guidance in relation to section 26: "*In order to decide whether any*

conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

177. As set out in the EHRC Code, "unwanted conduct" can include "*a wide range of behaviour*" (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8). Unwanted means unwanted by the employee (*Thomas Sanderson Blinds Ltd v English EAT 0316/10*).

178. The claimant is not required to possess the protected characteristic relied upon, provided that the unwanted conduct is related to the characteristic, nor does the conduct have to be directed at the employee. (*EBR Attridge LLP (formerly Attridge Law) and anor v Coleman [2010] ICR 242* and *Thomas Sanderson Blinds*, above). In *Moxam v Visible Changes Ltd and anor EAT 0267/11*, it was held that "*it does not matter what racial group the claimant comes from, for she is entitled to be offended and to bring claims where she suffers as a result of any discriminatory language and conduct*".

Burden of proof

179. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an Employment Tribunal.

180. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of *Igen v Wong [2005] IRLR 258*, and *Madarassy v Nomura International Plc [2007] IRLR 246*, both from the Court of Appeal. The claimant must first establish the first stage or a prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached the Tribunal is obliged to uphold the claim unless the respondent can show that it did not discriminate.

181. In *Madarassy*, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "*could conclude*" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (*Deman v Commission for Equality and Human Rights and ors [2010]*

EWCA Civ 1279, CA). The Tribunal has at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in *Laing v Manchester City Council [2006] IRLR 748*, an EAT authority approved by the Court of Appeal in *Madarassy*.

182. The burden of proof provisions are not relevant where the facts are not disputed or the Tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

183. Further, as the EAT and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did.

184. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

185. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong [2005] ICR 931* (as approved by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*).

Time limits for bringing a claim

186. The provisions relating to the time limits for bringing a claim under the EqA to the Employment Tribunal are set out in s123 of the EqA:- (1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the EqA] may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

187. Section 123(3) provides that (a) conduct extending over a period is to be treated as done at the end of the period, and (b) failure to do something is to be treated as occurring when the person in question decided on it.

188. The time limit in Section 123 is, however, subject to Section 140B, which provides for an extension of the time limit to facilitate conciliation before institution of Tribunal proceedings.

189. Day A is the day on which the worker concerned complies with the requirement of Section 18A of the Employment Tribunals Act 1996 to contact ACAS in relation to the matter in respect of which the proceedings are brought, and Day B is the day on which the worker receives or is treated as receiving the ACAS certificate issued under Section 18A.

190. In working out when the time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted. If the time limit set would, if not extended, expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

191. As to conduct which 'extends over a period' the Court of Appeal in *Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*, sets out that the burden is on the claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

192. In *South Western Ambulance Service NHS Foundation Trust (appellant) v King (respondent) [2020] IRLR 168* Chaudhury P in the EAT stated in the context of a continuing act at [36-38] "*It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged*."

193. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice, or principle which has had a clear and adverse effect on the complainant - *Barclays Bank plc v Kapur [1989] IRLR 387*. The Court of Appeal has cautioned Tribunals against applying the concepts of *'policy, rule, practice, scheme or regime*' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (*Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96*).

194. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (*Robertson v Bexley Community Centre [2003] IRLR 434*).

195. The EAT stated in *Dr Nicholas Jones v The Secretary of State For Health and Social Care [2024] EAT 2* that: "*It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of paragraphs 23 and 24*". The EAT stated that the propositions

of law for which *Robertson* is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere.

196. This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

197. Even if the Tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278*, following *Pathan v South London Islamic Centre UKEAT/0312/13* and *Szmidt v AC Produce Imports Ltd UKEAT/0291/14*. The Tribunal also considered the EAT's decision in *Habinteg Housing Association Ltd v Holleran UKEAT/0274/14* holding that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed in *Edomobi v La Retraite RC Girls School UKEAT/0180/16* in which the Judge added that she did not "*understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the Tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay*."

198. Per Langstaff J in *Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 (18 February 2014, unreported)*, a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (paragraph 52): *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was*."

199. In *Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman*: EA-2020-000801 the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "*it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason*".

200. In *Rathakrishnan* there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of *London Borough of Southwark v Afolabi [2003] IRLR 220*, in which it was held that a Tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to *Dale v British Coal Corporation [1992] 1 WLR 964*, a personal injury claim, where it was held to be appropriate to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded "*What has*

emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] IRLR 69) involves a multi-factoral approach. No single factor is determinative."

201. That said, the Limitation Act checklist as modified in the case of *British Coal Corporation v Keeble* includes as possible relevant factors: i) the relative prejudice to each of the parties; ii) all of the circumstances of the case which includes: iii) The length and reason for delay; iv) The extent that cogency of evidence is likely to be affected; v) The cooperation of the respondent in the provision of information requested, if relevant; vi) The promptness with which the claimant had acted once she knew of facts giving rise to the cause of action, and vii) Steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

202. In *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194* the Court of Appeal held: "*First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable*") that Parliament has chosen to give the employment tribunal the widest possible discretion."

203. That was emphasised more recently in *Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*, which discouraged use of what has become known as the Keeble factors, in relation to the Limitation Act referred to, as a form of template for the exercise of discretion.

Submissions

204. The claimant and the respondent's representative provided both written and oral submissions, which the Tribunal found informative. They are referred to where relevant.

205. In addition, parties referred to a number of authorities including but not limited to the following in their representations:

Respondent:
Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606
Lewis v Motorworld Garages Ltd [1985] IRLR 465
Omilaju v Waltham Forest LBC [2005] IRLR, CA
CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia C-83/14, [2015] IRLR 746 (see paragraph 46 of the respondent's submissions)
Rollett v British Airways plc Case No 332541 (20 January 2023, unreported) (see paragraph 48 of the respondent's submissions)

Claimant:
Western Excavating (ECC) Ltd v Sharp [1978] ICR 221
Malik v BCCI [1998] AC 20
Omilja v Waltham Forest LBC (No 2) [2004] EWCA Civ 1493
Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 12
EHCR Code (various paragraphs referred to in claimant's submissions)
British Airways v Starmer [2005] IRLR 862
Ishoal v Transport for London [2020] EWCA Civ 112
Williams v Trustees of Swansea University Pension [2018] UKSC 65
Lamb v The Business Academy Bexley UKEAT/0226/15
Ahmed v Department for Work and Pensions [2022] EAT 107
Martin v City and County of Swansea EA-2020-000460-AT
Insitu Cleaning Co Ltd & Anor v Heads [1994] UKEAT 576_92_0505 (5 May 1994)

206. The Tribunal reviewed the references to the authorities as referred to by parties in their respective submissions and considered the same fully prior to reaching their decision.

Discussion and decision

49 On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows:

Time limits

8. Has the claimant brought her claims of discrimination within the time limit set by section 123(1) of the EqA?

207. The claimant contacted ACAS for Early Conciliation purposes on 31 July 2023 and the ACAS Early Conciliation Certificate was issued on 11 September 2023, with the ET1 Form being issued on 30 September 2023. Therefore the Agreed List of Issues records that any complaint about an act or omission that occurred before 01 May 2023 may be out of time in terms of section 123(1)(a) of the EqA.

208. The claimant's allegations that are set out at paragraph 1 of the Tribunal's Judgment (above) occurred before 01 May 2023. They are dismissed on grounds that they were not presented to the Tribunal within the time limit set out at section 123(1)(a) of the EqA.

209. The remaining discrimination complaints within the Agreed List of Issues and the constructive unfair dismissal complaint were plainly presented in time, as those matters relate to the period on or after 01 May 2023.

Do the allegations at paragraph 1 of the Tribunal's Judgment form part of a course of conduct with, having regard to EqA s. 123(3)(a)?

210. The respondent's representative contends "*All events prior to 1 May 2023 are out of time. There was no "course of conduct" or ongoing series of events. Rather, the C complains of one off events, some of which are in time, some of which are not*."

211. The relevant dates relating to the matters relied on by the claimant which appear to have been presented out of time, range between April 2019 and up to 01 May 2023. There were no acts or omissions relied on by the claimant that occurred that were both in time and actionable. In the premise we are unable to accept the claimant's contention that there was a continuing act.

If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaints at paragraph 1 of the Tribunal's Judgment pursuant to section 123(1)(b) of the Equality Act 2010?

212. We proceeded to consider whether or not it is just and equitable to extend time to enable the claimant to present the claimant's complaints relating to the claimant's allegations that are set out at paragraph one of the Tribunal's Judgment.

213. Firstly, we considered the claimant's reasons for the late presentation of those complaints as set out in the claimant's witness statement and oral evidence. There was no satisfactory explanation provided for the late presentation of those complaints within the claimant's witness statement or oral evidence.

214. The did not present an internal grievance in relation to the matters she is complaining about in the Employment Tribunal prior to her resignation, such as her issues with lesson planning allocations by Dr Asong.

215. We do not accept that the claimant has provided a satisfactory reason to explain the delay in terms of contacting ACAS to start Early Conciliation or the delay in starting the claimant's claim.

216. Even if we had accepted that it was reasonable for the claimant to wait a period of time prior to making their claim, the time the claimant waited prior to presenting her claim, was fairly substantial. The claimant could have initiated Tribunal proceedings sooner.

217. Although the Tribunal did not accept that the claimant had a good or satisfactory reason to explain why the out of time complaints were presented outside the time limit at section 123(1)(a) of the EqA, the Tribunal proceeded to consider the balance of prejudice and hardship on the claimant and the respondent respectively in the event that the Tribunal refused or granted an extension of time.

218. Firstly, we considered that if the Tribunal declined to find that it was just and equitable in all the circumstances to extend time, this could obviously disadvantage the claimant as the claimant would be deprived of the opportunity of all the claimant's complaints being determined on their substantive merits. This issues in this case clearly have (and had) significant importance to the claimant, and we have taken account of the claimant's circumstances including but not limited to the claimant's written witness statement and oral evidence.

219. We noted that the claimant stated in her email dated 24 May 2023 to Dr Asong and Ms Khan "*I would urge you to reconsider your decision as I will be contacting my union*." It is not clear whether the claimant contacted her union at the relevant time and if so whether she was advised in relation to time limits. The claimant could have with reasonable diligence made contact with her union, or she may have been able to contact her legal adviser she was seeking advice from during the final hearing, or she could have taken other steps to inform herself about time limits. It is not clear why the claimant did not undertake research on Google or contact a Citizens' Advice Bureau or similar pro bono advice organisation prior to end of the relevant limit for presenting her complaints.

220. The respondent's representative points out that the claimant has advanced no arguments in support of an extension of time on a just and equitable basis.

221. Thereafter, we considered the impact on the respondent in the event that we found that it was just and equitable in all the circumstances to extend time.

222. The Tribunal had serious and significant concerns in respect of the delay in the claimant bringing their claim and the impact on the evidence. We noted that from the respondent's perspective the effluxion of time is a difficult problem to overcome and it was submitted that this was particularly acute when claims are not pursued in accordance with the contents of the Claim Form.

223. Dr Asong was no longer employed by the respondent and she had to be called to attend the Tribunal hearing by way of a witness order. No witness statement could be obtained on her behalf in advance of the hearing. Dr Asong did not have access to any documents other than the documents in the Hearing Bundle which she saw for the first time during the final hearing. Some of these issues may have been avoided if the claimant had presented her claim sooner.

