Case Number: 3202371/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Haslam**

Respondents: **(1) Colegrave Primary School**
(2) London Borough of Newham

Heard at: **East London Hearing Centre**

On: **28 – 30 January 2020 and (in chambers) 31 January 2020**

Before: **Employment Judge Ross**

Members: **Ms M Long**
Mr P Pendle

Representation

Claimant: Mr A Haslam, Claimant's husband

Respondent: Mr D Moher, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The complaints of unfair dismissal and disability discrimination under sections 20-21 Equality Act 2010 are dismissed.**

2. **The Claim is dismissed.**

REASONS

1. The Claimant was continuously employed by the Second Respondent as a Special Educational Needs Teaching Assistant ("TA") at the First Respondent ("the School") from 5 September 2016 to 30 September 2018. After a period of Early Conciliation, on 16 November 2018, the Claimant presented a Claim containing complaint of disability discrimination for failure to make reasonable adjustments and a complaint of constructive unfair dismissal.

The Issues

2. There was an agreed List of Issues (marked as a draft on file, but agreed to be the final version), which was prepared following the Preliminary Hearing.

3. On the second morning of the hearing, having heard the Claimant in evidence on 28 January 2020, the Respondent conceded the issue of disability, accepting that the Claimant had been a disabled person, at all relevant times, by reason of the chronic pelvic pain symptoms caused by her Adenomyosis.

4. The remainder of the list of issues should be treated as incorporated into this set of Reasons.

The Evidence

5. There was an agreed Bundle of documents. Page references in these Reasons refer to pages in that Bundle. Also, there was a bundle of witness statements.

6. The Tribunal read witness statements for and heard oral evidence for the following witnesses for the Claimant:

6.1. The Claimant;

6.2. Mursheda Haque, former Teaching Assistant at the School.

For the Respondents, the Tribunal read and heard evidence from:

6.3. Rasheeda Lisak-Khan, Special Educational Needs Co-ordinator ("SENCO") at the School;

6.4. Nazia Ishaq, Deputy Headteacher of the School;

6.5. Tahreem Shaz-Vennus, Headteacher of the School;

7. In addition, the Tribunal read statements for the following witnesses for the Claimant: Sundus Khalid and Farhana Begum. We attached such weight as we thought fit to that evidence, which was little, given that these witnesses did not give evidence relevant to the issues nor refer to the issues identified by the parties, and they were former employees each of whom appeared to have at least some dispute with the School; and the statements did not explain why they were not present for cross examination.

8. The Claimant was represented before us by her husband, Mr. Haslam. We are grateful for his assistance.

9. We did not find that the Claimant was a wholly reliable witness. As we shall explain, her recall of events was affected by her perceptions or misinterpretation of events. We concluded that she did not want to work in the Profound and Multiple Learning Difficulties room because she was extremely anxious that it would affect her health; this anxiety fed her perceptions and caused her to fail to remember events accurately.

10. In addition, although the Claimant produced a detailed, typed, witness statement, at outset of her evidence, she explained that there were errors within it, because it was not typed by her, but by legal advisors when she had been seeking advice. The Claimant's evidence was that she had had to serve it when Mr. Moher had explained that she had to file a witness statement and that she had no time to draft a new one; up to that point, she had not realised that she had to file a witness statement for herself. Before us, the Claimant corrected only one part of the witness statement before verifying it was correct. She stated that there were various "*errors*" in the statement, but she did not know where these were because she had not read it for a few weeks.

11. Although the Tribunal accepted that the Claimant was credible in explaining how her witness statement came to be drawn up (by legal advisors), we could not understand why (if she knew it contained errors) it was not corrected before it was sent to the Respondents, whether by handwriting revisions on the statement served or by setting out the corrections in an email or letter. Moreover, the Claimant's account of how it was formulated led us to conclude that minor errors were understandable; but we did not accept that the omission of key allegations were mere errors.

12. We considered that the Claimant must have known that the witness statements were important documents, particularly if she had taken legal advice, and that it was important that the contents of witness statements to be served on the Respondents were true and accurate. After all, the witness statement that she served contained a statement of truth.

13. Given the above points, the Tribunal treated the Claimant's evidence with caution where there was no corroboration for it.

