



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Pridmore

**Respondent:** The Governing Body of Silver End Primary School

**Heard at:** East London Hearing Centre  
**On:** 27-28 July 2017  
and (In Chambers) 21 August 2017

**Before:** Employment Judge A Allen

**Members:** Ms M Long  
Mr M Wood

## Representation

**Claimant:** S Bishop (Counsel)

**Respondent:** J Smeaton (Counsel)

# JUDGMENT

1 The unanimous decision of the Tribunal is that the Claimant's claims are all dismissed.

# REASONS

1. This claim of disability discrimination was presented by the Claimant on 21 February 2017. The issues were agreed between the parties and are set out in the list of issues as follows:

## 1 Disability

1.1 It is agreed that:

- (a) the Claimant was disabled for the purposes of the Equality Act 2010 by virtue of suffering from bipolar affective disorder.
- (b) The Respondent had knowledge of the Claimant's disability as referred to at 1.1 (a) above by 31 August 2016.

**2 Direct Discrimination - s.13 EA 2010**

2.1 Did the Respondent:

- (a) Dismiss the Claimant on 2 September 2016, the contract of employment having started on 1 September 2016; or
- (b) On 2 September 2016 withdraw the conditional offer of employment?; or
- (c) On 2 September did the Respondent decide not to continue with the recruitment process with the Claimant as 'preferred candidate'?

2.2 If so, in doing so, did the Respondent treat the Claimant less favourably than it did treat or would have treated an actual or hypothetical comparator in the same or not materially different circumstances?

2.3 The Claimant contends that the appropriate comparators are:

- a) TBC No actual comparators are known at this stage.
- b) An able bodied teacher sick on the first day of a term and for an indefinite period of time with no clear return to work date with a medical prognosis that they may be fit to return to work after half term.

2.4 Was the Claimant treated less favourably in that the Respondent took the decision not to continue with the recruitment process of the Claimant because of the Claimant's disability; or in the alternative, was C treated less favourably in that she was dismissed?

**3 Discrimination arising from disability - s.15 EA 2010**

3.1 Was the Claimant treated unfavourably as set out in paragraph 2.1 above?

3.2 Was that treatment because of something arising in consequence of the Claimant's disability, namely:

- (a) C's sickness absence;
- (b) C' s medical prognosis for her return to work?

3.3 If so was the unfavourable treatment a proportionate means of achieving a legitimate aim, namely stability in the provision of the Respondent's statutory duties to provide a standard of education to its children

**4 Indirect Discrimination - s.19 EA 2010**

4.1 Did the Respondent apply the following PCP's:

- (a) A requirement that all employees must begin work on the first day of term regardless of sickness;
  - (b) A requirement that teachers who were sick at the start of term must have a positive medical prognosis, at the start of term, that they will be fit to return to work by the end of that term's half term; in this case by 31 October 2016?
  - (c) A requirement for consistent attendance at work.
- 4.2 Did those, or would those, PCPs put people with bipolar affective disorder at a particular disadvantage?
- 4.3 Was the Claimant put at that disadvantage?
- 4.4 If so was the application of the PCP a proportionate means of achieving a legitimate aim namely stability in the provision of the Respondent's statutory duties to provide a standard of education to its children?

## **5 Reasonable Adjustments- s.20 EA 2010**

- 5.1 The Claimant relies on the same PCPs at paragraph 4.1 above and the, substantial disadvantage as paragraphs 4.2 and 4.3 above. Did the PCP(s) put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
- 5.2 If so, did the Respondent fail to take such steps as it was reasonable to avoid the disadvantage?
- 5.3 The Claimant claims that the following reasonable adjustments should have been made:
- (a) Obtaining an updated medical opinion at a later date such as the beginning of October 2016, possibly the end of October 2016.
  - (b) Waiting for a period to see what improvements might arise in the Claimant's fitness for work.
  - (c) Delaying the start date for employment to commence, if it had not already started.
- 5.4 Were these adjustments which the Respondent could reasonably be expected to take?

2. It was agreed at the outset of the hearing that the tribunal would deal only with liability at this stage.

3. We heard evidence from the Claimant, Claudia Pridmore; and on behalf of the Respondent from Stewart Caplen, Executive Head of the Respondent; Angela Hobster, Business Manager of the Respondent and Confidential PA to the Executive Head; and Nigel Sawyer, Senior HR Consultant, Essex County

Council.

4. We were referred to documents in an agreed paginated bundle running to 251 pages. Both parties' counsel supplied us with written arguments supplemented by oral submissions, and we were given an agreed cast list and chronology.

5. The Claimant supplied us with *Griffith v SoS Work and Pensions* [2015] EWCA Civ 1265. The Respondent supplied us with *Watson v Sussex NHS Foundation Trust* [2013] EWHC 4465 (QB).