224. We noted that the documents relating to the claimant's flexible working request, which was considered in May 2023 were made available, which would have assisted with any issues in terms of witness recollection, albeit this related to an in-time complaint. We had some records of team meetings before us that took place prior to the claimant's resignation. There may or

may not have been further team meeting records available if the claim were made sooner.

225. There is also general prejudice in terms of additional cost and time spent in defending the claimant's out of time claims.

226. We noted the claimant's status as a litigant in person and that the claimant herself was not suffering from a disability at the relevant time and appeared to have a good command of the language (the claimant worked as a specialist MFL teacher in a secondary school).

227. The claimant has a number of in time complaints that are before the Tribunal and they will accordingly be considered on their substantive merits.

228. Having considered all the circumstances and the witness evidence and the documents before us, and balancing the prejudice and hardship on both parties, we have decided that the balance lies in favour of refusing to extend time on a just and equitable basis.

229. The Tribunal concludes that it is not just and equitable in all the circumstances to extend time. The claimant's complaints that are set out at paragraph 1 of the Tribunal's Judgment (above) stand dismissed as they were not presented within the time limit set out at section 123(1)(a) of the EqA, there was no conduct extending over a period in terms of section 123(3)(a) and it is not just and equitable to extend time in terms of section 123(1)(b) of the EqA.

230. We also noted the conclusions below on liability, made in the alternative.

231. In the event that the Tribunal are wrong to so find, the Tribunal proceeded to consider the claimant's complaints that are set out at paragraph 1 of the Tribunal's Judgment on their substantive merits. The Tribunal trusts that the claimant will take some comfort in this further consideration of their out of time complaints, albeit in the alternative.

<u>Constructive unfair dismissal</u>

232. It is contended that the claimant terminated her contract of employment in circumstances in which she was entitled to terminate it by reason of the respondent's conduct and therefore was constructively unfairly dismissed contrary to s 95(1)(c) of the ERA.

233. It is not disputed that the claimant's contract of employment contained an implied duty of trust and confidence. The case of *Malik v BCCI* stated than an employer shall not *"without reasonable cause, conduct itself in a manner ….likely to destroy or seriously damage the relationship of trust and confidence."* The claimant contends that the respondent breached the implied duty of trust and confidence. The claimant relies on the acts set out at paragraph 4 of the Agreed List of Issues in respect of the same. The

Tribunal deals below with each of the alleged conduct on the respondent's part under separate headings.

(a) Requiring her to remain in meetings after 4.15pm from 18th of January 2023 until 24th of May 2023

234. We noted the contents of the relevant correspondences relating to this allegation that are set out in our findings of fact. We further noted that the claimant did not explain in any or any sufficient detail to Dr Asong or any other member of her team why she needed to leave any of the specific meetings early in any of the correspondences before us. It would not have been unreasonable for the claimant to divulge at least in broad terms what arrangements she had made in terms of childcare so any relevant individuals could understand her situation.

235. Within the claimant's earlier email correspondences, she does not mention shouting. This may have been because this was sent almost immediately after the event so the claimant probably felt that she needed to build bridges at the relevant time. The claimant mentioned Dr Asong shouting at her in her email dated 24 May 2023.

236. We accepted that the claimant was required to attend meetings on 18 January 2023 and 24 May 2023 at 3.15pm which were due to last until 4.15pm, and that both meetings had overrun. On both occasions when the claimant attempted to leave the meeting, the claimant was challenged by Dr Asong. We also identified that Dr Asong had indicated the relevant timings and that certain meetings may overrun in a number of email correspondences, after the claimant had asked for an indication of the same.

(b) Requiring extra hours to be worked from 28th February 2023

237. We noted the terms of the claimant's appraisal in respect of extracurricular activities and the examples provided by Dr Asong. We considered that the claimant carried out Italian Club voluntarily and in addition any interpreting duties. We noted that these matters were not disputed.

238. We do not find that the claimant was asked to focus on SEND because of her children or her children's disabilities. We noted that there was no reference to this in the appraisal document dated 28 February 2023. Dr Asong did not, even on the claimant's case, have knowledge of the disabilities of the claimant's children at the relevant time. The claimant has not provided details of the context in which any such conversation had allegedly occurred.

239. We do not find that the claimant was required to work extra hours from 28 February 2023. The claimant's appraisal noted the expectation that the claimant should carry out extracurricular activities and the examples provided included in relation to intervention and telephone calls to parents. However those tasks were an important part of teaching responsibilities, and we were not satisfied on the evidence that the claimant had workload issues, or that the workload expectations on the claimant were manifestly excessive considering her role and the claimant's timetables (and other staff members timetables that were before us).

(c) A refusal of part time work from September 2024 on 19th May 2023

240. The outcome letter dated 19 May 2023 did not state that the claimant was refused part time work from September 2024. The claimant did not appeal against that decision or raise a grievance at the material time.

241. The claimant sent her letter of resignation dated 26 May 2023 and we noted that the claimant stated in this that her personal circumstances did not allow her to work full time, she would have loved to have worked 3 days per week but she had to compromise to accommodate the needs of the school, and that the additional work she had been assigned was unfair and would lead her to breaking point where her part time role would no longer be part time.

242. We did not accept that the respondent refused to offer the claimant part time work from September 2024 in terms of the decision communicated in the outcome letter dated 19 May 2023. We accepted that the outcome letter dated 19 May 2023 advised the claimant that the part time working arrangements could take place for the next academic year from September 2023. Thereafter, it would be open to the claimant to make a further application for part time working for the following academic year. Based on the previous applications made by the claimant since 2019, and the respondent's circumstances since 2019, we find that if the claimant had made a further application in due course, the school is likely to have given serious consideration to the same and could well have granted the application. In reaching this decision, we note the contents of the outcome letter and any concerns identified in the context of granting the claimant's application on a permanent basis.

(d) Allocation of lesson plans for others on 24th of May 2023
(e) Preparing all Key Stage 4 Spanish lessons on 24th May 2023
(f) Preparing Year 11 Italian lessons on 24th May 2023

243. As paragraphs 4(d) to (f) of the Agreed List of Issues relate to the same or similar subject matter, we have considered these under the same heading.

244. In relation to the requirements placed on the claimant to prepare lesson plans on 24 May 2023, we note the claimant viewed the expectations on her as being unreasonable. However, Mr Brooks said this was put into place as a means of effectively using the gained time (year 11 students were undertaking examinations at the relevant time). Dr Asong agreed with this being the position in her evidence.

245. Although it was not explicitly stated whether or not the lessons needed to be planned by the claimant for a whole academic year within the relevant email correspondences, Mr Brooks and Dr Asong said lessons did not need to be planned from September 2023, and we accepted their evidence in this regard. There was no explicit mention of the claimant needing to carry out work in terms of any lesson plans from September 2023 and it was anticipated that the lesson planning work had to be completed by 28 June 2023. We noted that it could be said that this was inconsistent with an earlier email which indicated that lesson plans should be filed at least one week in advance (albeit this could be referring to ongoing lesson planning at the time). In any event even if the claimant had been required to plan 12 months of lessons, this was said to be twenty percent of the claimant's normal workload, and further that, the claimant was to be undertaking the work in advance (and therefore the claimant would not need to perform the work later in the year).

246. The claimant was made aware of these arrangements on 10 May 2023. There was a meeting on 18 May 2023 where the members of the claimant's team were all present to discuss the same. There were no complaints made to which we were referred between 18 May 2023 and 24 May 2023. Dr Asong invited the claimant to contact her to talk about the matter if needed (see email correspondence dated 25 May 2023). The claimant did not contact Dr Asong to discuss any concerns following receipt of that email. The claimant never specifically used the Grievance Policy and raised any grievance about the lesson plan allocations made by Dr Asong prior to resigning and the claimant indicated in evidence that she would have carried out the work if she had been offered extra pay.

247. Ultimately, the claimant was allocated undertaking lesson plans for year 10 Spanish, year 11 Spanish (we noted that year 11 students were undertaking exams at the time), and year 11 Italian (this related to the Italian club work the claimant undertook), which was confirmed by email dated 25 May 2023.

248. The claimant brought up other individuals in her evidence and that their allocation of work were unfair compared to the claimant's work but the Tribunal were provided with no information as to the other teachers' circumstances.

249. The claimant was given the relevant tasks as she was most proficient in the relevant subject areas. In terms of year 11 Italian, this was a lunchtime club that the claimant undertook voluntarily. It was noted on the actions following the team meeting that the claimant would be undertaking planning in respect of this, which was already undertaken by her. We noted that the content of these sessions were generally limited in terms of coverage within the relevant lunch period.

250. The claimant had five hours gained time and four hours admin time ("PPA") time in which to carry out the work.

251. We cannot say on the evidence before us that the claimant was assigned disproportionate work. Instead of engaging with the matter and getting to a point where the claimant could not manage it in gained time and PPA time and then raising any issues that may have arisen, we found that the claimant had assumed that it was going to take her longer than had been predicted or anticipated to undertake the lesson plan work. The claimant knew the timeline within which it was expected that the work had to be completed on 17 May 2023 (per bullet point 3 of item 1 on the email of that date). We did not consider that the work the claimant was being asked to complete was unreasonable or manifestly excessive. In any event the claimant could not properly demonstrate that the work could not be completed within the gained time and PPA time without at least attempting to complete it within those hours.

(g) Breaching privacy in respect of pay grades on 24th of May 2023

252. We noted in our findings of fact above that Dr Asong had referred to the fact that the claimant was on the Upper Pay Scale/Upper Pay Range at the meeting on 24 May 2023 in front of other team members and we considered that this was simply to indicate that the claimant was a senior teacher.

253. Whilst Dr Asong referred to this matter on 24 May 2023 during the relevant meeting, Dr Asong did not specifically state what pay scale the claimant was on, and we find that rather this was referred to in broad terms to indicate that the claimant was a senior teacher. We noted that information relating to UPS/UPR is available online. Thus the information divulged by Dr Asong would not have been a surprise to the claimant's colleagues given that the claimant was an experienced teacher and that teachers could apply for the same after around six years' teaching experience.

(h) Being required to work full time in due course and plan lessons for other staff was the final straw following a refusal to change this on 25th May 2023

254. We made our findings in respect of the allegation that the claimant was required to work full time, the allocation of workload and the requirement to undertake lesson planning for other staff above.

255. We noted the content of the claimant's resignation letter dated 26 May 2023 at page 262 of the Hearing Bundle.

256. We further noted that Mr Brooks responded to the claimant's letter accepting her resignation by way of a letter dated 26 May 2023 at page 263 of the Hearing Bundle.

257. We noted that the Mr Brooks did not offer the claimant advice in relation to utilising the grievance procedure, an exit interview or a cooling off period, and we consider that it would have been good industrial relations practice for the school to do so.

258. The claimant would have been required to work full time from September 2024 in accordance with the terms of the claimant's contract of employment which required her to undertake full time work, in the absence of a further application from the claimant and agreed part time work arrangements for a further period. It was open to the claimant to make a further application and it is likely based on the claimant's previous responses received from the respondent that any further application would have been given favourable consideration for another academic year.

259. For the avoidance of doubt, we do not find that the workload requirements placed on the claimant were tantamount to requiring the claimant to work full time even though she was granted temporary part time working arrangements for the academic year in question.