14. The fact that Ms Lisak-Khan, like the other Respondents' witnesses, had not made contemporaneous notes of her meetings with the Claimant did not undermine the credibility of the Respondents' witnesses. Although the Tribunal found it surprising that no record was made by Ms Lisak-Khan at the meeting 6 June 2018, we accepted her explanation that she did not make notes of such a meeting; on that day, Ms Lisak-Khan met a number of TAs with the same purpose of explaining where they would be working in the school in the next school year. In this case, the Claimant's meetings with the Respondents' witnesses were informal and often took place in an ad hoc way, by the Claimant approaching them.

15. The lack of contemporaneous notes did not cast doubt on the veracity of the Respondents' oral evidence, but it did make the Tribunal examine how reliable their witness evidence was. After consideration of all the evidence, we found the Respondents' witnesses were credible and that their evidence was reliable.

Findings of Fact

The School

16. At the material times, the School had about 600 pupils, with about 98 staff, including about 35-38 TAs. Of the TAs, about 25 were Special Educational Needs TAs.

17. The school is an inclusive school. Within the mainstream classes, the School has children with Special Educational Needs ("SEN").

18. In addition, the School has a facility to teach pupils with Profound and Multiple Learning Difficulties, which has been referred to in evidence as the "PMLD room" or "PMLD unit". A specialist teacher teaches and leads the TAs in the PMLD room. The staff in the PLMD room are specially trained to meet the needs of the children in that room. There is ongoing training, which is listed in the witness statement of Ms Lisak-Khan, and which the Claimant did not challenge on this point.

19. At the relevant time, the ratio of staff to pupils in the PLMD room was about 13 children to 11 staff members.

20. The majority of the children in the PMLD room (if not all those children) were wheelchair users. The duties required to be carried out within the PMLD room are listed in the statement of Ms. Lisak-Khan at paragraph 12, which was not challenged. In addition, TAs could be required to push children in wheelchairs within the PMLD unit.

21. There was the potential for the work of the TAs in the PMLD unit to be more strenuous than in other parts of the School. However, this risk was wholly mitigated by the use of physical aids or equipment (such as hoists), the degree of training (such as in respect of using hoists and dealing with children with epilepsy), and the fact that two TAs would work together to do certain tasks with a child (such as toileting). In addition, there was a specialist PMLD teacher to lead and direct the TAs within the PMLD room.

Deployment of TAs across the School

22. The Claimant was employed as a Special Educational Needs TA, initially on a temporary contract which was then made permanent. The key terms of her contract of employment are set out at B3.

23. There was a practice or policy, if not a term of Claimant's contract of employment, that TAs were required to work as directed in any part of the School, including within the PMLD unit. The School's policy is that TAs working with pupils with Special Educational Needs are redeployed around the School after the end of each school year. This has the benefit of preventing a child with SEN becoming too reliant on one TA, which assists them to be more accepting of less familiar adults; but it also ensures that certain pupils with SEN (such as those with Autistic Spectrum Disorder) have a stable routine for the school year and do not face disruption to their routine, which would not be in their best interests. In addition, this policy benefits the TAs, allowing their development from the broader range of experience.

24. The TAs are line managed by the SENCO, Ms. Lisak-Khan. We found her to be a teacher committed to teaching children with Special Educational Needs, and who demonstrated substantial knowledge and experience of dealing with children with disabilities. We had no difficulty in accepting her evidence. We found that she was doing her best to assist the Tribunal and, irrespective of the lack of any contemporaneous notes, her oral evidence was consistent and tended to be corroborated by the Respondents' other witnesses or other evidence.

25. Part of Ms Lisak-Khan's role was to arrange suitable deployment of the TAs ahead of the new academic year.

26. Deployment of the TAs was a task that had to be planned with considerable thought and care. TAs were deployed based on the needs of the pupils, the needs of the School and the TA's skills, training and experience. Ms Lisak-Khan formulated a plan ahead of each school year, which matched TAs with appropriate skills, training or experience with SEN pupils with certain needs.

27. In June 2017, the Claimant was deployed to work 1:1 with a reception pupil with Autistic Spectrum Disorder, who was self-directed and needed constant supervision. We found that there was not much difference in substance between the evidence of the parties about this child and how his needs affected his behaviour (a main point of difference being whether he bit himself, or only bit his clothing, and we accepted the evidence from Ms Lisak-Khan that he did both). This pupil was in reception; and it was not the degree of weight-bearing required when working with him that made it relatively strenuous, but that he always required constant supervision within the School, because he was physically non-compliant and where he could walk between rooms during "free flow" time, and run around the playground, which was physically demanding, even though the Claimant could cope with these duties.