6. Having graduated in 2014, by 2016, the Claimant was approaching the completion of 2 years as a newly qualified teacher (NQT) at a previous employer. Her references were very positive and she had been successful in her role. In April 2016 the Claimant applied for a class teacher post at the Respondent. In answer to a specific question on the recruitment monitoring form attached to the application form, the claim ticked the box 'No' "I do not consider myself to have a disability as defined by the Disability Discrimination Act 1995 (as detailed above)". The Respondent was a local authority school, which had chosen to receive services such as OH and HR from Essex County Council. The Respondent operated a sickness absence procedure for employees.

7. The Claimant attended an interview on 27 April 2016. The Respondent wrote to her on 28 April 2016 to make her a conditional offer in the following terms.

"I am pleased to inform you that you are the preferred candidate and we shall be proceeding with obtaining all necessary clearances, including medical and DBS check. Your salary will be within the teachers mean pay range with a commencing figure of £26,929 and start date of 1<sup>st</sup> September 2016. On receipt of all satisfactory clearances you will be made a formal Offer of Employment. However, if any of the clearances prove unsatisfactory then you shall be informed that we will not be furthering your application. Candidates are required to satisfy the School as to their physical fitness for the appointment and in this connection you are asked to complete the enclosed health declaration form and return as soon as possible.. . Please would you confirm in writing your acceptance of our offer at this stage. In the meantime if you require any additional information or assistance in connection with this offer, please do not hesitate to contact me, and all at Silver End Primary School are looking forward to working with you in September."

8. The Claimant responded to indicate her acceptance of the conditional offer.

9. On 12 May 2016 the Claimant completed a fitness to work declaration ticking the box 'Yes' in answer to the question "Do you have any health or medical issues that you consider would impact your ability to undertake the position offered and/or do you require any additional adjustments or support?"

10. On 16 May 2016 the Respondent sent to the Claimant the OH pre-placement health assessment to complete. The Claimant completed that on 23 May 2016.

11. On 14 June 2016 the Respondent chased OH for the OH assessment. On 5 July 2016, OH sent forms to the Claimant seeking her permission for the County Physician to contact her GP and/or other medical practitioners.

12. On 11 July 2016 when the Claimant attended at the Respondent school for a non-pupil day, Angela Hobster (Business Manager) spoke to her and explained that her medical clearance was still outstanding.

13. On 14 July 2016 when the Claimant attended school for a 'meet your new teacher event', she informed Angela Hobster that since she had been offered the post, "her condition had deteriorated" and that adjustments were in place in her current teaching job. The Claimant did not tell the Respondent at that stage what the condition was.

14. On 17 July 2016, Angela Hobster emailed Nigel Sawyer (Executive Head) asking various questions about the Claimant's position in light of the information communicated by the Claimant.

15. He replied on 18 July 2016 informing her that OH advice would be required as to her fitness for the role and/or any proposed adjustments.

16. On 18 July 2016 OH telephoned Angela Hobster to inform her that the forms seeking the Claimant's permission for the County Physician to contact her GP had been sent to the Claimant twice and that OH had tried to contact the Claimant without success. A third permission request was sent that morning and on 20 July 2016 Angela Hobster spoke to OH who confirmed that they had tried to call and email the Claimant about three times since Monday 18 July 2016 without success.

17. On 21 July 2016 Stewart Caplen wrote to the Claimant confirming that the offer made was conditional; referring to the medical clearance which was outstanding; pointing out that a response from the Claimant to OH was still awaited; confirming that "I also understand that any recommended adjustments would have to be considered by the School and, where possible, fulfilled before we can confirm your appointment so that you can commence in post. This could mean even if clearance arrives during the summer closure, your actual date of employment may not be until later in the Autumn Term"; inviting her to meet him; and informing the Claimant that employment had not been confirmed.

18. The Claimant replied the following day 22 July 2016 to Mr Caplen explaining that her failure to respond to OH was because she has had to "attend several medical appointments and have been too unwell this week to contact them"; agreeing to meet Mr Caplen; and thanking him for his patience.

19. On 22 July 2016 Angela Hobster wrote to Nigel Sawyer to confirm that the Claimant had responded to OH's request. She indicated that she had experienced technical difficulties with the forms (which was not what she had told Mr Caplen, earlier that day) and asking for Mr Sawyer's advice as to whether the School could withdraw its conditional offer; on what grounds; expressing concern that the School may have to consider arrangements for a supply teacher for September. She stated "We are extremely concerned by the whole scenario and also what the future may hold, for the school (and the budget) should Miss

Pridmore be declared Fit for Work.”

20. On the same day, Mr Sawyer replied telling the Respondent how to deal with any forthcoming meeting with the Claimant – and stating that after the meeting, Mr Caplen would have to decide whether to wait for the OH report and to decide whether the appointment could or couldn't proceed.