260. Although the claimant was required to plan lessons for other staff, this was for year 10 Spanish, year 11 Spanish (who were undertaking examinations) and year 11 Italian (relating to the claimant's Italian Club she were undertaking voluntarily). The claimant had gained time and PPA time in which to undertake this work. The claimant did not attempt to undertake the work within the allocated time and thereafter to advise of any specific issues experienced in terms of the work being completed, nor did the claimant seek support from Dr Asong having attempted to complete the work. If the claimant had sought assistance thereafter, Dr Asong may have been able to support the claimant as she did not have her own allocation of lesson planning work.

<u>5. Did the Respondent commit a fundamental breach of the Claimant's contract of employment?</u>

<u>7.Was the breach sufficiently serious so as to amount to a repudiatory breach entitling the Claimant to resign in response?</u>

261. We first considered whether or not the respondent breached the implied term of trust and confidence. This required the Tribunal to determine whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

262. We noted the claimant's position that the claimant was under a lot of pressure. The claimant felt she had a significant workload. The claimant was not willing to accept the responsibilities assigned in May 2023 in respect of lesson planning. She was concerned that this may push her to breaking point or make her work beyond her part time hours. We determined that the requirements placed on the claimant could not be said to be unreasonable in all the circumstances. Moreover the claimant could have attempted to carry out the work that had been allocated to her and if she was not able to complete the work within the allocated time, to either seek support or to make a complaint. It is not clear why the claimant did not take either of those steps and simply assumed that the work could not be completed by her.

263. We did not find that any of the matters set out at paragraph 4 of the Agreed List of Issues either individually or cumulatively amounted to a breach of the implied term of trust and confidence. In respect of the conduct relied on by the claimant, we do not find on the evidence before us that the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

264. If we were wrong to so find, for the reasons stated above and on the basis of our findings of fact, we would have considered that any alleged conduct on the respondent's part was with reasonable and proper cause.

265. In the event that we are wrong we proceeded to consider whether the claimant resigned in response to the said breach.

266. According to the list of issues the last straw related to the lesson planning arrangements and there being no permanent part time work arrangements. We considered the terms of the resignation letter dated 26 May 2023. The claimant's concern in that letter was expressed to be the allocation of lesson planning work, which she considered was unfair and will lead her to breaking point where her part time job would no longer be part time.

267. Based on the claimant's evidence before the Tribunal, on the claimant's own case she would have remained in employment if the lesson planning had been resolved in accordance with her requirements.

268. We did not find that lesson planning was approached by the respondent as the claimant says it was. Accordingly it was the claimant's position that she would have stayed in employment for one more year on the basis of her flexible working request outcome.

269. The reason for the claimant's resignation is therefore related to the claimant's disagreement with the allocation of lesson planning work to the claimant, although we did not accept that this amounted to a fundamental breach of contract for the reasons stated previously.

270. The next issue we would have considered if we were wrong to so find was whether the claimant affirmed the contract prior to resigning. Thereafter we would have considered whether or not the claimant's dismissal was fair in terms of section 98 of the ERA 1996.

271. The respondent's representative did not contend in the alternative that the claimant affirmed the contract or that there was a fair reason for dismissal. We therefore did not consider those matters in the alternative.

272. We note the respondent's representative stated in their submissions: "*Finally, it was made clear by the C that the actual reason for her resignation was her disagreement over the issue of lesson planning. She explained that, had it not been for this, she would have stayed in employment. That indicates that that was fundamentally the cause of her departure. The case therefore stands or falls on that point (either as the real reason for her resignation, or as the final straw)*."

273. In view of the above conclusions the claimant's complaint of constructive unfair dismissal is not well founded and it is hereby dismissed.

Disability – s 6 Equality Act 2010

274. We noted that the Agreed List of Issues at paragraph 8 records, "*The Respondent accepts that the Claimant's children were disabled for the purposes of the EQA at all material times, both having the condition of haemophilia and the Claimant's younger son being diagnosed with autism in May 2022.*"

275. We accepted that the claimant's children were disabled for the purposes of section 6 of the EqA at all material times relating to the claimant's claim by reason of their conditions of haemophilia and the claimant's younger son being diagnosed with autism in May 2022.

Direct disability discrimination – s 13 EqA

276. We considered each of the alleged acts or omissions set out at paragraph 13 of the Agreed List of Issues in relation to the complaints of direct disability discrimination in turn.

(a)A requirement to increase extra-curricular activities on 28th of February 2023

277. This relates to the comment made by Dr Asong on the claimant's performance appraisal (see findings of fact above).

278. The comment related to the claimant's need to increase extracurricular activities including interventions and calls to parents. Later in the appraisal documentation it is identified that this is an area for development for development generally, and it did not specifically relate to the claimant only.

279. Although this was a comment made by Dr Asong on the claimant's appraisal in relation to extracurricular activities there were specific examples of these provided. Those examples related to activities which teachers would normally need to carry out generally.

280. We did not find that the claimant was treated less favourably than a hypothetical comparator would have been treated in the same or similar circumstances. We did not accept that the claimant was treated less favourably than any other teachers that worked in the claimant's department. There were no examples provided of any teachers who were not subject to the same or similar requirement in terms of their appraisals.

281. There was no actual comparator relied upon and we were unable to conclude on the evidence that the claimant was treated less favourably than a hypothetical comparator whose circumstances were not materially different from the claimant's circumstances.

282. Even if we had found that, we do not find on the evidence before us, including the claimant's evidence, the documents to which we were referred and all the other evidence before us (save in respect of any evidence relating to the respondent's explanation), that the claimant has shown a prima facie case that she was treated less favourably because of her children's disabilities or her caring responsibilities towards them.

283. If we are wrong to do find, we would have accepted on the evidence before us that the respondent had provided a satisfactory non-discriminatory explanation in terms of any requirement to increase extra-curricular activities. This would have been in line with Dr Asong's objective to improve results and pupil progress. We are satisfied that this was in no sense whatsoever connected with the claimant's children's disabilities or her caring responsibilities towards them.

284. We did not find that any requirement imposed within the appraisal of the claimant in relation to this matter was because of disability (because of the claimant's children's protected characteristics of disability or the claimant's position as her children's carer). Schools are required to carry out appraisals to identify areas for development and the examples given by Dr Asong in terms of extracurricular activities are tasks that teachers are required to carry out generally. We do not consider that the burden of proof shifts to the respondent, but even if this had shifted, the respondent has shown that there was no connection with disability whatsoever and there was a non-discriminatory explanation in terms of the school's expectations. This matter was suggested as part of the appraisal and development process.

285. Viewed objectively, we did not find that the respondent's treatment amounted to a detriment. We were not satisfied on the evidence before us that the work could not be carried out during working hours. If this were not the case, and the work could not be completed within working hours, the claimant could have sought assistance from Dr Asong. There was no indication that the claimant had sought any assistance from Dr Asong in relation to time management matters relating to the same.

(b)Suggesting the Claimant brings her children into work, and they would be "bought pizza" (on or around 28th March 2023)

286. The claimant was asked to work during Easter (on or around 28 March 2023). The claimant declined to do so. Accordingly, she did not work during Easter. No pressure was placed on the claimant to work during Easter. In terms of any offer to buy pizza for the claimant's children, we find that this would have been a suggestion that was made in order to persuade the claimant to attend work. She did not have the accept the offer, and indeed, she did not accept it.

287. There was no suggestion that any pressure was placed on the claimant to work during Easter holidays in 2023. The claimant did not attend work during Easter holidays in 2023. There was no evidence or suggestion that she suffered any detriment as a result of not attending work during that time.

288. We did not accept that the claimant was treated less favourably than any other teachers that worked in the claimant's department in relation to this matter. There were no examples provided of any teachers who were not offered the opportunity to bring their children into work or in respect of whom there was no offer to purchase their children pizza.

289. There was no actual comparator relied upon and we were unable to conclude on the evidence that the claimant was treated less favourably than a hypothetical comparator whose circumstances were not materially different from the claimant's circumstances.

290. We did not find that any offer for the claimant to bring her children into school or to buy the claimant's children pizza was because of disability (because of the claimant's children's protected characteristics of disability or the claimant's position as her children's carer). The claimant suggested to us that she may feel uncomfortable if she had to bring her disabled children into school, but there was no pressure placed on her to do this and Dr Asong was not aware of their disabilities at the relevant time.

291. We do not consider that the burden of proof shifted to the respondent or that the claimant has made a prima facie case on the evidence before us, including the claimant's evidence, the documents to which we were referred and all the other evidence before us (save in respect of any evidence relating to the respondent's explanation). However, if we are wrong, and if the burden of proof had shifted, the respondent has shown that there was

no connection with disability whatsoever and there was a non-discriminatory explanation in terms that Dr Asong was attempting to facilitate the claimant's attendance at an intervention and on the basis that the claimant had children we find that she was seeking to be supportive.

292. Viewed objectively, we did not find that the respondent's treatment amounted to a detriment. The evidence before us showed that the offer was made to the claimant to facilitate her attendance at an intervention and to accommodate her children. Dr Asong was intending this to be a supportive measure. In any event the claimant declined the offer and she was not required to attend school during Easter 2023.

(c) A requirement to request part time/flexible working annually (between April 2019 and 19th May 2023)

293. There was a requirement to request part time or flexible working annually and the claimant made various application between April 2019 and the date of her resignation on 26 May 2023, and her requests for part time working were approved on a temporary yearly basis.

294. This is evidenced by the flexible working requests and the various outcome letters provided by the respondent to which we were referred.

295. There was a flexible working policy in place which required employees including the claimant to request part time working. The claimant applied each year between April 2019 and the date of her resignation on 26 May 2023, and her requests for part time working were approved on a temporary yearly basis (on each occasion).

296. We did not accept that the claimant was treated less favourably than any other teachers that worked in the claimant's department. All teachers would be required to request flexible or part time working using the same process, if their contract of employment required them to work full time hours.

297. There was reference to the fact that there were teachers whose employment were transferred to the respondent following a TUPE transfer, working pursuant to a part time employment contract. The claimant referred to Ms Nash in particular. However their circumstances were not comparable to the claimant's circumstances as they transferred to the respondent on the basis of their existing part time working contracts of employment.

298. There was no actual comparator relied upon for the purposes of section 23 of the EqA and we were unable to conclude on the evidence that the claimant was treated less favourably than a hypothetical comparator whose circumstances were not materially different from the claimant's circumstances.

299. The claimant had decided to apply for part time working in the context in which she had been employed to work full time hours. In any event, we did not find that the claimant making any request for part time working made annually from April 2019 amounted to less favourable treatment because of disability (because of the claimant's children's protected characteristics of disability or the claimant's position as her children's carer). The claimant had to use the same procedure that all other employees who wanted to request part time working had to follow.

300. We do not consider that the burden of proof shifted to the respondent or that the claimant has made a prima facie case on the evidence before us, including the claimant's evidence, the documents to which we were referred and all the other evidence before us (save in respect of any evidence relating to the respondent's explanation). However, if we are wrong, and if the burden of proof had shifted, the respondent has shown that there was no connection with disability whatsoever and there was a process that had to be followed by all employees requesting part time working. This ensured that the claimant's request could be given proper consideration, that a meeting could be arranged if appropriate, and that the claimant could be sent a detailed outcome letter with the provision of a right of appeal.

301. Viewed objectively, we did not find that the respondent's treatment amounted to a detriment. This was a procedural requirement that applied to all teachers who wished to request part time working. The claimant's requests to work part time were granted on a temporary year basis on each occasion.