Respondents' knowledge of disability prior to Summer 2018

28. The Claimant has been suffering pelvic pain on an episodic basis since about November 2015.

29. In 2017, the Claimant had what should have been a straightforward surgical procedure to remove a cyst. In fact, complications arose and the Claimant was off work for 16 days. At a return to work meeting after this absence, she explained to the Head Teacher, Ms Shaz-Vennus, about experiencing pelvic pain, which she managed with medication. The Claimant did not mention pelvic pain again to Ms Shaz-Vennus or the SENCO nor to any member of the Senior Leadership Team ("SLT") until June 2018; none of the Respondents' witnesses knew, nor were they likely to have known, that the Claimant continued to experience pain and took pain relief medication up to June 2018. Up to June 2018, Claimant did not mention to any member of SLT nor the SENCO that she was in pain whilst at work.

June 2018

30. On 6 June 2018, Ms Lisak-Khan met with three to four TAs individually (as she did on other days in that week) to explain where they would be deployed in the following academic year.

31. Ms Lisak-Khan met the Claimant on that day. We preferred Ms Lisak-Khan's account of that meeting over that of the Claimant, because, even without contemporaneous notes, her account was clear and credible.

32. The meeting lasted about 10 minutes. Ms Lisak-Khan informed the Claimant that she would be placed in the PMLD room. It was explained this was because the SENCO, Ms. Lisak-Khan, believed this would suit her strengths; there would be a smaller group of children and a specialist teacher who could oversee her learning within the PMLD.

33. The context to this move was that during the 2016-17 school year, the class teacher and a more experienced TA for the room in which the Claimant worked had expressed concern about certain aspects of the Claimant's practice and her ability to

follow instructions. No formal action was taken and the matters were never raised with the Claimant, including during the conversation on 6 June 2018. When it came to deploying the SEN TAs in June 2018, Ms Lisak-Khan took what she believed to be a positive approach to assist in the Claimant's development by moving her to work in the PMLD room.

34. The Claimant then raised that she had concerns about working in the PMLD room, because of her health concerns. Ms Lisak-Khan knew the Claimant was referring to a gynaecological matter, although the Claimant did not describe the precise degree or location of the pain as pelvic or in any other way. The Claimant did not state what tasks she could not do, or could only do with difficulty; she raised only general concerns over working in the PMLD room without providing any explanation.

35. Ms Lisak-Khan did not dispute that the Claimant had the pain referred to. Ms Lisak-Khan told the Claimant that because of those concerns, the Claimant need to speak to Ms Ishaq and things would be put in place for her.

36. At that meeting, Ms Lisak-Khan also spent time explaining about PMLD room duties including that lifting would not be necessary and that hoist training would be provided; that no one could hoist without supervision; and that toileting was undertaken with two members of staff.

37. Moreover, Ms Lisak-Khan explained that the Claimant would not be expected to carry out any duties in that room immediately when the school year started, because she would have to be trained first, that training that would be provided in September 2018, and the Claimant would only be observing until her training was complete. Ms Lisak-Khan knew that training of TAs to work in the PMLD room would take at least 3 weeks, depending on the precise training needs of the TA.

38. On about 11 June 2018, the Claimant approached Ms. Ishaq, deputy head teacher, and stated that she had been told that she would be working in the PMLD room in the following academic year. The Claimant requested that she be moved to be a class TA because she had medical issues, referring to the medical procedure in June 2017 and stating this was the reason for being unable to work in the PMLD room.

39. After the absence in June 2017, the Claimant had not discussed any ongoing pain or her physical impairment with any member of the SLT. Ms. Ishaq sensibly explained that the School had no medical evidence about her condition, and requested a letter from her doctor to support this. Ms Ishaq explained that she would refer the Claimant to Occupational Health ("OH"). We found that this prompt action by Ms. Ishaq, taken at the first opportunity to refer the Claimant to OH, demonstrated that the School took the Claimant's concerns seriously; the referral was made earlier in this case than under the normal School procedure because of the Claimant's concern and her history.

40. We preferred Ms. Ishaq's evidence about the meeting on 11 June 2018, which was clear. She did not state that it would be difficult to place the Claimant due to her pain, nor use the words alleged in issue 1b. In contrast, the Claimant's evidence was less clear and less reliable; for example, the Claimant's witness statement did not mention the alleged comment in issue 1b at all, which we found was unlikely to be a mere error of drafting.

41. After this meeting, the Claimant provided Ms. Ishaq with an extract of her GP records, at C8. This included:

> "*Severe pelvic pain last 2 months but has been going on for about 2 years. Has warranted 2 x A&E attendances…Previously told she may have endometriosis*."