21. A meeting with the Respondent was arranged for the Claimant by Jill Jones, the Claimant's supporting friend, who told the Respondent that the Claimant was in hospital and had been ill that week.

22. The meeting took place on 25 July 2016, attended by the Claimant who was accompanied by Jill Jones; Mr Caplen and Ms Hobster. Mr Caplen explained the School's position in that medical clearance had not yet been received, and that, following advice from OH and HR, he wished to inform the Claimant that at this stage:- the school were not able to confirm her appointment- and thus she could not commence employment on 1 September 2016.

23. The Claimant explained that contact had been forthcoming from occupational health, and that an appointment with the County Physician had been arranged for 25 August 2016. Mr Caplen acknowledged this positive point, but explained that with the onset of the summer closure period, any reports and recommended adjustments from the County Physician may not be acted upon until after 1 September 2016. He said that therefore the school could not confirm or otherwise the Claimant's appointment. He said that the date of her contract of employment would be the date on which she actually commenced her role, i.e. after 1 September 2016, once the school had received and assessed any recommended adjustments and then determine if these could be implemented.

24. The Claimant was asked what adjustments have been put in place at her current school enabling her to carry on working there and she explained that: 1. She had been working half days 2. She had been given admin tasks to undertake 3. She had been allowed to work from home 4. She had been given time off to attend many medical appointments 5. At the time she was with her class, she had been assigned a full-time teaching assistant to be with her at all times.

25. The Respondent accepted at the hearing before us, that 4 and 5 would not have caused any difficulty – but that it did not consider that 1, 2 and 3 were compatible with a role as a classroom teacher.

26. Mr Caplen reiterated that whilst it was positive that the Claimant had an appointment with the County Physician for 25<sup>th</sup> of August 2016, her commencement of employment would not be able to start until after this date and following advice from OH and HR the school could also have the option of withdrawing the conditional offer. He expressed sympathy with the claimant, explaining that she could not start in her role until such time as a report has been received from OH. He said that any recommended adjustments could be considered, and if feasible, these would be put into place prior to the Claimant's commencement of any employment at the school.

27. There was no evidence in the documents before the tribunal that Mr Caplen or Ms Hobster had behaved in any way which was inappropriate at this meeting on 25 July 2016. The Claimant's evidence is rejected that Mr Caplen

was cold and unsympathetic and that he said that the reasonable adjustments already in place at her existing school would not be made because of the budget. This was denied by Mr Caplen and Ms Hobster. The Claimant's account was not consistent with the Respondent's note of the meeting. The Claimant was not well at that time and was upset at what was a long and detailed meeting at which information which had to be communicated was put to her by the Respondent. She has told us that she had memory problems at times. In general the Claimant's evidence from this period as expressed in her witness statement and in oral evidence was less convincing – and in part somewhat confused in comparison to the Respondent's evidence. Nothing after the meeting in correspondence from the Claimant, Jill Jones, or the Claimant's union suggested that the tone of that meeting was as now suggested by the Claimant. Therefore we preferred the Respondent's evidence.

28. On 25 July 2016, shortly after the meeting, Ms Hobster called OH who told her that they still hadn't received signed consent forms from the Claimant, but that a provisional appointment had been arranged for 25 August 2016.

29. Also on 25 July 2016 Ms Hobster called HR to explain her concerns. In Mr Sawyer's absence she spoke to an HR help line advisor who confirmed according to Ms Hobster's note of the call:

1. "at this stage, the school is not able to confirm its conditional offer to Miss Pridmore.
2. Miss Pridmore would not be able to commence her employment at the school on 1st September 2016 as medical clearance had not been forthcoming.
3. OH processes to obtain medical clearance cannot be commenced until signed consent is received from Miss Pridmore.
4. The School has a duty of care to Miss Pridmore to ensure that she can undertake her role.
5. Pre-employment checks are required to protect the school and the individual employee.
6. The school needs a teacher by September 2016 - a candidate who can carry out the role, (not a candidate who only works half days, undertakes admin tasks, or works from home)
7. The process of engaging OH is undertaken as the school needs 'expert' medical advice. School personnel are not medical experts."

30. Ms Hobster went on to note that HR confirmed that "the school would be able to withdraw its conditional offer should any 'recommended adjustments' be considered unreasonable and/or not possible to be accommodated by the School, either from a resource/equipment or budgetary viewpoint."

31. On 26 July 2016 Ms Hobster updated Mr Sawyer as to the situation telling him of the 5 adjustments which the Claimant had told the Respondent about on 25 July 2016 at her current school.

32. It is clear that Ms Hobster was concerned about the possible ramifications of the Claimant's appointment

33. On 27 July 2016, the Claimant returned the consent forms to OH. This was about 3 weeks after she had first been sent them by email. It is notable that it still took until 25 August 2016 for OH to have a meeting with the Claimant.

