EMPLOYMENT TRIBUNALS

Claimant: **Ms M Myers**

Respondent: **London Early Years Foundation**

Heard at: London South

On: 20 & 21 December 2016
& 28 February, 01, 02 & 03 March 2017
03 April 2017 in chambers

Before: Employment Judge Freer
Members: Ms D Fennell
Mr W Dixon

Representation
Claimant: In person
Respondent: Ms S Jones, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of unfair constructive dismissal, direct disability discrimination, and breach of contract are unsuccessful.

REASONS

1. By a claim presented to the employment tribunals on 22 December 2015 the Claimant claimed unfair constructive dismissal, direct disability discrimination, and breach of contract.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf.

4. The Respondent gave evidence through Ms Lynne Kelly, Nursery Manager; Mr Rashid Iqbal, Director of Children and Families; Ms Gill Springer, Senior Programme Manager Learning and Development; Mr Neil Best, Head of Operations and Performance Improvement; Ms Hilda Miller, Area Operations Manager; and Ms Dilys Epton, Senior Human Resources Advisor;

5. The Tribunal was presented with a bundle of documents from each of both the Claimant and Respondent and additional documents during the course of the hearing as agreed by the Tribunal.

The Issues

6. The list of issues was agreed between the parties at the outset of the Hearing and is as set out in an Order from a Preliminary Hearing held on 08 June 2016 save that the Respondent accepts that the Claimant was a disabled person at the material times with regard to the condition of Anxiety.

7. It was agreed that the Tribunal in the first instance will address liability and general unfair dismissal remedy issues as appropriate.

A brief statement of the relevant law

8. The law relating to constructive dismissal is well-established and requires generally four conditions to be present:

   · There must be a breach of contract by the employer;

   · That breach (or series of incidents) must amount to a fundamental breach;

   · The employee must leave employment as a consequence of that breach (whether express or repudiatory); and

   · The employee must not affirm the breach

   (see **Western Excavating (EEC) Ltd –v- Sharp** [1978] IRLR 27, CA)

9. The common law relating to contractual terms and breach of contract is also well-established. It is an objective analysis for the Tribunal.

10. A breach of an express or implied term must be considered objectively (see **BG plc –v- Brien** [2001] IRLR 496, EAT). The range of reasonable responses is

not applied at this stage (see **Bournemouth University Higher Education Corporation –v- Buckland** [2010] IRLR 445, CA)

11. Where a claimant has been constructively dismissed, the Respondent must show that the reason for dismissal is one of a number of permissible reasons.

12. If so demonstrated, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4) of the Employment Rights Act 1996. The standard of fairness is achieved by applying the range of reasonable responses test.

13. In the case of **Malik –v- The Bank of Credit and Commerce International SA** [1997] IRLR 462, HL, confirmed that the implied term of mutual trust and confidence is implied into every contract of employment. With regard to a breach of that implied term Lord Steyn stated: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see also **Omilaju –v- Waltham Forest London Borough Council** [2005] ICR 481, CA).

14. An employee's subjective belief as to how they believe they have been treated is not relevant, even if genuinely held (see **Omilaju**).

15. With regard to a 'final straw' constructive dismissal, the Court of Appeal in **Omilaju** held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.
>
> Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer".

16. The Tribunal was also referred by the Respondent to the authority of **Vairea -v- Reed Business Information Limited** UKEAT/0177/15.

17. Disability is a protected characteristic under the Equality Act 2010. Section 6 provides:

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
>
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
>
> (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
>
> (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
>
> (6) Schedule 1 (disability: supplementary provision) has effect."

18. Schedule 1 of the Act sets out important supplementary provisions to the determination of disability, in particular relating to "impairment"; "long-term effects"; "substantial adverse effects"; and "the effect of medical treatment". The Tribunal will not repeat these provisions in these reasons, but the Tribunal has referred itself fully to them.

19. There is also Secretary of State "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance"). The Guidance does not impose legal obligations itself, but the Tribunal has taken it into account where it appears to be relevant.

20. The burden of proof is on the Claimant to show that they are a disabled person under the statutory definition.

21. When assessing any adverse effect on normal day-to-day activities, the Tribunal should focus on what the employee cannot do or can do only with difficulty (**Goodwin –v- Patent Office** [1999] ICR 302); take into account the time taken to carry out an activity; the way in which it is carried out; the effects of environment; the cumulative effects of the impairment; and the extent to which the person can reasonably be expected to prevent or reduce those adverse effects.