(d) A requirement to work full time on or around 20th May 2023

302. The claimant was employed under a full-time contract of employment. The claimant made applications for flexible working from April 2019 onwards and was granted part time working on a temporary yearly basis from that year until the end of her employment in May 2023.

303. The claimant's flexible working application to work part time was granted on a temporary basis for a further academic year and this was confirmed in writing to the claimant on 19 May 2023. The claimant would have been able to make a further application in the following academic year.

304. On the evidence before us, the claimant was not required to work full time on or around 20 May 2023. If the claimant wished to continue to work part time from September 2024, she could have made an application during the next academic year.

305. For the avoidance of doubt, we do not accept that the claimant was required to undertake full time work despite working part time hours.

306. We did not accept that the claimant was treated less favourably than any other teachers that worked in the claimant's department. All teachers would be required to work full time if they had a full-time contract, or alternatively, to request part time working hours using the flexible working procedure.

307. There was no actual comparator relied upon and we were unable to conclude on the evidence that the claimant was treated less favourably than a hypothetical comparator whose circumstances were not materially different from the claimant's circumstances.

308. We find that the claimant was not required to work full time on or around 20 May 2023. In any event, we did not find that the respondent's conduct namely granting part time working for the next academic year (particularly in circumstances in which the claimant could request flexible working for the following academic year thereafter) amounted to less favourable treatment because of disability (because of the claimant's children's protected characteristics of disability or the claimant's position as her children's carer). The claimant had to use the same procedure that all other employees who wanted to request part time working had to follow.

309. We do not consider that the burden of proof shifted to the respondent or that the claimant has made a prima facie case on the evidence before us, including the claimant's evidence, the documents to which we were referred and all the other evidence before us (save in respect of evidence relating to the respondent's explanation). However, if we are wrong, and if the burden of proof had shifted, the respondent has shown that there was no connection whatsoever between the alleged treatment and disability. The claimant's situation was due to the fact that she was employed pursuant to a full-time contract, albeit she had the ability to make a flexible working request application.

310. Viewed objectively, we did not find that the respondent's treatment amounted to a detriment. The claimant was granted flexible working for the next academic year which was confirmed in writing on 19 May 2023. Any requirement to reapply for the following academic year at an appropriate time if the claimant wished to continue working part time was a procedural requirement that applied to all teachers who wished to request part time working. The claimant's requests to work part time were granted on a temporary year basis on each occasion she had made a request.

(e) A requirement to spend her day off planning lessons on 24th May 2023

311. A departmental meeting took place on 24 May 2023, during which the claimant was informed that she would be planning the Spanish lessons for years 10 and 11 and year 11 Italian lessons (per email communication at page 286 of the Hearing Bundle).

312. The claimant does not state in her witness statement that there was a requirement for the claimant to spend her day off planning lessons on 24 May 2023.

313. We do not find that there was a requirement for the claimant to spend her day off planning lessons on 24 May 2023.

314. As we have found that this did not take place and that there was no such requirement imposed on the claimant, we were not required to consider this matter further.

315. In view of the above, the claimant's complaints of direct disability discrimination are not well founded, and they are hereby dismissed.

Indirect disability discrimination

316. We have found that the Tribunal does not have jurisdiction to hear the complaints of indirect disability discrimination. We refer to the analysis of EU law, the EqA s 19 and relevant case law cited above.

317. The respondent's representations at paragraphs 46-48 state as follows:

> "*46 This is a claim for associative indirect discrimination. The legal principles and proper approach to this are as set out by the provisions at s19A EQA. Those provisions enshrine and encapsulate the principles and approach set out, prior to amendment of the domestic statute, in the leading case of CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia C-83/14, [2015] IRLR 746.*
>
> *47. The claim the C brings for indirect discrimination does not fall within the principles of either of the above. Those principles provide that where a PCP causes a person with a disability a particular disadvantage compared to persons without a disability, then, if the Claimant is caused the same disadvantage a claim arises (subject to any justification defence).*
>
> *48. The claim brought by the C appears to be based on a mistaken understanding as to the principles of associative indirect discrimination. See, for an example of this, the first instance decision of: Rollett v British Airways plc Case No 332541 (20 January 2023, unreported)*"

318. The claimant did not address us on this matter specifically in their oral or written submissions, save in relation to the generality of the claimant's position that s 19 of the EqA applied in the context of this case.We prefer the respondent's position and we find that the claimant cannot pursue a claim under s 19 of the EqA for indirect disability discrimination. Even if the Tribunal had had jurisdiction, we would have dismissed the claim for the reasons set out below (which we considered in the alternative). We addressed each PCP relied on by the claimant separately.

a. <u>To require staff to remain in meetings after 4.15pm from 18th January 2023</u>

319. We referred to clause 5 of the Claimant's employment contract (please see above). On 18 January 2023 the claimant tried to leave at 4.25pm and subsequently stayed until the end of the meeting after Dr Asong challenged her and there was email correspondence between the parties after that meeting. The claimant requested advance notice if a meeting was likely to be overrunning thereafter. There were correspondences from Dr Asong after that date in which the meeting agendas and timings were set out along with an indication if a meeting was likely to overrun.

320. There were regular staff meetings taking place approximately once a month from January 2023 from 3.15pm that were running beyond one hour according to the email correspondences before the Tribunal. From May 2023 there are email correspondences showing that advance written notice was being provided to the claimant that the meetings were likely to last more than one hour.

321. The respondent avers that the claimant's attendance at meetings which overran was in accordance with the respondent's expectation of reasonable flexibility in her working hours. The respondent also avers that meetings overran less frequently and less excessively than the claimant has alleged. This expectation was applied to the claimant in respect of the details of the meetings that we had before us, which we have referred to in our findings of fact.

322. There were other members of staff who were expected to attend the same meeting. We were not provided with details in relation to their children and any disabilities they had.

323. We are satisfied that if the relevant staff members had children with the same disabilities as the claimant, they would also have been required to attend the regular meetings and to remain at the meeting beyond an hour.

324. We did not have sufficient evidence before us to enable the Tribunal to determine whether the PCP put individuals who have children who share the claimant's (children's) disability at a particular disadvantage. In relation to children who have the same disabilities, there may be children who experience different symptoms or impacts on their day-to-day activities in respect of the same disabilities and also there may be parents who have differing responsibilities in respect of their children's individual requirements. It is not possible for us to conclude that any such individuals were placed at a particular disadvantage on the evidence before us.

325. Although the claimant makes several references to her children and their needs in her witness statement, the claimant did not explain or adequately address the issue in terms how the PCP put the claimant at a particular disadvantage. The claimant stated at paragraph 44 of her witness statement that she was disappointed in relation to her workload being increased despite being part time and having to leave on time for her children. However any parent with caring responsibilities for their children may need to leave at a certain time to undertake caring duties. There is no indication that the claimant had any specific additional responsibilities or constraints arising from the disabilities of her children in the claimant's evidence. We noted that the claimant also did not explain to Dr Asong that she had additional caring responsibilities as a result of her obligations towards her children on account of their disabilities at the material times.

326. If we are wrong to so find, we would have found that the respondent's aim at paragraph 20a. of the Agreed List of Issues was a legitimate aim. There was evidence within the email correspondences particularly around May and June 2023 that a number of detailed and important subjects were discussed at the meetings which were essential for the running of the department. The level of required detailed discussions meant that some meetings would take longer than an hour. The claimant requested to be notified when meetings will be lasting more than an hour so she could make necessary arrangements. We noted that in relation to subsequent meetings detailed timings were provided along with an indication where meetings may overrun by 15 minutes.

327. Given the amount of time the claimant was asked to attend the meeting, and the frequency of the meetings, and the advance notice given to the claimant, this was proportionate.

328. Although the claimant was upset at the way she was addressed at the meeting on 18 January 2023, there were discussions about meetings thereafter, and the claimant was open to make alternative suggestions and she did not appear to do so.

329. We considered the context including that the claimant did not disclose that she needed to leave any meetings early due to childcare responsibilities or arising from her children's health needs.

330. It is not clear what alternative arrangements could be put into place in any event, particularly given that the claimant had expressed in email correspondences including by email dated 07 March 2023 that she was not happy with lunchtime meetings every Friday (albeit they were relatively short meetings) as they were encroaching on other work she carried out during lunchtimes (the claimant had indicated by email dated 19 January 2023 that she was always happy and available to discuss on her lunchtimes). Meeting remotely after school hours is unlikely to have been practicable due to the travel time that would have had to have been taken into account.

331. The respondent's aim was a proportionate means of achieving a legitimate aim in the circumstances. There was no reasonable alternative means of achieving the respondent's aim. In any event the claimant did not put forward any viable alternative options. The claimant was informed after 18 January 2023 on certain occasions in advance that meetings were likely to overrun.

(b) To require staff to increase their extra-curricular hours from 28th February 2023

332. There was no dispute that the claimant was undertaking additional duties including Italian sessions. The claimant undertook this work voluntarily. There was also no dispute that the claimant had to be involved with other duties such as interventions, parental contacts and professional dialogues. We were referred to the claimant's appraisal documentation in which this requirement was documented.

333. It is not clear what specific additional work the claimant refers to being asked to undertake from 28 February 2023 in particular.

334. Whilst the performance appraisal document indicated that the claimant was required to increase availability and/or output to pursue extracurricular activities, the examples provided were interventions, parental contacts and professional dialogues, all of which are essential components of a teacher's role. The description of these as extracurricular activities is a misnomer as they are an essential part of a teacher's duties and they were set out in broad terms. There was no specific requirement for the claimant to undertake additional extracurricular work such as lunchtime clubs. The claimant was expected to undertake increased interventions parental contact and professional dialogue.

335. We are satisfied that the same requirement would have been applied to other teachers who did not have children who had disabilities and/or caring responsibilities towards them, as these were essential parts of the role.

336. We did not have sufficient evidence before us to enable the Tribunal to determine that the PCP (from 28 February 2023 in particular) put individuals who have children who share the claimant's (children's) disabilities at a particular disadvantage.

337. The claimant states in her witness statement "*I was surprised by this given that she was fully aware that I had to leave work to collect my son and that I worked a four day week due to his disabilities*."

338. We did not find that Dr Asong was made aware of the claimant's children's disabilities. The claimant does not provide any or any detailed information in relation to her caring responsibilities or her son's disabilities which she states placed her at a particular disadvantage. We do not find that she was placed at a particular disadvantage in terms of s 19 of the EqA.

339. In terms of their legitimate aim (in the alternative), we note that the respondent focuses on recruitment and extracurricular activities which do not appear to be relevant to the key issue that the claimant is complaining about.

340. If we are wrong to so find, we noted that there was no information before us to show either a specific number of additional interventions or telephone calls home or that the number the claimant was required to make was unreasonable. There was reference to general issues being experienced in the department on the appraisal document in terms that "teacher availability for intervention and the effectiveness of intervention groups (attendance, parental contact) is currently a cause for concern."

341. The respondent's aim was a proportionate means of achieving a legitimate aim in the circumstances. There was no reasonable alternative means of achieving the respondent's aim. In any event the claimant did not put forward any viable alternative options.

(c) To require staff to increase their availability to work after normal working hours (26th February 2023)

342. We refer to our findings in respect of the claimant being required to increase "extracurricular work" after 28 February 2023. There is no information in the claimant's witness statement or submissions suggesting that she or any other staff were required to increase availability after 28 February 2023 in addition to those matters.

343. To the extent that we have already considered in relation to PCPs a) and b) above, the PCP was applied to the claimant.