34. On 28 July 2016 – again Ms Hobster contacted Mr Sawyer asking

“ . . . I am just sitting here thinking what if the decision is taken that Claudia is considered 'fit to work' (ON THE DAY OF THE APPOINTMENT) and then consequently falls ill after commencing her role at Silver End.

Could we still withdraw our offer, based on our experience with this case, or not if she has been declared 'fit to work'? Could it be that we decide now to withdraw our offer, and thus suspend any further services from OH? Or do we have to allow Miss Pridmore to complete all the OH processes, especially now as the forms have been returned, despite the 4-week delay from the original awaits request on 5<sup>th</sup> July? Sorry Nigel, this case is a real minefield so far, and I am very concerned about this candidate, who I feel has not always been upfront and honest with either ourselves or OH, and is now being assisted (pushed) by Jill Jones. You can probably sense my nervousness about this appointment!”

35. On the same day, Ms Hobster noted Mr Sawyer's telephone response “As advised in Nigel's email of 22 July 2016, the school was presented with the opportunity to withdraw its offer of employment following the meeting with Ms Pridmore on Monday 25<sup>th</sup> July. As the decision was taken to allow Miss Pridmore to continue with the OH processes, (i.e. to receive and return the consent forms) then processes must now be allowed to proceed. The school must be seen to be allowing Miss Pridmore every opportunity to demonstrate but she is fit (or not) to take on the assigned role (Classroom Teacher). Dependent on Miss Pridmore's condition, the School needs to ensure that cannot be subject to a Disability Discrimination claim.

...

If all the medical evidence is not received and the meeting has to be cancelled/postponed, the school may be able to withdraw its offer, Nigel will advise. Should the meeting of 25<sup>th</sup> August go-ahead, outcomes could include: a. Miss Pridmore is declared fit to work; she receives a formal contract and would commence duties on 1 September 2016\*\*b. Mr Pridmore is declared unfit to work; the School's offer is withdrawn. c. Declared unfit to work but which are recommending 'adjustments'. Nigel would offer the support on whether the adjustments are both 'reasonable' and 'practical' for the school. At this point, Claudia should be invited to meet with the Executive Head, Nigel Sawyer will attend, and the recommended adjustments discussed between all parties. At this point it may still be possible for the school to withdraw its offer of employment.

\*\*Should Miss Pridmore be offered a formal contract of employment at the School; she has not worked with Essex county council previously, (the Flitch Green School is an Academy and not subject to local government employment conditions) her contract of employment will be subject to a



six-month probationary period. At this point the school (along with HR support) would rigorously monitor Miss Pridmore's conduct, attendance and performance during this period.(This may prove to be a 'safety net for the School', should Miss Pridmore be declared fit to work).As always, Nigel Sawyer will continue to guide and advise us throughout this process we must continue with caution, ensuring all procedures are carefully followed and all detail recorded."

36. On 9 August 2016 the NASUWT Regional Organiser contacted Mr Caplen about the concern felt by the Claimant in relation to a delayed start date, which the union thought could be until 1 January 2017.

37. On 9 August 2016 Ms Hobster contacted Mr Sawyer and she noted his advice as follows:

"Employers are expected to be able to enable employees to undertake their roles with reasonable adjustments.

...

I asked Nigel what the definition of 'reasonable' is, and this could be up to a tribunal to decide.

As regards the current adjustments made by the Fritch Academy;

- a. Miss Pridmore only working half days
- b. On admin tasks
- c. Sometimes at home
- d. Time off to attend medical appointments
- e. And the assigning of an LSA to her

Nigel feels these would be unreasonable, as Ms Pridmore applied, we interviewed to fill the role of a class teacher, required to work 5 days per week in a classroom, not half days on admin tasks. However the School might be expected to allow Miss Pridmore to perhaps:

- have an afternoon out of the class per week(other than PPA release);

-

- to leave early once a week;

- and to maybe have an LSA assigned to her for say, 50% of the day. The school will not be able to say 'it could not afford to put 'reasonable' adjustments in place' due to financial reasons; if a child joined the school and required special measures then we would be expected to deliver these and it is the same with employees, but again the word reasonable is key."

38. On 10 August 2016, Mr Caplen responded to the union informing them that they were awaiting the OH assessment and that whilst there may be a delay to the start date it would be for the minimum period necessary and not until January 2017 – and suggesting a meeting on 2 September 2016.

39. On 25 August 2016 the Claimant attended the OH assessment.

40. On 31 August 2016 – very shortly before term started on 5 September

2016, the Respondent was sent the assessment by OH which stated that the Claimant was currently unfit

“Claudia told me that she has recently been diagnosed with bipolar disorder. She is currently under the care of treating specialist and is following appropriate treatment and advice. Adjustments to her medications are planned over the next few weeks and therefore I would advise that any return to work is delayed until after her next review in occupational health. Claudia provided me with the recent letter from her treating specialist to her GP which mentions that investigations into another possible underlying health condition are planned. I would recommend that she discusses her fitness to drive with her treating specialist’s team.