22. Where the impairment is subject to treatment or correction, the impairment is to be treated as having the effect it would have without the measures in question (save for some specific circumstances, such as wearing glasses), even if the measures result in the effects being completely under control. The burden to prove any deduced effect is on the Claimant (**Woodrup –v- Southwark LBC** [2003] IRLR 111, CA and Guidance at paragraphs B12 &13).

23. The long-term nature of an effect is set out in paragraph 2 of Schedule 1. It is "likely" an event will happen "if it could well happen" rather than if it is "more probable than not" (reference **SCA Packaging –v- Boyle** [2009] ICR 1056, SC and the Guidance at C2)

24. An effect is substantial where it reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. It must be "more than minor or trivial" (see **Goodwin** above with regard to the meaning of 'substantial' under section 1) or be "of substance" (see **Jones –v- Post Office** [2001] IRLR 384, CA with regard to the meaning of 'substantial' as part of a justification defence).

25. The assessment of whether a person is a disabled person must be at the relevant time of the decision complained of on the basis of the information prevailing at the time. When assessing whether the condition was likely to last more than 12 months account should not be taken of events that post-date the alleged unlawful conduct (see **Richmond Adult Community College –v- McDougall** [2008] IRLR 227, CA).

26. Section 13 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

27. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

28. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

29. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

30. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

31. The Court of Appeal in **Madarassy** above held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

32. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable

treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

33. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

34. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society –v- Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have been taken into account by the Tribunal in the instant case.

35. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

36. The law on breach of contract is well established. The Claimant must show the contractual term relied upon, prove that it has been breached and the consequential loss arising.

Facts and associated conclusions

37. The Claimant commenced work as a Nursery Officer for the Respondent, the London Early Years Foundation, on 01 September 2009.

38. The Respondent is a registered charity and a social enterprise not-for-profit company that provides nurseries across London. It employs over 500 staff members.

39. With regard to the disability discrimination claim the Claimant relies upon the disabilities of chronic Anxiety, Diabetes, and Arthritis.

40. The Respondent accepted that the Claimant had a disability of chronic Anxiety at the material times but does not accept the Claimant had disabilities of Arthritis and/or Diabetes.

41. With regard to the Arthritis condition, the Tribunal has received no evidence to show that the Claimant has actually received that medical diagnosis. There is not an express medical diagnosis in the medical advice from occupational health or the Claimant's GP's notes. The condition is not even mentioned in the Claimant's completed Declaration of Health (see below) and as highlighted by the Respondent, nor is it mentioned in the Claimant's claim form.

42. The only place where it is mentioned is as a matter of self-reporting in the occupational health report dated 29 April 2015 which states: "Ms Myers first developed symptoms of joint pains around five years ago which she indicates her GP diagnosed as arthritis based on her symptoms". However, the GP records produced in evidence do not confirm any such actual medical diagnosis.

43. The occupational health report continues "Clinical examination revealed a good range of movement of both knees with no limitation likely to impact on her ability to sit, stand, move around or work on the floor as necessary . . . ".

44. This medical examination and assessment completely contradicts the Claimant's evidence, both oral and documentary, on the effects of the condition on her ability to undertake day-to-day activities. Accordingly, the Tribunal finds on balance that the Claimant's account of the effects of the condition is unreliable.

45. Therefore, the Tribunal concludes that the Claimant has not proved by adequate evidence that she has, or had at the material times, a diagnosis, and/or the alleged effects of that condition.

46. With regard to the Claimant's Diabetes condition, the Tribunal has been referred to a letter from the Grange Road Practice and Dr Kahn dated 17 March 2016 that states: "She also has a past medical history of Diabetes which is controlled by diet only and is awaiting repeat blood tests for this".

47. Also the Occupational Health report dated 29 April 2015 at page 171 that states: "She was diagnosed with diabetes through four years ago at a blood test recommended by a dentist following some dental problems. She was initially told the result was borderline. However, on review it was considered that the diagnosis of diabetes was made. She's been under the care of her GP since. The most recent bloods in February 2015 she is told were okay. Her diabetes is controlled by diet and she has altered the level of sugar and carbohydrate she eats as well as losing weight and taking regular exercise by walking. She had also attended a course aimed at helping herself manage her condition. She has regular diabetic eye checks. In terms of diabetic symptoms, she has noted that on occasion and particularly if she thinks her sugars may be high, she has a degree of urgency needing to get the toilet and pass urine straightaway. It is certainly possible that this type of symptom could be related to her diabetes".

48. The Claimant's impact statement submitted in compliance with a Tribunal Order, does not give any further suggestion of adverse effects on normal day-to-day activities.

49. The Tribunal has received no medical, or other, evidence to suggest what the deduced effects on the Claimant's day to day activities would be, if any, had she had not changed her diet to control the condition as set out in the medical information.