42. We understood the extract not to state that the severe pain had been going on for 2 years, and the extract does not state how the pelvic pain affects day to day activities, save that there is a reference to "*missing lots of work*", which, read in context, appears to be a reference to more recent absences.

43. In June 2018, the Claimant did not understand that she was a disabled person. She made no mention to either Ms Ishaq nor Ms Lisak-Khan of disability. We found that they did not know and could not reasonably be expected to know that her condition had a substantial adverse effect on her day-to-day activities until they read the Occupational Health ("OH") report referred to below.

The Occupational Health Referral

44. Ms Ishaq informed the Head Teacher of the need to refer the Claimant to OH. Ms Shaz-Vennus followed the normal procedure and asked the School's Business Manager to make the referral. She relayed what she had been told was the reason for the referral.

45. A referral to OH was made. The completed referral form is at C23. The referral form is of tick box style. The School marked that the reasons for referral were "Advice on Workplace Restrictions", "Capability to undertake current role", and "Fitness for alternative duties/redeployment/role change". Under "Other", the form stated:

> "*has stated unable to work with certain SEN children due to chronic pelvic pain and episodes of IMB but no PCB … back pain worse on left side*"

46. The form stated that the Claimant was a teaching assistant, but gave no details of her actual duties on a day-to-day basis, nor those actual duties that she would be doing once trained in the PMLD room. Under "Physical requirements of the Job", the Business Manager marked as relevant "Bending/squatting/kneeling/stretching" and "Pushing/pulling/carrying loads" of 10kg.

47. The form made no mention that in the PMLD room there was the provision of hoists, targeted training for TAs, nor that the TAs worked as part of a larger team and that certain tasks were done in pairs. The form was not accompanied by a letter of instruction, nor a set of specific questions about duties that the Claimant could or could not do, nor a job description.

48. We found that these omissions (even if not part of normal school policy) were regrettable. They had the unfortunate consequence of producing a report that was not sufficiently detailed and which did not assist the SLT in the School in understanding what tasks the Claimant could or could not do as a TA.

49. Moreover, the absence of adequate instructions by the School to the OH doctor meant that the OH report recommendations were almost entirely the result of information

provided by the Claimant about her perception of the work required in the PMLD room. The Tribunal found that the Claimant's perception of the work done in the room was not factually accurate, but based largely on what she had heard anecdotally from other staff and affected by her anxiety about her health. The Claimant had limited direct experience of the PMLD room, having never worked in it, and having only covered occasional break time supervision.

50. The OH report (C15-C16) was sent by email to the Claimant and the School on 18 July 2018.

51. The report is regrettably brief. Although the report states the referral was made because the Claimant had requested to be restricted from duties, there is no description of the duties which the Claimant had asked to be restricted from. Under the heading "Current situation", it stated:

> "*Mrs. Haslam experiences low grade pain all of the time with her pain ranging from moderate to severe for up to 2 weeks out of every 4. Her pelvic pain is exacerbated by standing/walking for prolonged periods without being able to sit. Strenuous activities … also exacerbates her pain*."

52. The Recommendations section is somewhat vague:

> *"Ms. Haslam is fit for her current duties assuming she is allowed to use a seat from time to time when required….*
>
> *I gather she has been advised that she will be working in a unit with students who are far more physically dependent during the next academic year.*
>
> *It is my view that these activities will exacerbate her current symptoms and are unlikely to be sustainable…*
>
> *I would recommend that Ms. Haslam be restricted from working in the PMLD room or undertaking strenuous physical activities whilst her gynaecological symptoms are ongoing."*

53. The recommendation of restriction from working in the PMLD room is based on a premise which, although not false, was incomplete and inaccurate: the students in that room are more physically dependent, but training, working techniques and aids equipment mitigated the physical demands on TAs in that room. The OH had no instructions about any of those matters.

54. The OH report did, however, refer to the need to make reasonable adjustments; a reasonable inference which should have been drawn from this was that the Claimant was (or might be) a disabled person.

Events 18 – 20 July 2018

55. The end of the Summer term was Friday 20 July 2018. The end of term was an incredibly busy time for the SENCO and the SLT of the School. Ms. Ishaq and the Head Teacher were engaged in tasks which had to be completed so that the School was ready to close and so that preparations for the next academic year were completed.

56. On 18 July 2018, the Claimant approached Ms. Ishaq and asked if she had read the report; she stated that she not, but would read it soon.