344. We are satisfied that the same requirement would have been applied to other teachers, as these were essential parts of the role.

345. We did not have sufficient evidence before us to enable the Tribunal to determine whether the PCP put individuals who have children who share the claimant's (children's) disabilities at a particular disadvantage.

346. We did not have sufficient evidence before us to enable the Tribunal to determine whether the PCP put the claimant at a particular disadvantage.

347. If we were wrong to so find, we would have considered the respondent's justification. The justification at paragraph 20c of the LOI starts by focussing on the requirement to conclude a meeting properly. We found that in the particular circumstances this was justified for the reasons set out earlier.

348. However we understood that this allegation also related to the requirements within the claimant's appraisal which were referred to in respect of the PCP at paragraph 15b. of the Agreed List of Issues. We considered the justification in relation to paragraph 20b. of the List of Issues and our earlier findings above in respect of this matter.

(d) To require staff to work full time from Sept 2024 on 19th of May 2023

349. The claimant had a full-time contract. It was stipulated in the flexible working request outcome letters that she would be required to work full time once the agreed period of flexible working had concluded. However it remained open to the claimant to make flexible working requests and these were granted for on a temporary yearly basis for a number of years.

350. On 20 May 2022 the claimant sent an email to Mr Brooks advising she will require part time working and that her younger son had been diagnosed with autism (see page 238 of the Hearing Bundle). At the time the claimant was working part time hours and she was subsequently granted part time working from 01 September 2022 until 31 August 2023.

351. The claimant made a flexible working request in 2023 in respect of the next academic year. On 19 May 2023 the claimant's flexible working request outcome letter stated:

> "*In May 2019, you submitted a flexible working request to reduce your hours to part-time (0.8) and, though this was not approved, you accepted a temporary offer to work those reduced hours for one academic year. That temporary offer, initially for one year only, has been extended in each subsequent year and, whilst your substantive post is full-time, your current arrangement, which expires on 31st August 2023, remains to work 0.8 of that*."

352. The letter concludes: "*In view of the above, the school is happy to agree to you following a four-days-per-week (0.8) pattern of working from 1st September 2023 until 31 s1 August 2024. As the timetable is still under construction , it is not yet possible to confirm which day of the week would be your non-working day, but this will be shared with you as soon as it is known and not later than the second week of July 2023.*
> *It should be noted that this offer represents a temporary arrangement only and that you would return to your substantive, full-time (1.0) role from 1st September 2024*."

353. The claimant had requested either a permanent change to part time working hours or a year's extension. The claimant was granted a year's extension. The claimant did not appeal or raise a grievance.

354. The claimant was expected to work full time hours in accordance with her contract, unless there was a flexible working application which was granted by the respondent or unless temporary yearly flexible working arrangements were agreed. If she made an application, it is likely that it may have been granted on a temporary basis for a further year. We note the respondent's contention in this regard that the PCP was not applied to the claimant.

355. We were told that there were teachers who transferred to the respondent by virtue of TUPE on a part time employment contract. We did not have any evidence before us in terms of whether or not they had children without the

same disability as the claimant's. We were unable to conclude that the respondent applied this PCP to other teachers.

356. However we found that the respondent potentially would have applied this PCP to teachers whose children did not have the same disability as the claimant's children, at least some of whom may have been working on full time contracts.

357. We are unclear as to the specific terms of the purported disadvantage, save in relation to the claimant's email correspondences we were referred to within 2023. We are unable to accept the claimant's contention that on the evidence before us that teachers who share the Claimant's (children's) disability will have additional difficulties or be placed at a particular disadvantage in relation to this PCP.

358. In relation to children who have the same disabilities, there may be children who experience different symptoms or impacts on their day-to-day activities in respect of the same disabilities and also there may be parents who have differing responsibilities in respect of their children's individual requirements. It is not possible for us to conclude that any such individuals were placed or would be placed at a particular disadvantage on the evidence before us. It is conceivable that parents with children that have disabilities may make alternative arrangements and may be able to work full-time. It may of course depend on the nature and extent of the particular disabilities, including in relation to autism the nature of the diagnosis.

359. We noted the terms of the claimant's flexible working applications. By way of example the letter dated 28 May 2021 referred to a letter from a Clinical Nurse Specialist at Great Ormond Street Hospital haemophilia department explaining how reduced hours of working would continue to benefit the care of the claimant's children.

360. We did not accept that the claimant was placed at a particular disadvantage by this requirement on a practical level. This is because she was granted the ability to work part time on a temporary yearly basis. Although we recognise that there may have been some uncertainty each year when an application was made. By letter dated 19 May 2023 the claimant was advised that she could work part time from 01 September 2023 until the end of that academic year, albeit the claimant resigned on 26 May 2023. As a matter of fact the claimant was not required to work full time from 19 May 2023 (and in any event she had subsequently resigned).

361. If we are wrong to so find, the claimant's contract of employment required the claimant to work full time hours as noted at paragraph 20d. of the Agreed List of Issues. The respondent sought to pursue legitimate aims in terms of ensuing high quality education for its students and to avoid affecting their outcomes, effective working and keeping costs under control. The respondent made available its flexible working policy and application process to the claimant to enable her to request part time working. This

gave the school the opportunity to consider the claimant's application in the context of the school's aims and needs.

362. We considered the above in the context of the issue of proportionality. We also considered the matters within the respondent's flexible working request outcome letters and the matters the school had explored.

363. We considered whether the part time working could have been granted for a longer period, such as 2 or 3 years. We noted that the claimant did not make such a request. Secondly we noted that the school's requirement had to be reviewed on a yearly basis, including pupil numbers and subject demand. In that context, the decision to allow part time working on a yearly basis was justified and proportionate.

364. The school granted extensions each year the claimant had made an application.

365. All reasonable options were considered. There were no other reasonable options available in the circumstances.

366. We are satisfied that the respondent's aim was a legitimate aim and that it was proportionate in all the circumstances.

(e) To require staff to apply annually for part time working on 19th of May 2023 (from April 2019 until 19th May 2023)

367. Although the claimant was required to applications for flexible working in 2023, the claimant indicated to the respondent that she would accept temporary arrangements on a yearly basis working part time. We noted that the claimant's requests were granted within a short timeframe.

368. The claimant's application in relation to the following academic year was made before 19 May 2023, and the outcome of the claimant's application was communicated to the claimant on 19 May 2023. The claimant's application was determined and she was granted part time working for one year. To that extent, this PCP was applied to the claimant.

369. Although we did not have any evidence of the respondent applying this PCP to any other teachers, we were satisfied that this was the respondent's policy and practice and that they would have applied the same requirement to persons with whom the claimant did not share the protected characteristic.

370. We did not accept that this put individuals who have children who share the claimant's (children's) disabilities at a particular disadvantage. The respondent granted the claimant's application and gave the application consideration, having provided the reasoning for their decision. It was also indicated in Mr Brooks's evidence that the application could have been made earlier, and an individual could have thereby been given greater certainty about the upcoming academic year.

371. The claimant was granted part time working on a temporary yearly basis on making an application. The claimant also had the benefit that her contract remained full time and she could return to full time working when her circumstances allowed.

372. We did not accept that the claimant was placed at a particular disadvantage. Although the claimant had some uncertainty about the process, not only was her part time working granted on a yearly basis but she could have made applications earlier in order to provide greater certainty.

373. If we are wrong to so find, the reasons why the claimant's flexible working request was extended by a year were explained in the outcome letter dated 19 May 2023. We accept that as stated at paragraph 20e. of the Agreed List of Issues, the school could not have accurately forecasted the applicability of the legitimate aims for the subsequent academic years and this is consistent with the approach taken in the flexible working request outcome dated 19 May 2023. We accept that those reasons are legitimate aims for the respondent's school to pursue and that those aims were pursued. The school had considered the request fairly and they explained why they felt they were unable to grant the request on a permanent basis. In any event the claimant had indicated that she was happy for an extension of her current working arrangements by a further year and the school informed her that this was achievable.

374. We considered whether the part time working could have been granted for a longer period, such as 2 or 3 years. We noted that the claimant did not make such a request. Secondly we noted that the school's requirement had to be reviewed on a yearly basis, including pupil numbers and subject demand. In that context, the decision to allow part time working on a yearly basis was justified and proportionate.

375. The school granted extensions each year the claimant had applied.
376. All reasonable options were considered. There were no other reasonable options available in the circumstances.

377. We are satisfied that the respondent's aim was a legitimate aim and that it was proportionate in all the circumstances.

f. <u>To require staff to plan for lessons for other staff (24 May 2023</u>)

378. The claimant was made aware of the lesson planning arrangements on 10 May 2023. There was a meeting on 18 May 2023 where the MFL team (including the claimant) were all present to discuss the matter. No complaints were made by the claimant between 18 May 2023 and 24 May 2023. Dr Asong invited the claimant to contact her to talk if needed by email dated 25 May 2023. The claimant did not contact her thereafter to discuss the matter further or to ask for any support. She never specifically raised a complaint in relation to Dr Asong's conduct relating to lesson planning allocations and we find that the claimant would have been willing to

complete the work if she had been offered extra pay. The claimant brought up other people within her team during her evidence and their allocations but we were not provided with information about their individual circumstances.

379. The claimant was given those tasks that she was most proficient in. She had five hours gained time and four hours PPA time in which to do the work. We cannot say on the evidence it was disproportionate work. Instead of engaging with it and getting to a point where she could not manage it within gained time and then raising a complaint or concern, the claimant assumed it was going to take her longer than had been predicted. The claimant knew the timeline on 17 May 2023 as this was set out in the relevant email at bullet point three of item one.

380. In relation to preparing year 11 Italian Lessons on 24 May 2023, this was a lunchtime club which the claimant was already presiding over.

381. The respondent accepts that PCP 15(f) was applied to the claimant. The claimant says that she was required to plan for others the same amount of planning that the Key Stage 4 Co-Ordinator was undertaking for French.

382. There were seven staff including the claimant who were allocated planning work for particular year groups according to the email dated 25 May 2023 from Dr Asong. The claimant says in her submissions that it did apply to all staff but she was required to plan more lessons than others. We do not have any information about any children or caring responsibilities of those staff and whether their children had any disabilities, or any other individual circumstances they may have had. We are unable to find on the evidence that the PCP was in fact applied to other staff namely teachers with children without the same disability as the claimant's children.

383. We did not accept that this PCP put or would put individuals who have children who share the claimant's (children's) disabilities at a particular disadvantage on the evidence. We did not have any or any sufficient evidence to demonstrate this before us. We were also unable to find that the PCP put or would put individuals who have children who share the claimant's (children's) disabilities at a particular disadvantage.

384. The claimant states in their submissions that **"***I would say it is clear that female teachers who have children with disabilities need time to care for their children. Female teachers who had parental responsibilities need extra might need to take extra more planning home Planning more than others, would put me in such pressure that I would have to spend my day off planning. I was never asked to choose, and the decision for shared planning was imposed on me*." We were not satisfied on the evidence before us that the amount of work assigned to the claimant in this context was greater or significantly greater than the work expected of other members of staff.

385. Whilst the claimant states that she may have needed to take work home, we noted that the claimant had administration time and gained time and year 11 students were undertaking exams at the material time. The planning work aimed to reduce the overall burden and to create efficiency over a longer period of time. In the circumstances, we were not satisfied that the claimant was placed at a particular disadvantage.