50. The Claimant argued on occasion in cross-examination that she did not want to have "a hypo" like her husband once suffered, as he also has Diabetes. However, the Tribunal has received no medical evidence to demonstrate that this would in fact be the result of the Claimant not altering her food intake as recommended.

51. The Claimant is required to prove any deduced effects, preferably by medical evidence, and she has not done so.

52. The Tribunal has also received inconsistent evidence on the Claimant's alleged incontinence and to which condition that is attributed.

53. The Claimant in her evidence to the Tribunal appeared to suggest that her alleged bouts of incontinence were due to her anxiety condition, depression, and stress (see for example the Claimant's 'Grievance of Reasonable Adjustments' at page 245, fourth paragraph).

54. The Claimant has linked her account of anxiety and stress to her self-diagnosed and not medically diagnosed Parkinson's disease, which is not a pleaded disability before this Tribunal.

55. The highest the matter can be put, and that is only in respect of the self-reported symptoms of the Diabetes condition, is that with regard to "a degree of urgency needing to get the toilet" it is "*possible* that this type of symptom *could be* related to her diabetes".

56. This self-reported symptom conflicts with the Claimant's other account which attributes the same symptom to anxiety, depression and stress, as stated above.

57. The Tribunal concludes on balance that there is no clear medical or other evidence from which a conclusion can be drawn on a balance of probability that the Claimant suffers from incontinence or urgency to urinate and that this symptom is due to a particular pleaded disability. The Claimant has not discharged her burden of proof.

58. As a consequence the Tribunal concludes that the Claimant has not proved that she is a disabled person in accordance with section 6 of the Equality Act 2010 with regard to the Diabetes condition.

59. However, despite the above conclusions, should the Tribunal's assessment be incorrect, particularly with regard to deduced effects of the Diabetes condition, the Tribunal has considered the Claimant's direct disability claims as if all the pleaded disabilities have been made out in fact and law.

60. In the list of issues the Claimant relies upon the same allegations as amounting to both constructive dismissal and direct disability discrimination. The only difference is that in the list of issues relating to direct disability discrimination some of the related disabilities have been identified.

61. The Claimant's contract of employment commences at page 85 in the Tribunal bundle.

62. On 23 July 2014, the Claimant moved to one of the Respondent's nurseries, Bird in Bush, in Peckham. The Claimant's manager was Ms Lynne Kelly, Nursery Manager.

63. At that stage Ms Kelly had no knowledge of the Claimant and had not been made aware of any of her health conditions.

64. On the Claimant's first day at Bird in Bush nursery she informed Ms Kelly that she suffered from Diabetes and Parkinson's Disease.

65. However, in fact, the Claimant has never been medically diagnosed with Parkinson's Disease. It is a self-diagnosis that the Claimant has derived from the fact that the Claimant says her father had the condition.

66. When the Claimant was initially shown around the nursery and taken to the baby room, the Claimant stated that she would not work in that room due to her health issues. As a consequence the Claimant was asked not to lift any of the babies or to undertake any nappy changing duties. Later that day it was agreed that the Claimant would stay in the baby room until Friday (her first day being Wednesday of the same week) at which time she was moved to preschool children care, a decision with which the Claimant was content.

67. The first circumstance set out in the list of issues is stated to have occurred in October 2014. In actual fact the event referred to took place on 20 November 2014.

68. It is not in dispute that the Claimant was eating a banana in the preschool room during a period when she was caring for the children. It is also not in dispute that members of staff should not eat in front of the children outside the children's regular meal times.

69. Ms O'Halloran observed the Claimant eating and raised it with Ms Kelly. Ms Kelly asked her to raise it with the Claimant.

70. There is a dispute of fact over how the matter was raised with the Claimant but the result was that the Claimant and Ms O'Halloran had a reasonably serious falling out in the preschool room in front of the children.

71. As a consequence of that Ms Kelly felt that she needed to address the matter urgently and called Ms O'Halloran and the Claimant to a meeting at around 18.30 that evening after the nursery had ended for the day.

72. There is a dispute of fact over the Claimant's demeanour in that meeting and on balance the Tribunal prefers the evidence of Ms Kelly that the Claimant called Ms O'Halloran “a liar” and suggested that she "had an agenda".

73. The Tribunal prefers Ms Kelly's evidence on the basis that there was no need for her to add that element to her account and her account is entirely consistent with the Claimant's later comments made on Facebook and her approach to that matter in evidence at the Employment Tribunal.