Claudia may be able to return to teaching duties after the mid-term break in October 2016 however this will depend on her response to treatment. In the meantime, I would advise that she remains on sickness absence. It is likely on current evidence that Claudia will require a phased return to work over a period of at least 6 - 8 weeks when she is fit to return to work. Adjustments such as a gradual increase in her hours and duties will need to be considered. I will advise further regarding any other adjustments to her duties that may need to be considered on her return to work at later date when she is fit to return to teaching duties. I would advise that Claudia [sic] in occupational health in mid-October 2016 and would be grateful if you could arrange an appointment if you are in agreement with this. In my opinion the provisions of the Equality Act 2010 are likely to apply in this case. Claudia’s condition, bipolar disorder, without treatment substantially impacts on her ability to concentrate and her memory and therefore impact on her activities of daily living. As you are aware it is ultimately a legal rather than a medical decision as to whether the Equality Act 2010 applies in particular case

**Status under the Equality Act 2010:** Regardless of the status under the Act, you as the employer have a duty of care to consider reasonable adjustments to allow the employee to continue working. While we may provide advice on adjustments, it is for you to decide on the reasonableness of these adjustments, balanced against the needs of the business.”

41. OH clarified on 31/8/16 that there was ‘no guarantee’ that the Claimant would be fit for work in October.

42. On 31 August 2016, Mr Sawyer advised Ms Hobster that in light of the OH report, the school could withdraw its current preferred candidate offer.

43. The meeting arranged for 2 September 2016 did not take place. The union contacted Mr Sawyer to inform him that the Claimant was not well enough and asked the school to consider the union’s options for the way forward, these being either that the Claimant should commence employment but be allowed to work from home; or that the claimant to be allowed to commence employment at the school when fit to do so. Mr Sawyer discussed these with Mr Caplen – and the proposals were rejected. Mr Caplen’s oral evidence, which the tribunal accepted, was that this class of children had had a turbulent previous year with a number of

different supply teachers and that it was important to the school to attempt to provide some consistency and stability of teaching as this cohort's Year 2 would involve national exams in the following May.

44. The ultimate decision was taken by Mr Caplen. Ms Hobster was not a decision maker.

45. On 2 September 2016, Mr Caplen wrote to the Claimant informing her that the options put forward on her behalf were rejected and giving brief reasons and telling her that "regretfully, the school will not be able to proceed with your application and will not be able to make you a formal offer of employment on this occasion."

46. The school re-advertised the post in the hope of getting someone who could have given notice to their present employer by 31 October 2016 and start in January 2017. Teachers can resign from their posts at only three points during the year (31 October, 28 February and 31 May). No suitable candidate came forward. The only applicant had been previously rejected. Fortunately for the school, a subsequent advertisement was answered by a teacher on a 1 term contract, who was able to commence employment from 1 January 2017.

47. The Claimant told us that she has been able to work as a supply teacher for 1 day per week since February 2017 with adjustments and that she hopes to increase this to 3 days per week from October 2017 but accepts that she may never be able to work full time again. She extensively set out for the tribunal what she would require as adjustments, in summary:

- a. A constant Teaching Assistant (which would be in place in most classrooms anyway);
- b. A safe place to recover from any consequences of her condition;
- c. A back up plan including working from home, and a support mentor if the Claimant was unable to attend work;
- d. Reduced responsibilities such as no assemblies or playground duties;
- e. Breaks to take medication, time off to attend therapy, medication reviews;
- f. Staff trained on how to support her during a panic attack or shaking seizures;
- g. Reminders due to short term memory loss.

48. The Claimant referred to these adjustments as requiring little alteration on the school's behalf and Mr Caplen in evidence stated that these were adjustments that could be made. The Tribunal did consider that these were extensive adjustments.

49. The Claimant told us that:

“In the seven months that followed my dismissal I was severely unwell, and constantly in and out of hospital for as many as five visits a week. I was constantly experiencing depressive and manic episodes, along with both severe and regular panic attacks and shaking seizures. These were all worse than I had previously ever had. These were so severe that at one time I was nearly sent for a stay in inpatient care after a visit to A&E. Following this I was put on home treatment, where I was supervised by a doctor or nurse daily. The situation had become so severe and there was no feasibility of work at all due to severe state I was in.”

50. The Claimant went on to state that she did “not believe that this worsened ill-health was unrelated to the stress I had undergone as a result of both losing my job and being discriminated against”.