386. If we are wrong to so find, we accepted the respondent's legitimate aim was to devise the best possible lesson plans to ensure the effective education of pupils (see paragraph 20f. of the Agreed List of Issues). It is also a justification to allocate resources as efficiently as possible, particularly in the long term in the circumstances. We noted that planning work was an essential part of the claimant's and other teachers' duties. As the claimant was the most experienced Spanish teacher, she was assigned planning work for GCSE year groups.

387. Dr Asong stated in her email of 25 May 2023, there was no planning to undertake for year 11 as they had exams at the time. The Italian club was a weekly session the claimant delivered during lunch, these were provided by the claimant on a voluntary basis, and the claimant could have ceased those sessions if the claimant wished.

388. The centralised approach for planning was intended to reduce workload on a long-term basis for the claimant and other teachers. This may well assist teachers in terms of being able to allocate time for problem areas such as interventions and telephone calls home.

389. Having consistent lesson plans may also improve quality of teaching provided to pupils, who remain the central focus in any school.

390. Although the claimant says all teachers had gained time, Mr Brooks told the Tribunal that the claimant's PPA time was not pro rata'd (according to her part time working hours) and the claimant had the same PPA time as full-time teachers. The claimant states Ms Hulpoi was employed full time and had 7 hours' gained time.

391. The claimant submits that the respondent are now claiming that it was a temporary arrangement, which was not true as there it was not suggested anywhere that it was not going to carry on in September 2023 after gained time had finished. However Dr Asong did not advise the claimant specifically that the claimant had to plan an entire year's worth of work in the email correspondences that were before the Tribunal.

392. The claimant also submits that she disagreed with the approach in terms of using other teacher's lesson plans and the practicality of this. However, we find that it is open to the respondent to adopt an approach that promotes a degree of consistency in their judgment and following their assessment of the circumstances.

393. Although the claimant takes issue with account not being taken off other workload constraints, the Tribunal noted that the respondent had an awareness of the classes that were being taught and timetables were produced in respect thereof. There was no indication that significant additional workload issues persisted. We took into account that the claimant had volunteered to take on additional work such as the Italian Club.

394. We find that the respondent has shown that the treatment is a proportionate means of achieving a legitimate aim having carefully reviewed the evidence before us.

395. Accordingly, in the alternative, we would have dismissed the claimant's complaints of indirect disability discrimination having assessed their merits and considered all the evidence and circumstances.

Harassment related to disability

396. The Tribunal deals with each of the claimant's complaints of harassment related to disability in turn under separate headings below.

a) Shouting at the claimant when she wanted to leave at 4.15pm

397. We accepted the claimant's evidence in relation to the two incidents on 18 January 2023 and 24 May 2023 where she describes shouting by Dr Asong and the fact she reported the incident to Mr Brooks who referred the matter to Ms Khan to be addressed. The claimant advised that she spoke to Ms Khan on 25 May 2023 she had agreed to speak to Dr Asong about this matter (the claimant's recollection in this regard was clear).

398. We accept that both incidents were unwanted conduct. The claimant said that this was unwanted conduct, and further, we find that a reasonable employee would have perceived it as such.

399. Taking account of the claimant's evidence, the documents to which we were referred and all the other evidence (save in relation to the respondent's explanation), we do not accept that the claimant has shown a prima facie case that the alleged conduct was related to disability.

400. We do not accept that this related to the claimant's children's disabilities or to the claimant's position as their carer arising from the same. Any shouting that took place could not be related to the claimant's children's disabilities or the claimant's caring responsibilities arising from those disabilities as Dr Asong was not aware of her children's disabilities at the relevant time. The claimant did not disclose this information to Dr Asong and there is nothing in the claimant's witness statement to suggest otherwise. Dr Asong said she was not made aware of the claimant's children's disabilities and we accepted her evidence in this regard. We noted that there was no indication that the claimant had informed Dr Asong of any need to leave by a particular time on any of those two meetings by 4.30pm in advance (in relation to the second meeting the claimant would have been aware of the doctor's appointment and the need to leave at a particular time to attend the appointment in advance).

401. We were satisfied that the respondent's conduct had no connection whatsoever with the claimant's children's disabilities or the claimant's caring responsibilities arising from those disabilities on the evidence before us.

402. If we are wrong to so find, we would have accepted that the shouting described by the claimant on both occasions had the effect of creating a humiliating or offensive environment for the claimant.

(b)Stating "Would you like to focus on SEND because of your children" during the appraisal process meeting on 28 February 2023

403. We did not accept that Dr Asong said to the claimant on 28 February 2023 during an appraisal meeting "Would you like to focus on SEND because of your children". We refer to our earlier findings in respect of Dr Asong's state of knowledge about the claimant's children's disabilities.

404. Although the claimant sets out the alleged comment in her witness statement, it is not clear in what context this is said by the claimant to have been made. We did not accept that this comment was made by Dr Asong. Dr Asong denied making the comment ascribed to her.

405. If we are wrong to so find, and if this had been said, although the claimant describes the comment as offensive, it would have depended on the context in which the alleged comment was made as to whether it amounted to unwanted conduct. Without further information, it is difficult for the Tribunal to conclude that this amounted to unwanted conduct in the circumstances.

406. Even if the comment was made, although any comment would need to be viewed in the context in which it were made, on the basis of the information before us, we would not have found that this was related to the claimant's children's disabilities or the claimant's position as their carer arising from the same.

407. Furthermore, if the comment were made and we are wrong to so find, although it would have been made in a specific context, the claimant states in their statement that the comment was offensive. We note the respondent

contends that it could only be reasonably interpreted as a thoughtful offer to the claimant to use her broader experience or expertise to improve and broaden her teaching career/role. It is more likely than not that the alleged comment would have been made in the same or a similar context to that suggested by the respondent's representative. It is likely that someone living with and caring for children with disabilities every day will be more familiar with this area so the school may have wanted someone with that experience. Whilst the claimant may have not wanted to take on such work, this was not forced upon her. It was not reasonable that the alleged comment created an offensive environment for the claimant (based on the claimant's evidence) and viewed objectively in all the circumstances.

(c)Telling the claimant that she ought to bring her disabled children to work and she will get them pizza a week before Easter Holiday 2023

408. We found in terms of our findings of fact that Dr Asong offered to the claimant that she could bring her children to work during the Easter holiday 2023 period and she also offered to buy them pizza.

409. Although the claimant was asked to work during Easter, ultimately she declined to work during the said period.

410. Although the claimant perceived this to be unwanted conduct, we are not satisfied that this incident amounted to unwanted conduct on the basis of our findings of fact. The claimant did not work during Easter 2023. No pressure was placed on the claimant to work during Easter 2023 either on the claimant's own case or on the evidence before us. Dr Asong's comments were of a supportive nature. We do not find that this was unwanted conduct in the circumstances.

411. Taking account of the claimant's evidence, the documents to which we were referred and all the other evidence (save in relation to the respondent's explanation), we do not accept that the claimant has shown a prima facie case that the alleged conduct was related to disability.

412. In the alternative, taking account of the respondent's explanation we do not accept that this related to the claimant's children's disabilities or to the claimant's position as their carer arising from the same.

413. In terms of any offer to buy pizza for the claimant's children, this was a suggestion made by Dr Asong in order to persuade the claimant to attend work during the Easter 2023 period. The claimant did not have to accept the offer, and indeed, she did not accept it. Dr Asong was not aware of the claimant's children's disabilities at the relevant time.

414. We are satisfied that the respondent conduct had no connection whatsoever with the claimant's children's disabilities or to the claimant's position as their carer arising from the same.

415. Furthermore, we do not accept that the conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

416. Whilst the claimant suggested in her evidence that she might feel uncomfortable if required to bring her disabled children into school for the Tribunal, no pressure was placed on her to do so. In any event, we find that Dr Asong was not aware of the claimant's children's disabilities at the material time. The respondent's representative submits that, if this occurred, it was a supportive act and not an act of harassment. Dr Asong's purpose was to encourage the claimant to attend an intervention in school taking place at the relevant time. We do not accept that her offer could reasonably be construed as having the effect described by the claimant in her witness evidence.

417. The claimant's complaints of harassment related to disability are not well founded and they are hereby dismissed.

Indirect sex discrimination

418. The claimant describes her sex as female. The claimant is the primary carer of her two children.

419. The claimant brings her complaints based on the protected characteristic of sex under s 19 of the EqA.

420. The Tribunal deals with each of the PCPs relied on by the claimant separately below. As the Tribunal has addressed questions 23 and 24 in respect of the claimant's indirect disability discrimination complaints above, the Tribunal refers to their earlier findings in respect of each PCP above to avoid repetition. The Tribunal shall address the questions within the Agreed List of Issues from question 25.

(a) To require staff to remain in meetings after 4.15pm from 18 January 2023

421. The respondent applied the PCP to a teaching member of staff called David Hull who was listed on the list of attendees at meetings, including on 23 May 2023. Even if David Hull had not been present, we would have found that it is more likely than not that the PCP would have been applied to male teachers and female teachers alike.

422. It is generally accepted that female employees take more of a burden in terms of childcare responsibilities, a matter upon which the Tribunal are prepared to take judicial notice. This could mean that female employees would need to finish work earlier. By way example, the Tribunal notes that some nurseries may close earlier and the school day finishing times may vary. In that sense, this PCP is more likely than not to put female teachers at a particular disadvantage.

423. We find that the claimant had been placed at a particular disadvantage. The claimant expressed in correspondences albeit in general terms, by way of example in her email dated 19 January 2023 that if meetings will be lasting more than an hour Dr Asong should let her know so she could make arrangements accordingly. The claimant sent an email to Mr Brooks on 24 May 2023 complaining that lately meetings had been finishing as earliest at 4.30pm and she mentioned that she had to attend a telephone GP appointment at 4.30pm (or as soon as she received the call) and Dr Asong shouted at her. Although the claimant does not create a link between her "arrangements" or her "GP appointment" and childcare responsibilities, viewing this in context of her evidence before the Tribunal, we accept that the claimant was placed at a particular disadvantage when meetings lasted more than an hour and she was not given advance notice of this possibility so she could make arrangements relating to childcare.

424. We find that the respondent's aim at paragraph 20a. of the Agreed List of Issues was a legitimate aim. There was evidence within the email correspondences particularly around May and June 2023 that a number of detailed and important subjects were discussed at the meetings which were essential for the running of the department. The level of required detailed discussions meant that some meetings would take longer than an hour. The claimant requested to be notified when meetings will be lasting more than an hour so she could make necessary arrangements. We noted that in relation to subsequent meetings detailed timings were provided along with an indication where meetings may overrun by 15 minutes.

425. Given the amount of time the claimant was asked to attend the meeting, and the frequency of the meetings, and the advance notice given to the claimant, this was proportionate.

426. Although the claimant was upset at the way she was addressed at the meeting on 18 January 2023, there were discussions about meetings thereafter, and the claimant was open to make alternative suggestions and she did not appear to do so.

427. We considered the context including that the claimant did not disclose that she needed to leave any meetings early due to childcare responsibilities or arising from her children's health needs.

428. It is not clear what alternative arrangements could be put into place in any event, particularly given that the claimant had expressed in email correspondences including by email dated 07 March 2023 that she was not happy with lunchtime meetings every Friday (albeit they were relatively short meetings) as they were encroaching on other work she carried out during lunchtimes (despite indicating by email dated 19 January 2023 that she was always happy and available to discuss on her lunchtimes). Meeting remotely after school hours is unlikely to have been practicable due to the travel time that would have had to have been taken into account.