74. In any event, it is accepted by both the Claimant and Ms Kelly in their evidence that the meeting was called to allow the Claimant to air her views, that the Claimant and Ms O'Halloran hugged at the end of the meeting, the matter was resolved and in the Claimant's words in cross-examination: "I did not feel aggrieved about it".

75. The matter was not raised again by the Claimant and Ms Kelly did not feel it necessary to raise the matter in any substance with Ms Miller when she came to the Nursery the following day whereupon Ms Kelly told her that she had sorted it out.

76. The Tribunal also concludes that the Claimant did not tell Ms O'Halloran at the meeting that day that she had Parkinson's disease.

77. Ms Kelly had already accepted in her evidence that the Claimant had informed her that she had Parkinson's disease when she first commenced at the Bird in Bush nursery in July and there was no motivation for her to be untruthful about whether or not it was raised at that particular meeting.

78. The Tribunal finds that, of itself, this event did not amount to a breach of contract, either express or implied.

79. The Tribunal finds as fact that being “kept back” as the Claimant describes it in the list of issues could not have “affected her health” as alleged. There was no evidence to support that contention.

80. The Tribunal concludes that the Respondent’s conduct was not because of the Claimant’s disability. Ms O’Halloran did not know of the Claimant’s conditions at the time and there has been no evidence that the altercation between Ms O’Halloran and the Claimant was because of any alleged disability. It arose because Ms O’Halloran considered the Claimant was eating at work when she should not have been. The reasons why Ms Kelly treated the Claimant the way she did was because there was a serious incident in the workplace that needed addressing immediately.

81. With regard to the second matter relied upon by the Claimant, that she did not get the lunchbreak she needed on time, the Tribunal has received no evidence save for the Claimant's oral evidence, corroborating this allegation.

82. The Claimant accepted in her cross-examination that she did not raise the issue in a grievance and the Tribunal has been referred to page 110 of the bundle, which is an email by the Claimant to Ms Epton dated 02 February 2015 confirming that the grievance procedures were explained to her and the Claimant would not be taking out a grievance.

83. On the Claimant's evidence in cross-examination she confirmed that she gave up her lunch breaks to help Ms June O'Sullivan, that she made sure that she had lunch and had it alongside the children and suggested that: "Sometimes I did not get a lunchbreak". However, that suggestion is not consistent with the alleged breach of contract where the Claimant argues this happened "about three times a week from October 2014 to September 2015".

84. Accordingly, on balance at the Tribunal concludes that the Claimant was not denied a lunchbreak and most certainly was not denied a lunchbreak to the extent that she alleges in the list of issues. Accordingly, there is no breach of contract, either express or implied. Further there is no primary finding of fact from which the Tribunal could conclude that this allegation was because of the Claimant's Diabetes condition as alleged. Even if any lack of lunchbreak can be made out there is no evidence of the "something more' that is required (see **Madarassy** above) that demonstrates a causal link that it occurred 'because of' the Claimant's Diabetes condition.

85. The third issue is that the Claimant alleges that she was left alone with the children contrary to advice from occupational health. The occupational health report is dated 29 April 2015 and commences at page 171 of the bundle. It states: "In terms of diabetic symptoms, she has noted that on occasion in particular she thinks her sugars may be high, she has a degree of urgency needing to get to the toilet and pass urine straightaway. It is certainly possible that this type of symptom could be related to her diabetes".

86. In fact the occupational health report does not recommend that the Claimant should not be left alone with children in case she needed to go to the toilet.

87. However the Claimant raised that point herself with Ms Miller at a meeting on 26 May 2015. This is confirmed in an email to the Claimant dated 22 June 2015 from Ms Epton that: "It was accepted that it was not advisable for MM to work alone as she may need to visit the bathroom at short notice".

88. The Tribunal concludes on balance from the evidence that this action point appears to have been implemented.

89. The Claimant accepted in cross-examination that she could have gone back to Ms Miller and Ms Epton and said if things were not right. The Claimant did not raise the issue in her grievance of reasonable adjustments dated 14 June 2015, which is in the Tribunal bundle at pages 245 to 247. The Claimant

argued that this was a condensed version of a 37 page document, but had to accept that it was a summary of the most serious concerns.

90. It is also not mentioned in the Claimant's staff supervision record form dated 28 August 2015, nor mentioned in a letter written by the Claimant dated 08 September 2015 which commences: "I would like to bring to your attention some of the pressing matters that are causing me concerns and thereby exacerbating my diagnosed chronic anxiety".

91. The Claimant alleges in the list of issues that she was left alone with the children for "2 to 3 times per week". The Claimant also alleges that: "this caused her to "leak" on herself and she had to take clothing in case she needed to change".