51. The Claimant is categorised as severely disabled by the (Department of Work and Pensions) DWP. In the period after September 2016, as stated, she ascribes the down turn in her state of health (which included manifestations and diagnoses of new mental health conditions) at least in part to the Respondent’s withdrawal of its offer to her. There is some medical documentary evidence in the bundle from this period of time – although it is somewhat unsatisfactory as two of the letters from medical practitioners are incomplete – because the Claimant has only disclosed part of those documents. This medical evidence did not suggest a link between the downturn in the Claimant’s health and the withdrawal of the offer. On the limited information before it, the Tribunal could not conclude that the Claimant’s poor health preventing her from working in the period after 1 September 2016 would not have occurred in any event.

## **The Law**

52. The Equality Act 2010 states as follows:

### **6(3)**

(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.

### **13(1) Direct Discrimination**

(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.

### **15 Discrimination arising from disability**

(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

### **19 Indirect discrimination**

(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.

**20 Duty to make adjustments**

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- ...
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

**21 Failure to comply with duty**

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

**23 Comparison by reference to circumstances**

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person's abilities if—
  - (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
- ...

**39 Employees and applicants**

- (1) An employer (A) must not discriminate against a person (B)—
  - (a) in the arrangements A makes for deciding to whom to offer employment;
  - (b) as to the terms on which A offers B employment;
  - (c) by not offering B employment.
- (2) An employer (A) must not discriminate against an employee of A's (B)—
  - (a) as to B's terms of employment;
  - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
  - (c) by dismissing B;
  - (d) by subjecting B to any other detriment.
- ...
- (5) A duty to make reasonable adjustments applies to an employer.

**60 Enquiries about disability and health**

- (1) A person (A) to whom an application for work is made must not ask about the health of the applicant (B)—
  - (a) before offering work to B, or
  - (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.
- (2) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8), is enforceable only by the Commission under that Part).

- (3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.
- (4) Subsection (5) applies if B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance on information given in response to a question about B's health is a contravention of a relevant disability provision.
- (5) In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.
- (6) This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of—
- (a) establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment,
  - (b) establishing whether B will be able to carry out a function that is intrinsic to the work concerned,
  - (c) monitoring diversity in the range of persons applying to A for work,
  - (d) taking action to which section 158 would apply if references in that section to persons who share (or do not share) a protected characteristic were references to disabled persons (or persons who are not disabled) and the reference to the characteristic were a reference to disability, or
  - (e) if A applies in relation to the work a requirement to have a particular disability, establishing whether B has that disability.
- (7) In subsection (6)(b), where A reasonably believes that a duty to make reasonable adjustments would be imposed on A in relation to B in connection with the work, the reference to a function that is intrinsic to the work is to be read as a reference to a function that would be intrinsic to the work once A complied with the duty.
- (8) Subsection (6)(e) applies only if A shows that, having regard to the nature or context of the work—
- (a) the requirement is an occupational requirement, and
  - (b) the application of the requirement is a proportionate means of achieving a legitimate aim.
- (9) "Work" means employment, contract work, a position as a partner, a position as a member of an LLP, a pupillage or tenancy, being taken as a devil, membership of a stable, an appointment to a personal or public office, or the provision of an employment service; and the references in subsection (1) to offering a person work are, in relation to contract work, to be read as references to allowing a person to do the work.
- (10) A reference to offering work is a reference to making a conditional or unconditional offer of work (and, in relation to contract work, is a reference to allowing a person to do the work subject to fulfilment of one or more conditions).
- (11) The following, so far as relating to discrimination within section 13 because of disability, are relevant disability provisions— (a) section 39(1)(a) or (c); (b) section 41(1)(b); (c) section 44(1)(a) or (c); (d) section 45(1)(a) or (c); (e) section 47(1)(a) or (c); (f) section 48(1)(a) or (c); (g) section 49(3)(a) or (c); (h) section 50(3)(a) or (c); (i) section 51(1); (j) section 55(1)(a) or (c).
- (12) An assessment is an interview or other process designed to give an indication of a person's suitability for the work concerned.
- (13) For the purposes of this section, whether or not a person has a disability is to be regarded as an aspect of that person's health.

...

### **136 Burden of proof**

- (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.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
  - (a) an employment tribunal
- ...

## Conclusions

### *Nature of the detriment*

53. It was not disputed that the Claimant had suffered a detriment on 2 September 2016 when the Claimant was told by the Respondent that the school would not be able to proceed with her application and would not be able to make her formal offer of employment. The precise category of that detriment was not agreed in that the Respondent did not agree with the Claimant's primary contention that she had been employed since 1 September 2016.

54. The tribunal concluded that the Claimant had not been employed by the Respondent. The offer made on 27 April 2016 was clearly conditional on the Claimant passing a health check which she had not done by 1 September 2016.