429. The respondent has satisfied us that its aim was a proportionate means of achieving a legitimate aim in the circumstances. There was no reasonable alternative means of achieving the respondent's aim. In any event the claimant did not put forward any viable alternative options. The claimant was informed after 18 January 2023 on certain occasions in advance that meetings were likely to overrun.

(b) To require staff to increase their extra-curricular hours from 28th February 2023

430. On one analysis, we had no evidence before us that any increase in extracurricular work being suggested in the context of this PCP (from 28 February 2023), could not be carried out within the working day. To the extent that any work had to be carried out outside the working day, we did not have specific details of this. We are unable to ascertain whether this would have placed female teachers at a particular disadvantage in this context.

431. Evidentially, the position would be the same in respect of the claimant's situation. We did not have any or any sufficient information before us to suggest that the claimant was placed at a substantial disadvantage in respect of this particular PCP.

432. If we are wrong to so find, we reviewed the respondent's justification at paragraph 20b. of the Agreed List of Issues.

433. We noted that the justification relied upon was not set out in bespoke terms reflecting the examples of extracurricular activities provided within the claimant's appraisal documents to which we were referred.

434. We accept the respondent's legitimate aim in terms of inviting staff to undertake extracurricular activities, including in respect of overcoming staffing shortages and recruitment difficulties. We note that the claimant volunteered to undertake extracurricular activities such as the Italian Club and did not complain about this additional work she were undertaking to the respondent. The requirements within the claimant's appraisal in terms of extracurricular work and interventions was reasonable and in line with the expectations of the claimant's role. There was no suggestion within the appraisal documents or correspondences from around that time that the expectations of the claimant in terms of extracurricular requests being made from 28 February 2023 were excessive or unreasonable.

(c) The claimant does not suggest any alternative means of achieving the respondent's aim. Where teachers have capacity, they may be requested to undertake extracurricular activities in order to meet the respondent's aim. On the limited information before us, we are satisfied that the respondent's aim was both legitimate and proportionate in the circumstances.To require staff to increase their availability to work after normal working hours from 26th February 2023

435. There was no evidence put before the Tribunal in relation to this PCP placing any additional requirements upon the claimant, except insofar as the requirements under the PCPs at paragraphs 23a. and 23b. of the Agreed List of Issues, which have been considered above. From reviewing the claimant's submissions, it is clear that there is considerable overlap.

436. We considered whether this PCP put individuals who have children who share the claimant's sex at a particular disadvantage in the context of the PCPs at paragraphs 23a. and 23b. of the Agreed List of Issues. We repeat our findings above in relation to the PCPs at paragraphs 23a. and 23b of the Agreed List of Issues.

437. In relation to whether they put the claimant at a particular disadvantage, we repeat our findings relating to paragraphs 23a. and 23b of the Agreed List of Issues.

438. Additionally, we repeat our conclusions above in respect of the respondent's justification defences relating to paragraphs 23a. and 23b of the Agreed List of Issues.

439. We noted that at paragraph 20c. of the Agreed List of Issues the respondent points out they only required staff to be present after school at meetings to the extent necessary to conclude the meeting properly. It was not suggested that the meetings were conducted inefficiently or that they covered irrelevant material. We note from the agendas and minutes of the various meetings that a number of detailed matters were discussed at meetings that appear essential to the smooth running of the MFL department. The claimant does not suggest any other method by which the respondent's aim could be achieved in the interests of the respondent's pupils. There appears to be no other reasonable means by which to achieve their aim.

440. We are satisfied that the respondent's aim was a legitimate aim and that it was proportionate on the evidence before us.

(d) To require staff to work full time from Sept 2024 on 19th of May 2023

441. We do not have any information or evidence showing if David Hull, a male teacher working within the MFL department worked pursuant to a full-time contract of employment.

442. We accept that any full-time working requirement would have applied equally to male teachers as they applied to a female teacher. There was no suggestion that any such requirement only applied to female teachers.

443. Based on the timetables before us, there were other staff members working full time hours, which included female teachers. We do not have a breakdown of individuals' working hours and their sex. We are unable to determine on the basis of the information before us that female teachers were placed at a particular disadvantage. On the evidence we are unable to find that the PCP put individuals who have children who share the claimant's sex (female) at a particular disadvantage.

444. We proceed on the basis that the PCP would put individuals who have children who share the claimant's sex (female) at a particular disadvantage. This is because the Tribunal takes judicial notice that a greater proportion of female employees are likely to have primary childcare responsibilities than male employees generally. It is likely that a full-time working requirement would have placed individuals with childcare responsibilities at a particular disadvantage.

445. We do not find that the PCP puts or would put the claimant at that disadvantage. The claimant did not work full time between 19 May 2023 and September 2024. Although the claimant resigned in May 2023 (her last day of working for salary purposes was 31 August 2023), the claimant was offered an extended period of part time working from 01 September 2023 until 31 August 2024 by letter dated 19 May 2023 (prior to tendering her resignation). The claimant had made a number of successful part time working applications in respect of several previous academic year prior and we find that the claimant was open to make a further application to cover the period from 01 September 2024 if she wished to do so.

446. Alternatively, we considered that the claimant was employed on a full-time contract. We accepted it was a legitimate aim to require the claimant to make flexible working applications yearly and that this served the aims listed at paragraph 20d. of the Agreed List of Issues. As we indicated earlier the claimant could have made an application at an earlier date in order to provide her greater certainty. The claimant could also return to full time working when her circumstances permitted.

447. If we are wrong to so find, the claimant's contract of employment required the claimant to work full time hours as noted at paragraph 20d. of the Agreed List of Issues. The respondent sought to pursue legitimate aims in terms of ensuing high quality education for its students and to avoid affecting their outcomes, effective working and keeping costs under control. The respondent made available its flexible working policy and application process to the claimant to enable her to request part time working. This gave the school the opportunity to consider the claimant's application in the context of the school's aims and needs.

448. We considered the above in the context of the issue of proportionality. We also considered the matters within the respondent's flexible working request outcome letters and the matters the school had explored.

449. We considered whether the part time working could have been granted for a longer period, such as 2 or 3 years. We noted that the claimant did not make such a request. Secondly we noted that the school's requirement had to be reviewed on a yearly basis, including pupil numbers and subject demand. In that context, the decision to allow part time working on a yearly basis was justified and proportionate.

450. The school granted extensions each year the claimant had made an application.

451. All reasonable options were considered. There were no other reasonable options available in the circumstances.

452. We are satisfied that the respondent's aim was a legitimate aim and that it was proportionate in all the circumstances.

(e)To require staff to apply annually for part time working on 19th of May 2023 (from April 2019 until 19th May 2023)

453. We do not know if David Hull applied to work part time. We find that any flexible working application requirement would have applied equally to male teachers. There was no suggestion that any such requirement only applied to female teachers. It could be said that a greater number of female teachers may need to make such applications as female teachers may on the whole be more likely statistically to have caring responsibilities.

454. There was no evidence that any other staff member had made a flexible working request application or had intended to make any such application, or that they were disadvantaged by the school's flexible working request procedure or any requirement to make an application annually. On the evidence before us, we do not find that the PCP put or would put female teachers at a particular disadvantage.

455. We did not accept that the claimant was put or would be put at a particular disadvantage by the PCP in question. Although the claimant may have experienced some uncertainty when she were required to reapply, not only were her part time working requests granted on a yearly basis since she started making her requests but she could have made her applications earlier in order to provide greater certainty (as suggested by Mr Brooks in his oral evidence).

456. If we are wrong to so find, the reasons why the claimant's flexible working request was extended by a year were explained in the outcome letter dated 19 May 2023. We accept that as stated at paragraph 20e. of the Agreed List of Issues, the school could not have accurately forecasted the applicability of the legitimate aims for the subsequent academic years and this is consistent with the approach taken in the flexible working request outcome dated 19 May 2023. We accept that those reasons are legitimate aims for the respondent's school to pursue and that those aims were pursued. The

school had considered the request fairly and they explained why they felt they were unable to grant the request on a permanent basis. In any event the claimant had indicated that she was happy for an extension of her current working arrangements by a further year and the school informed her that this was achievable.

457. We considered whether the part time working could have been granted for a longer period, such as 2 or 3 years. We noted that the claimant did not make such a request. Secondly we noted that the school's requirement had to be reviewed on a yearly basis, including pupil numbers and subject demand. In that context, the decision to allow part time working on a yearly basis was justified and proportionate.

458. The school granted extensions each year the claimant had applied.

459. All reasonable options were considered. There were no other reasonable options available in the circumstances.

460. We are satisfied that the respondent's aim was a legitimate aim and that it was proportionate in all the circumstances.

(f)To require staff to plan for lessons for other staff (24 May 2023)

461. We note that David Hull, a male teacher was also required to plan lessons for other staff.

462. We did not find that this PCP placed female teachers at a particular disadvantage. We did not have details within the evidence suggesting or showing that any teachers were asked to or had to carry out work outside the working day.

463. The claimant states in their submissions that "*I would say it is clear that female teachers who have children with disabilities need time to care for their children. Female teachers who had parental responsibilities need extra might need to take extra more planning home Planning more than others, would put me in such pressure that I would have to spend my day off planning. I was never asked to choose, and the decision for shared planning was imposed on me*."

464. We were not satisfied on the evidence before us that the amount of work assigned to the claimant in this context was greater or significantly greater than the work expected of other members of staff.

465. Whilst the claimant states that she may have needed to take work home, we noted that the claimant had both PPA time and gained time and year 11 students were undertaking exams at the time. The planning work aimed to reduce the overall burden and to create efficiency over a longer period of time. In the circumstances, we were not satisfied that the claimant had been put or would be put at a particular disadvantage.

466. If we are wrong to so find, we accepted the respondent's legitimate aim was to devise the best possible lesson plans to ensure the effective education of pupils (see paragraph 20f. of the Agreed List of Issues). It is also a justification to allocate resources as efficiently as possible, particularly in the long term in the circumstances. We noted that planning work was an essential part of the claimant's and other teachers' duties. As the claimant was the most experienced Spanish teacher, she was assigned planning work for GCSE year groups.

467. Dr Asong stated in her email of 25 May 2023, there was no planning to undertake for year 11 as they had exams at the time. The Italian club was a weekly session the claimant delivered during lunch, these were provided by the claimant on a voluntary basis, and the claimant could have ceased those sessions if the claimant wished.

468. The centralised approach for planning was intended to reduce workload on a long-term basis for the claimant and other teachers. This may well assist teachers in terms of being able to allocate time for problem areas such as interventions and telephone calls home.

469. Having consistent lesson plans may also improve quality of teaching provided to pupils, who remain the central focus in any school.

470. Although the claimant says all teachers had gained time, Mr Brooks told the Tribunal that the claimant's PPA time was not pro rata'd (according to her part time working hours) and the claimant had the same PPA time as full-time teachers. The claimant states Ms Hulpoi was employed full time and had 7 hours' gained time.

471. The claimant submits that the respondent are now claiming that it was a temporary arrangement, which was not true as there it was not suggested anywhere that it was not going to carry on in September 2023 after gained time had finished. However Dr Asong did not advise the claimant specifically that the claimant had to plan an entire year's worth of work in the email correspondences that were before the Tribunal.