92. The Tribunal concludes that it received no evidence to substantiate the Claimant's claim that she was left on her own with children at all or of the alleged consequences of so doing, particularly after the time she raised the issue with Ms Epton.

93. There is no evidence that the Claimant considered that it was an issue after that time and certainly no evidence to corroborate the allegation that this occurred 2 to 3 times per week with the consequences as expressed by the Claimant.

94. It is the important to note that the Claimant had moved from Bird in Bush nursery to New Cross nursery as from 02 June 2015. The Claimant was therefore no longer under the line management of Ms Kelly and there were no residual matters that may have endured from that line management relationship.

95. The Tribunal concludes therefore that the Claimant has not made out this allegation as a matter of fact.

96. Further, the Claimant alleges that this issue relates to her Diabetes condition and the Tribunal has received no evidence to suggest, even by inference, that even if the Claimant was left on her own it was done because of her Diabetes condition.

97. The next issue is an allegation that in October 2014 the Claimant was told by Ms Kelly when at the Bird in Bush nursery that she had to be on the floor with the younger children when she worked.

98. The Claimant alleges that Ms Kelly was not aware that it had been agreed with the Area Manager, Ms Maria Freeman, that she should work with older children. The Claimant's claim is that this state of affairs persisted to September 2015.

99. The Tribunal refers to its conclusions relating to the first issue above and that when the Claimant first started at the Bird in Bush nursery she raised with Ms Kelly that she had a diagnosis of Parkinson's disease and Diabetes. Because

that matter was raised, the Claimant was not required to lift babies or change nappies and was transferred to the preschool area after three days.

100. The Claimant acknowledged in cross-examination that it was reasonable for Ms Kelly to require a couple of days to arrange the Claimant's place of work, but contends that Ms Kelly should have been informed of the Claimant's medical condition.

101. The Tribunal was referred to the page 78 of the bundle, which is the Claimant's completed Declaration of Health in which she raises that she has: "signs and symptoms of inherited Parkinson's disease" and "chronic anxiety symptoms of Parkinson's disease that is inherited and genetic". The Claimant also confirms that someone else living in her household had Diabetes. That form is signed and dated 13 June 2009.

102. The Claimant in cross-examination contended that her period in the baby room extended beyond the three days in July 2014 as a consequence of an arrangement made with her to swap with a colleague named Rumi.

103. The Tribunal received no direct evidence of the various signing in register/books relating to the baby room (under 2's), which require signing for nappy changes and sleep periods. However, Ms Kelly's oral evidence was that there was no evidence of the Claimant having signed those registers and she would have done so had she worked in in the baby room as alleged.

104. The Claimant in cross-examination argued that she had difficulty undertaking work in the baby room because of her arthritis condition. The Claimant stated: "If I go down now I have difficulty getting up, back problems led to arthritis".

105. However, the Tribunal was referred to the medical report dated 29 April 2015 which states: "Clinical examination revealed a good range of movement of both knees with the no limitation likely to impact on her ability to sit, stand, move around or work on the floor as necessary and to lift or move children to safety in an emergency situation".

106. The Tribunal was also referred to the Claimant's GP records in respect of which a page was missing. The Tribunal obtained the missing page from the Claimant and those notes do not refer to her arthritis condition as was alleged by the Claimant.

107. The Claimant also did not raise the matter in her grievance and when asked whether she complained she stated that she could not remember.

108. Accordingly, on the evidence the Tribunal concludes that the Claimant was only requested to work in the baby room for the three days in July 2014. The Tribunal also concludes that the Claimant did not make the Respondent aware of a back condition/arthritis, as confirmed by the medical disclosure form.

109. Also, had this matter persisted on the Claimant's case to September 2015 then it would have endured at both the Bird in Bush and New Cross nurseries. The

Tribunal has received no corroborative evidence of this position and the Claimant's allegation of arthritis pain difficulty is incompatible with the contemporaneous medical notes.

110. There the Tribunal concludes that this has not been made out as a matter of fact as alleged.

111. The fifth issue is an allegation that the Claimant was sent by Ms Miller from Bird in Bush to the House of Commons nursery resulting a longer journey to work.

112. The Claimant accepted in cross-examination that the trip to the House of Commons nursery took around 30 to 35 minutes. The Tribunal was also shown an email from the Claimant to Ms Upton dated 28 March 2015 in which the Claimant confirms that Ms Miller: "Sent me to the House of Commons nursery for a couple weeks to take the pressure off me".

113. The Claimant accepted in cross-examination that the House of Commons nursery was in fact a prestigious place to work.