55. The OH report of 25 August 2016 states clearly that the Claimant is currently unfit for work. The tribunal concluded that the Respondent on 2 September 2016 withdrew the offer in accordance with the terms of 27 April 2016 conditional offer letter. This was not a dismissal from employment.

### *S60 Equality Act 2010*

56. The Tribunal considered sections 10.39 to 10.43 of the EHRC Code of Practice on Employment. The Tribunal concluded that s60(1) of the Equality Act was not contravened given the operation of subsection 10. The claimant was not asked about her health before the conditional offer was made to her on 27 April 2016.

### *Failure to make reasonable adjustments*

57. The agreed list of issues asked whether the Respondent applied the following PCPs: *a. A requirement that all employees must begin work on the first day of term regardless of sickness. b. A requirement that teachers who were sick at the start of term must have a positive medical prognosis, at the start of term, that they will be fit to return to work by the end of that terms half term; in this case by 31 October 2016. c. A requirement for consistent attendance at work.*

58. The claimant, relying on *Griffith v SoS Work and Pensions* [2015] EWCA Civ 1265 at paragraph 47, sought to add a gloss to PCP (c) above adding the words "in order not to be subject to the risk of sanctions". The Tribunal permitted this addition.

59. In relation to PCP (a) above, the tribunal concluded that this was not a PCP applied by the Respondent. In its communications to the Claimant in July 2016, the Respondent had made it clear that as a result of the investigations into her state of health, her actual date of employment might not be until later in the autumn term, which indicated to the tribunal that the Respondent did not operate the PCP (a) contended for and in the right circumstances would have

contemplated a delayed start date. It was only after the OH report had been received that the Respondent withdrew the conditional offer. It had known for some time that the Claimant was unlikely to be able to start work on 1 September 2016.

60. In relation to PCP (b) above, the tribunal concluded that this was not applied by the Respondent in the way it was written above but was close to a PCP that was applied by the Respondent. The PCP applied is more accurately stated as follows (words in square brackets added by the Tribunal):

*b. A requirement that [prospective] teachers who were sick at the start of term must have a positive medical prognosis, at the start of term, that they will be fit to return to work [or be likely to be fit to return to work] by the end of that terms half term; in this case by 31 October 2016 [or within that term].*

61. The Tribunal considered that PCP (c) or something very like it was likely to be applied by the Respondent to its employees. However, the Tribunal did not consider that PCP (c) was applied to the Claimant. The Claimant was not an employee of the Respondent, which was not basing its decisions in relation to her on considerations relating to her attendance. The Respondent did not have knowledge of the Claimant's attendance at her last employer. The Respondent was not applying a sanction to the Claimant under any sickness absence procedure.

62. In relation to the amended PCP (b) that the Tribunal did find had been applied by the Respondent, the Tribunal concluded that there were facts from which it could decide in the absence of any other explanation that the Claimant had been put at a substantial disadvantage in comparison with persons who were not disabled in relation to this matter and that therefore the Respondent was required to take such steps as it was reasonable for it to have to take.

63. The reasonable adjustments contended for in the agreed list of issues were as follows: a. Obtaining an updated medical opinion at a later date such as the beginning of October 2016, possibly the end of October 2016. b. Waiting for a period to see what improvements might arise in the Claimant's fitness for work. c. Delaying the start date for employment to commence, if it had not already started.

64. In submissions, the Claimant developed further an argument that even if it was accepted that the Respondents circumstances required it to re-open the selection exercise for the post of class teacher or to open a new selection exercise for the post of class teacher in order to find someone who could provide stability to the children from at least the beginning of January 2017, it could have retained the claimant as part of such an exercise taking the actions as identified above in parallel with a search for an potential alternative candidate. The Claimant argued that save for the cost of any new recruitment process, the Respondent would not lose anything by making such adjustments whilst operating such a parallel process and that it was unreasonable to have effectively excluded the Claimant from such a process.

65. The Respondent contended that the adjustments relied upon by the claimant in the list of issues were not reasonable given the need for stability for the children in the class and the strong and reasonable desire to avoid the



possibility of supply teachers being involved up to at least May 2017 and given that OH had stated that the Claimant was currently unfit for work and that there was no certainty as to when or whether she would be fit for work. The Respondent argued that it needed to start advertising for a permanent candidate to fulfil the role as soon as possible; and that if it had waited until after a re-assessment of the Claimant by OH in mid-October 2016, it would have missed the window of opportunity permitting recruitment of a teacher who could resign from her old job at the end of October 2016 and start in a new job in January 2017.

66. The Tribunal is now aware from the Claimant's own evidence, that the Claimant was not in fact fit for work in mid-October 2016 and has never been fit for work of this kind in the period since then. That was not information that the Respondent could have had in early September 2016.

67. The Tribunal concluded that there was no prospect that any of the steps contended for by the Claimant would have alleviated the Claimant's disadvantage and in addition that it would not have been reasonable for the Respondent to have waited and / or to have run a parallel recruitment process for a job that may or may not have been available – which would have been disproportionately unfair to potential candidates.