472. The claimant also submits that she disagreed with the approach in terms of using other teacher's lesson plans and the practicality of this. However, we find that it is open to the respondent to adopt an approach that promotes a degree of consistency in their judgment and following their assessment of the circumstances.

473. Although the claimant takes issue with account not being taken off other workload constraints, the Tribunal noted that the respondent had an awareness of the classes that were being taught and timetables were produced in respect thereof. There was no indication that significant additional workload issues persisted. We took into account that the claimant had volunteered to take on additional work such as the Italian Club.

474. We noted that the claimant advised in evidence that she took marking home and undertook this on her train journey. However she did not complain about undertaking that work or that this was due to substantial workload issues. Dr Asong advised in her evidence that she could have offered help if she were approached by the claimant and asked for support in May 2023 (we accepted that she would have offered the claimant support had she been asked for the same by the claimant). However, the claimant did not ask Dr Asong for support with any workload issues.

475. We find that the respondent has shown that the treatment complained of is a proportionate means of achieving a legitimate aim having carefully reviewed the evidence before us.

476. In view of the above the claimant's complaints of indirect sex discrimination are dismissed.

Conclusion

477. The claimant's complaints are accordingly dismissed in their entirety.

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Employment Judge B Beyzade
Dated: 1 September 2025

Annex A – Agreed List of Issues

"Pre-amble

1. *This List of Issues ("LoI") was revised at the start of the substantive hearing by the Employment Judge with the agreement of the parties.*
2. *The following definitions are used throughout this LoI:*

ERA – The Employment Rights Act 1996
EQA – The Equality Act 2010

Constructive Dismissal

3. *Did the Claimant terminate her contract of employment in circumstances in which she was entitled to terminate it by reason of the Respondent's conduct and thus was constructively unfairly dismissed contrary to ERA S95 (1)(c)?*
4. *The Claimant relies upon the following acts in respect of Constructive Dismissal (relevant paragraphs in the Respondent's Grounds are referred to in square brackets):*

   (a) *Requiring her to remain in meetings after 4.15pm from 18th of January 2023 until 24th of May 2023 [ET3 GOR §§10.4, 12.3]*
   (b) *Requiring extra hours to be worked from 28th February 2023 [ET3 GOR §9.10.1-2]*
   (c) *A refusal of part time work from September 2024 on 19th May 2023 [ET3 GOR §§11.4.1-11.4.4 and 12.1]*
   (d) *Allocation of lesson plans for others on 24th of May 2023 [ET3 GOR §§9.10.1-9.10.4]*
   (e) *Preparing all Key Stage 4 Spanish lessons on 24th May 2023 [ET3 GOR §§9.10.1-9.10.4]*
   (f) *Preparing Year 11 Italian lessons on 24th May 2023 [ET3 GOR §§9.10.1-9.10.4]*
   (g) *Breaching privacy in respect of pay grades on 24th of May 2023 [ET3 GOR §10.2]*
   (h) *Being required to work full time in due course and plan lessons for other staff was the final straw following a refusal to change this on 25th May 2023 [ET3 GOR §§11.4.1-11.4.4 and 12.1; 9.10.1-9.10.4]*

5. *Did the Respondent commit a fundamental breach of the Claimant's contract of employment?*

6. *The Claimant relies upon a breach of the implied term of trust and confidence.*

7. *Was the breach sufficiently serious so as to amount to a repudiatory breach entitling the Claimant to resign in response?*

Remedy for Unfair Dismissal

The Claimant does not seek reinstatement or re-engagement.

Basic award

a. *What, if any award is the Claimant entitled to?*

Compensatory award

b. *What, if any award is the Claimant entitled to?*

c. *Should any award be increased and if so by how much? The Claimant claims there should be an uplift with regard to aggravated damages, and that no other uplift is claimed in the Schedule of Loss.*

d. *Should any award be subject to any decrease and if so, how much, in particular:*

i. *On grounds on grounds of contributory conduct arising from a disagreement in relation to undertaking additional tasks which the Respondent says caused the Claimant to leave;*

ii. *on grounds of breach of the ACAS code of practice on grievance procedures by reason that the Claimant did not pursue a grievance and/or appeal.*

Disability

8. *The Respondent accepts that the Claimant's children were disabled for the purposes of the EQA at all material times, both having the condition of haemophilia and the Claimant's younger son being diagnosed with autism in May 2022.*

Time Limits

9. *The Claimant has an ACAS Certificate R219009/23/44 which commenced on 31 July 2023 and was issued on 11 September 2023. The Claim was issued on 30 September 2023.*

10. *The Respondent contends that any claim, to the extent that it relates to the Respondent's conduct before 01 May 2023, is out of time.*

11. *Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? If not:*

a. *Are any of the alleged acts of discrimination part of an act extending over a period and if so was the last act within time? Or;*

b. *Were the claims brought within any such period as the Tribunal considers just and equitable?*

Grounds of Disability

S13 EQA (Direct Discrimination)

12. *Did the Respondent discriminate against the Claimant by reason of her children's disability by treating her less favourably than it treats or would treat others?*

13. *The Claimant contends that she was treated less favourably by the following (paragraphs in square brackets referring to relevant paragraphs of the ET3 grounds):*

    (a) *A requirement to increase extra-curricular activities on 28th of February 2023 [ET3 GOR §13.2]*

    (b) *Suggesting the Claimant brings her children into work, and they would be "bought pizza" (on or around 28th March 2023)*

    (c) *A requirement to request part time/flexible working annually (between April 2019 and 19th May 2023) [ET3 GOR §§11.4.1-11.4.4 and 12.1]*

    (d) *A requirement to work full time on or around 20th May 2023 [ET3 GOR §§11.4.3-11.4.4 and 12.1]*

    (e) *A requirement to spend her day off planning lessons on 24th May 2023 [ET3 GOR §9.10.2].*

14. *The Claimant contends the comparator(s) are hypothetical.*

S19 EQA (Indirect Discrimination)

15. *Did the Respondent apply to the Claimant the following PCPs:*

    a. *To require staff to remain in meetings after 4.15pm from 18th January 2023*

    b. *To require staff to increase their extra-curricular hours from 28th February 2023*

    c. *To require staff to increase their availability to work after normal working hours (26th February 2023)*

    d. *To require staff to work full time from Sept 2024 on 19th of May 2023*

    e. *To require staff to apply annually for part time working on 19th of May 2023 (from April 2019 until 19th May 2023)*

    f. *To require staff to plan for lessons for other staff (24 May 2023)*

16. *PCPs A to E above are not accepted but it is accepted PCP F was applied.*

17. *Did the Respondent apply, or would it have applied, the treatment to persons with whom the Claimant did not share the protected characteristic, namely teachers with children without the same disability as the Claimant's children?*

18. *Does the PCP put individuals who have children who share the Claimant's (children's) disability at a particular disadvantage?*

19. *Did the PCP put the Claimant at that particular disadvantage?*

20. *If so, can the Respondent show that the treatment is a proportionate means of achieving a legitimate aim? If the Tribunal accepts that any PCPs in paragraph 15 put the Claimant to a disadvantage, the Respondent contends they were a proportionate means of achieving a legitimate aim, as follows:*

    a. *The Respondent's legitimate aim was to maximise the effectiveness of its Modern Foreign Languages teaching, for the benefit of its pupils. Discussing issues in as much detail as necessary at meetings, which sometimes lengthened the duration of meetings, was a proportionate means of achieving this aim.*

    b. *The Respondent struggled with recruitment (see paragraphs 9.4 and 12.6 of the Respondent's grounds of resistance). Staff were invited, not required, to engage in extracurricular activities. Voluntary engagement in extracurricular activities to overcome staffing shortages was a legitimate aim. Inviting staff to voluntarily engage in extracurricular activities was a proportionate means of achieving the aim.*

    c. *The Respondent only required staff to increase their availability after normal working hours to the extent that this was necessary to conclude a meeting properly. As with paragraph 20(a) above, The Respondent's legitimate aim was to maximise the effectiveness of its Modern Foreign Languages teaching, for the benefit of its pupils. Discussing issues in as much detail as necessary at meetings, which sometimes lengthened the duration of meetings, was a proportionate means of achieving this aim.*

    d. *The Claimant's employment contract confirmed the default position that she would work full-time. The Respondent's legitimate aims were to provide high-quality teaching for its pupils, avoid detrimental impacts to employees' quality and performance, have effective working patterns, and avoid the costs associated with recruiting additional staff. With regard to section 80G of the ERA and the Acas guidance on responding to a flexible working request, having employees work full-time in accordance with their full-time employment contract is a proportionate means of achieving these aims.*

e. *The Respondent's legitimate aims for this PCP are set out in paragraph 20(d) above. The Respondent assessed the applicability of these legitimate aims prior to the forthcoming academic year, and could not have accurately forecasted the applicability of the legitimate aims for subsequent academic years.*

f. *The Respondent's legitimate aim was to devise the best possible lesson plans to ensure the effective education of pupils. As the Claimant was viewed as the most proficient Spanish teacher (see paragraph 9.10.4 of the Respondent's grounds of resistance), instructing the Claimant to devise these lesson plans was a proportionate means of achieving the aim.*

S26 EQA (Harassment)

21. *Did the Respondent engage in unwanted conduct related to the Claimant's children's disability? The Claimant contends the following acts were unwanted but engaged in by the Respondent (references in square brackets referring to relevant paragraphs of the ET3 Grounds of Resistanc):*

a) *Shouting at the Claimant when she wanted to leave at 4.15 pm (between 18 January 2023 and 25 May 2023). [ET3 GOR §§10.2, 11.2 and 12.7]*

b) *Stating "Would you like to focus on SEND because of your children" during the appraisal process meeting on the 28th of February 2023.*

c) *Telling the Claimant that she ought to bring her disabled children to work and she will get them pizza a week before Easter Holiday (on or around 31 March 2023).*

22. *If the answer to any of the above is in the affirmative, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking particular account of the other circumstances, the Claimant's perception and whether it was reasonable for it to have such effect?*

Grounds of Sex

S19 EQA (Indirect Discrimination)

23. *Did the Respondent apply to the Claimant the following PCPs:*

a. *To require staff to remain in meetings after 4.15pm from 18th January 2023*

b. *To require staff to increase their extra-curricular hours from 28th February 2023*

c. *To require staff to increase their availability to work after normal working hours from 26th February 2023*

d. *To require staff to work full time from Sept 2024 on 19th of May 2023*

e. *To require staff to apply annually for part time working on 19th of May 2023 (from April 2019 until 19th May 2023)*

f. *To require staff to plan for lessons for other staff (24 May 2023)*

24. *PCPs A to E above are not accepted but it is accepted PCP F was applied.*

25. *Did the Respondent apply, or would it have applied, the treatment to persons with whom the Claimant did not share the protected characteristic, namely males?*

26. *Does the PCP put individuals who share the Claimant's sex (female) at a particular disadvantage?*

27. *Did the PCP put the Claimant at that particular disadvantage?*

28. *If so, can the Respondent show that the treatment is a proportionate means of achieving a legitimate aim?*

29. *The Claimant contends that no legitimate aims were identified in its ET3. The Respondent contends that this is because indirect discrimination was not alleged in the Claimant's ET1.*

30. *If the Tribunal accepts that any of the above PCPs put the Claimant to a disadvantage the Respondent contends they were a proportionate means of achieving a legitimate aim, as set out in paragraph 20 above."*