114. The Claimant did not raise any issue she had over public transport travel and incontinence difficulties. For example, the notes of a meeting between Ms Upton and the Claimant on 27 March 2015 does not make any reference to it.

115. The Claimant alleged in evidence that she had raised the matter of incontinence and travel time in a document at page 246 in the Claimant's bundle in the entry for 18 March 2015. However, that entry does not mention those points.

116. Also, the Claimant's contract of employment at clause 5 at page 85 confirmed: "We are an organisation that operates across several locations and this means that during the course of your employment you may move between our sites including Head Office. Sometimes you will have chosen to change sites in order to take up a new role, and sometimes, due to the needs of the business, we might ask you to be based at another site for a long or short period. We expect that you will be able to make the moves as they are regarded as a normal part of our business and involve reasonable commuting time."

117. The Tribunal finds that a commuting time of 30 to 35 minutes, particularly in London, is a reasonable commute time. Accordingly, the Respondent did not breach any express or implied terms of the Claimant's contract of employment.

118. Further, the Tribunal concludes that the Claimant's posting to the House of Commons nursery was not a detriment when objectively considered and so cannot amount to less favourable treatment for direct discrimination purposes. In addition, there is no evidence to suggest that this action was taken because the Claimant had Diabetes. The reason why Ms Miller took the action was to assist the Claimant and moved her to a location that was considered prestigious. It was not a decision that was either consciously or subconsciously because of the Claimant Diabetes.

119. The next allegation relates to the Claimant attending a wedding on 04 January 2015 where she contends an allegation was made by Mr Benedict Siewe that, at the wedding, the Claimant had spoken in a derogatory manner about Ms Kelly and Central Office staff.

120. Ms Kelly heard about the alleged comments and asked the Claimant to go to her office to talk about it and her account is set out at pages 98 to 99 of the bundle.

121. It was put to the Claimant in cross-examination that the meeting ended as set out in those notes: "I finished the meeting on good terms as it was Mervelee's word against Benedict's and I couldn't prove anything. I also thought that as this happened outside the working environment it would be unfair to accuse Mervelee of anything until there was another disclosure regarding what was said. I reminded Mervelee that she should talk to me if she needed".

122. The Claimant alleges that this is not what happened and Ms Kelly did not speak to her directly. However, that is contradicted by Ms Kelly's notes of events on 09 January 2015 as set out pages 100 to 101 of the bundle.

123. The Claimant did not raise any grievance at the time on this issue.

124. After that event Ms Kelly gave the Claimant a very positive appraisal at 'level 4', which was the highest possible. In fact, in the start of year appraisal, the Claimant was marked higher in one category relating to 'managing change' then she had actually graded herself in the self-assessment (see page 185 in the Claimant's bundle).

125. The positive assessment strongly militates against any suggestion that Ms Kelly had taken a negative view against the Claimant because of the allegations arising from the wedding on 04 January 2015.

126. The Tribunal concludes that the manner in which the matter had been dealt with by Ms Kelly did not breach any express or implied term of the Claimant's contract of employment. It was not conduct that without proper cause was calculated or likely to breach trust and confidence.

127. Further, the Claimant argues this issue relates to her Anxiety condition. The Tribunal has received no evidence to suggest that Mr Seiwe knew of the Claimant's Anxiety condition, or that even if he did make the allegations that he did so because of the Claimant's Anxiety condition.

128. In addition the Tribunal concludes that Ms Kelly's handling of the matter did not objectively amount to a detriment. Further, there is no evidence remotely to suggest that Ms Kelly's conduct was done either consciously or subconsciously because of the Claimant's Anxiety condition.

129. The next issue is an allegation that the Claimant faced disciplinary action as a result of three colleagues complaining about her aggressive conduct.

130. The Claimant received a final written warning which was upheld on appeal, but the duration of the warning reduced from a year to 6 months.

131. The Tribunal has referred itself to the fact-finding investigation as set out at pages 111 to 131 in the bundle.

132. The Tribunal concludes that on this information it was reasonable to invite the Claimant to a disciplinary hearing to consider the allegation that: "Your behaviour and conduct in the nursery has a times being unprofessional, confrontational, rude, intimidating and unprofessional. That this behaviour has been displayed in front of children".

133. The disciplinary meeting took place on 7 April 2015 conducted by Mr Rashid Akbar, Director for Children and Families on a panel together with two independent Nursery Managers.

134. The outcome was provided to the Claimant in a letter dated 13 April 2015, see pages 153 to 154 of the bundle.

135. The Tribunal concludes that it was reasonable for the disciplinary panel to conclude on the evidence that the Claimant had: ". . . behaved in a manner which has offended colleagues and that cumulatively this should be seen as serious misconduct. As a result the Panel has decided that you should be issued with a Final Written Warning for professional, rude and intimidating conduct in front of colleagues and children".