#### *Direct discrimination*

68. In considering whether the Respondents action of 2 September 2016 was less favourable treatment because of the Claimant's disability, the tribunal considered the hypothetical comparator as set out in the agreed list of issues at para 2.3(b): "An able-bodied [prospective] teacher sick on the first day of a term and for an indefinite period of time with no clear return to work date with the medical prognosis that they may be fixed to work to return to work after half term." The tribunal concluded that the Respondent would have treated such a comparator in the same way as it's treated the Claimant. The reason that the Respondent on 2 September 2016 informed the Claimant that it would not be furthering her application was that the claimant was currently unfit for work and there was no clear prognosis of when she would be fit. A hypothetical comparator in the same relevant circumstances would have been treated in the same way and the reason for the treatment was not the Claimant's disability.

#### *Discrimination arising from disability*

69. It was agreed that the Respondent in informing the Claimant that it would not be furthering her application was treating her unfavourably and it was agreed that this treatment was because of something arising in consequence of the Claimant's disability. The Respondents accepted that the Claimant's lack of current fitness for work and her uncertain medical prognosis arose from her disability. The Respondent did not agree with the Claimant's assertion that the Claimant's treatment was because of sickness absence and the tribunal agreed with the Respondent that 'sickness absence' as such was not the cause of the unfavourable treatment in that the claimant was not absent in the sense of an absent employee given that her employment had not yet commenced.

70. The legitimate aim relied upon by the Respondent was the stability in the provision of the Respondents statutory duties to provide a standard of education

to its children. This is clearly a legitimate aim. The Claimant would have been responsible for planning and delivering lessons and assessing the children in her class. The Tribunal accepted the unchallenged evidence of the Respondent that Children in Year 2 take national tests in May in English reading; English grammar; punctuation and spelling; and maths and that it is vital that there is stability in the provision of teaching in order to ensure a satisfactory standard of education and that this particular class of children had had a turbulent previous year with a number of supply teachers.

71. The key question in relation to this part of the Claimant's claim is in relation to proportionality.

72. The Claimant relies on provisions within the Respondent's sickness absence processes that would have applied had she been an employee, namely that an employee is entitled to a substantial period of contractual sick pay up to 150 working days; that long-term sickness absence is usually defined as more than four weeks; that it would normally be appropriate to make a referral to OH for long-term sickness after 4 to 6 weeks of absence; and that the appropriate stage to consider formal action for long-term sickness absence is usually before 12 months absence, when the respondent might consider that such absences no longer sustainable. Against this argument is of course the fact that the Claimant was not yet an employee and that in relation to someone who had just become an employee, the Respondent's policies do not suggest that the maximum periods would necessarily be applied prior to any action being taken against such a sick employee.

73. The Respondent's priority was to find an employee that could provide stability which the children needed. Had the Respondent waited for a further OH assessment in mid-October, it would have missed the opportunity to get a new teacher who could start in January 2017. That could have lead to the children being taught by a succession of supply teachers until at least the end of the 2<sup>nd</sup> term. The Claimant argued that as OH had stated that she may be able to return to teaching duties after the October 2016 mid-term break, it would have bee proportionate to wait until then and to have then obtained another OH report. The Respondent emphasised the lack of certainty (relying on the OH comment on 31 August 2016) and stated that it couldn't run a recruitment exercise for a job that might not be there.

74. The Tribunal accepted that the Respondent's action was necessary and appropriate and that the Respondent had justified its actions. It was proportionate to focus on getting a new teacher in place as soon as possible. It would not have been proportionate to have run a parallel recruitment process for a job that may not have been there.

75. The Claimant argued that the Respondent should have obtained a prognosis from the Claimant's treating physician and she points out that there was no medical report stating that she was *unlikely* (or likely) to return to work by a particular date. The Respondent says that the OH report was as clear as it could be about the present situation and it had not suggested a need for further expert opinion and that in any event there was insufficient time to obtain further medical opinion.

76. The Tribunal considered the points made by the Claimant individually and as a whole but concluded that the Respondent's action in early September 2016 was proportionate in the circumstances facing the school (and in particular Year 2) at that time.

*Indirect Discrimination*

77. The Tribunal did not see how this head of claim added anything to the other matters discussed above in this case. The Tribunal's conclusions as to the PCPs are as set out above in relation to reasonable adjustments. The Tribunal's conclusions as to justification are as set out above in relation to discriminating arising from disability. Given those conclusions, strictly speaking there was no need to consider individual and group disadvantage, however the Tribunal considered that the Claimant would have established both individual and group particular disadvantage.

*Summary*

78. The Claimant's claims all fail and are dismissed.

Employment Judge Allen

18 September 2017