136. It should also be noted that the letter confirms: "At the hearing you were asked whether your health and personal circumstances affected your behaviour at work and you said that they had not". That conclusion is confirmed by the hearing notes that are at pages 147 to 152 of the bundle and page 151 in particular.

137. The Claimant appealed against that decision by a letter in the bundle at pages 158 to 168. The appeal hearing took place on 13 May 2015 conducted by Ms Louise Cooper, Director of Business Development together with Ms Gill Springer, Learning and Development Manager and Ms Mary Wynne-Finch, a Trustee.

138. The Claimant was provided with the outcome by a letter dated 15 May 2015 at pages 183 to 184 of the bundle. The panel upheld the disciplinary conclusion but reduced the length of the final written warning to 6 months from the original 12 month period.

139. In the circumstances the Tribunal concludes that these decisions were reasonably made by the Respondent upon reasonable evidence. They are decisions that were objectively reasonably available to the Respondent and did not constitute either an express breach of contract or breach of the implied term of mutual trust and confidence. It was not conduct that without reasonable cause was calculated or likely to destroy the relationship of trust and confidence between employer and employee.

140. The Claimant argued that this issue relates to her Anxiety and Diabetes conditions.

141. It is people who potentially discrimination, not an organisation as a general entity. The Tribunal has received no evidence that the decisions made by the seven people involved in the Claimant's disciplinary process were made because of the Claimant's two conditions as alleged. Indeed, the Claimant has not made out facts that might infer that any single decision maker acted because of the Claimant's conditions.

142. The eighth allegation is that the Respondent failed to deal with the renewal of the Claimant's DBS check. It was due for renewal in July 2015. The Respondent's DBS process appears to be that a hyperlink is sent to the individual employee for them to follow and complete the DBS application form online with the Respondent's allocated provider. The employee needs to indicate what form of proof of identification they will be providing.

143. The Tribunal was referred by the Claimant to email correspondence dated 21 October 2015 at page 365 of the Claimant's bundle, which states: "Your online criminal record application for London Early Years Foundation has been withdrawn. If you wish to reapply, please contact your organisation to reregister service". This correspondence is post-the Claimant's employment with the Respondent.

144. It is entirely possible that withdrawal is simply a withdrawal from being able to use the allocated hyperlink. In any event, the Tribunal has received no evidence to suggest that the Claimant's DBS check renewal was part of a deliberate process by the Respondent and the evidence suggests that there was possibly a series of errors by both the Claimant and the Respondent in respect of the DBS renewal.

145. It was the Respondent's evidence, accepted by the Tribunal, that it is not an unusual event where a DBS certificate expires before it is renewed and on those occasions the individual employee is taken off care work during the period while the DBS certificate is being secured.

146. The Tribunal concludes that there was no breach of contract in the Respondent's actions.

147. It was not clear what disability the Claimant was relying on in this instance, but it was clear that the actions of those involved were in no sense whatsoever because of any of the Claimant's alleged conditions.

148. The next issue is that on 10 September 2015 the Claimant was called to a meeting by Ms Miller and Ms Louise Eliasen following a Diabetes eye clinic appointment and was told that if she was sick she should go to the doctor and not work. The Claimant alleges this caused her more stress and relates to her Diabetes and Anxiety conditions. The Claimant argued that she was well and wanted to be at work.

149. The Tribunal accepts the evidence of Ms Miller that when the Claimant attended at the meeting with her and Ms Eliasen on 10 September 2015, Ms Miller said that if the Claimant was ill she should go to her doctor and not be at work. The Claimant had been upset and that is why Ms Miller used those words. The comment was made in an empathetic manner. On balance the Tribunal accepts Ms Miller's evidence.

150. The Tribunal also concludes having considered all the evidence that Ms Miller was not trying to treat the Claimant unfairly or was "using her vulnerability against her".

151. Accordingly, the Tribunal concludes there was no breach of contract, express or implied.

152. Further, the advice given by Ms Miller did not objectively amount to a detriment. An objective worker would not consider it to be such. In addition the Tribunal concludes that the suggestion by Ms Miller was not done because of the Claimant Diabetes or Anxiety conditions. The reason why it was suggested because that was an appropriate action in the circumstances, consistent with the Respondent's duty of care.

153. The final allegation is that on 22 September 2015 the Claimant attended at a suspension meeting and was treated disrespectfully by Mr Neil King. He allegedly called the Claimant aggressive and unprofessional and repeated matters that were in her disciplinary outcome. The Claimant alleges that Mr King tried to get her to write a resignation letter.

154. On 22 September 2015 Mr King and Ms Epton met the Claimant to give her the suspension letter, which is at pages 278 to 279 of the bundle. The suspension was pending an investigation to establish the facts surrounding the allegations that the Claimant had: "Posted comments on Facebook that breached mutual trust between yourself and your organisation bringing the organisation into disrepute" and "failed to adhere to the Social Media Policy which is misconduct under the Disciplinary Policy".

155. The Tribunal was taken to those Policies.

156. The Tribunal has been taken in evidence to the relevant Facebook pages and the Claimant in her oral evidence was extremely reticent to accept that the Facebook posts were hurtful, derogatory and offensive. As a consequence the Claimant was taken through a significant number of examples in respect of which Claimant accepted on each individual example that they were written by her and accepted that they were offensive (see pages 306 to 328).

157. The Tribunal considers that it is self-evident that the Facebook entries were and were intended to be offensive. It should not have required the Claimant to be taken through them individually for that acceptance to be made.

158. It was put to the Claimant in evidence that she should never speak about her employer in this way to which the Claimant replied "I don't agree".

159. The Claimant accepted in evidence that the individuals referred to in the postings could access and read them, as also could any other individuals. The identity of the individuals was also clear even though they were referred to in insulting terms.

160. The Claimant accepted that it brought the Respondent into disrepute, but considered that the Respondent was responsible for all her actions.

161. The Tribunal concludes that the Claimant's suspension in the circumstances was entirely objectively reasonable.

162. With regard to the meeting itself, the Claimant provided a 67 page witness statement for the Tribunal hearing and this matter is mentioned at page 50 in six lines of text. There is no mention in that witness statement of Mr King treating the Claimant disrespectfully or calling the Claimant aggressive and unprofessional.

163. The Claimant accepted that Mr King had arranged the meeting to inform the Claimant of her suspension.

164. The Tribunal concludes Mr King did not act in the way alleged by the Claimant in relation to his attitude towards the Claimant.

165. With regard to the allegation that Mr King tried to get the Claimant to write her resignation letter, the Claimant's evidence in this respect was unimpressive. Once understood it was essentially that Mr King and Ms Epton left the room for reasons that are not entirely clear on the Claimant's account and left a pen on the desk, which the Claimant took to be an invitation to write her resignation letter. The Claimant appears to have arrived at this conclusion from a verbal exchange at the conclusion of the meeting where Mr King asked the Claimant if it was her pen to which the Claimant replied that it was not.

166. The Tribunal concludes that Mr King did not try to get the Claimant to write her resignation letter as alleged. The Tribunal accepts the submission by the Respondent if the Claimant had been forced to resign she would have mentioned in her resignation letter that she was coerced into resigning.

167. The Tribunal has taken care to consider all of the above allegations as a whole and to assess whether, even though as individual complaints they do not amount to breaches of contract, as cumulative acts together they do amount to a fundamental breach. However, the Tribunal unanimously reaches the conclusion that when considering all the alleged events as a whole and the relevant surrounding circumstances the Respondent did not breach the implied term of mutual trust and confidence and did not act without reasonable cause in a manner calculated or likely to destroy that relationship. Accordingly, the Claimant's claim of unfair dismissal is unsuccessful.

168. In addition, even if the Tribunal is incorrect of its assessment of the Claimant as a disabled person, the Tribunal unanimously concludes that the Claimant has not proved primary findings of fact from which the Tribunal could conclude that the allegations were done because of the Claimant's disabilities when considering the matters alleged both individually and cumulatively in the overall factual matrix. They have either not been made out as fact, do not amount to a detriment, or there is no inference of a causal link, even when carefully considered together as a whole.

169. As stated in **Madarassy** above, where it is required to apply the burden of proof reversal provision, the burden of proof does not shift to the employer simply upon the Claimant establishing a difference in status (e.g. disability) and a difference in treatment. Such facts, even if made out, only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. It requires proof of facts that show "something more" and infer that the acts have been done "because of" the disability. The Claimant has manifestly failed to prove her case.

170. It is therefore the Tribunal's unanimous conclusion that the Claimant's direct discrimination claims are also unsuccessful.

171. Finally, with regard to the breach of contract claim relating to notice pay, the Tribunal has found above that the Claimant was not constructively dismissed. The Claimant therefore resigned with immediate effect by her letter dated 27 September 2015 and no notice pay is owed, although it is not disputed that the Respondent in fact paid the Claimant four weeks' notice pay.

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Employment Judge Freer
Date: 26 July 2017