57. On 19 July 2018, the Claimant came to Ms Ishaq's office and asked whether she had read the OH report. Ms Ishaq stated that she had not had time to read the report, but explained that she would and that she needed to discuss it with the Head teacher and Ms Lisak-Khan. Given that this issue was going to affect her ability to complete essential, end of year, tasks, Ms Ishaq passed the matter to the Head Teacher.

58. Later that day, the Claimant came back to see Ms Ishaq. The Claimant wanted to discuss her role for the next year, and her need for it to be changed; the Claimant wanted an immediate decision. Ms Ishaq explained that discussions between the SENCO and the Head would need to be held, but that such a meeting would be held in the new academic year, because it was not possible to arrange one so close to the end of term. The Claimant persisted in wanting to discuss the report and her request to change. Ms Ishaq explained that the Claimant would have to discuss the matter further with the Head Teacher because the matter had been passed to her.

59. There was a factual dispute about what precisely was said during this conversation. We preferred Ms. Ishaq's account, in that we accepted that she was neither rude nor threatening to the Claimant. Having seen the Claimant and Ms. Ishaq give evidence, we found that Ms. Ishaq's direct style of answering was not likely to have been well-received by the Claimant, given her anxiety about her health. The facts were that Ms. Ishaq was very busy, and the Claimant was away from her 1 to 1 duties; so she told the Claimant to book time in the future to discuss the matter. This was realistic management: it was apparent to the Tribunal that for a proper discussion to take place, an appropriate amount of time would need to be set aside for this, and the matter could not be resolved by the Claimant simply arriving at the office of the Head or Deputy, not least because if the Claimant was to work in the PMLD room, some discussion about adjustments was required; and if she was to move rooms, this would mean moving other TAs around, which required further planning. In either case, Ms. Lisak-Khan would need to be present at such a meeting.

60. Ms. Ishaq probably did state to the Claimant that she would still be going into the PMLD room at the start of the year in September 2018; but we accepted that this was said in the context of it being very close to the end of the school year and that the matter would be reviewed at the start of the new school year with the Head and SENCO. The Claimant has, retrospectively, perceived this to be a statement of a final position by the School, which it was not.

61. The Tribunal found that the Claimant did not book an appointment with the Head Teacher, nor did she complain about Ms. Ishaq at the time nor at any point until the issue of this Claim. We found that, after her resignation, the Claimant had misinterpreted the events on that day, and perceived what Ms. Ishaq said was rude.

62. We concluded that the responses of Ms. Ishaq were part of normal school management during the pressure of work at the end of term. Although we found that Ms. Ishaq was likely to have become irritable by the end of the conversations on 19 July, this was unsurprising; and her responses were not capable of being a breach of the duty of trust and confidence, nor of forming part of a sequence of events amounting to such a breach.

63. On 20 July 2018, Ms. Ishaq and Ms Shaz-Vennus read the OH report, and realised that it did not set out the duties that the Claimant should refrain from, but simply stated that she should not work in the PMLD room without explaining what duties she could or could not perform, nor how she should be deployed. Ms Ishaq and Ms Shaz-Vennus knew that when working with all children in school, there was an element of bending, sitting on low chairs, lifting, pushing equipment or pupils.

64. The report did not set out what if any adjustments should be made for the Claimant, stating only that she should be seated as much as possible. Ms Ishaq and Ms Shaz-Vennus found this recommendation to be inconsistent with the recommendation that she should not work in the PMLD room, because she was more likely to be seated working with the pupils in that room. Moreover, in the PMLD room, they knew that the Claimant would be working with a team of TAs and fewer children than in a normal class. In contrast, if the Claimant worked in a class, the pace of work would be quicker and she would be more likely to be on her feet, moving between up to 30 pupils.

65. Due to the lack of clarity provided by the report, Ms Shaz-Vennus and Ms Ishaq decided to take further OH advice in the new academic year. The Tribunal found that it was simply not practical or reasonable for the SLT of the School to make another referral to OH at that time, given that specific questions clearly needed to be formulated, and when they had to prioritise the end of the school year and preparations for the new academic year. The interests of the children and all staff were best met if those tasks were prioritised.

66. It is important to note that the school was closing on 20 July 2018 for the Summer break. The Claimant's contract, as with all the TAs, was for 39 weeks; it did not provide for any work during the holidays.

67. We did not accept Ms Mursheda Haque's evidence about witnessing a heated discussion between Ms Ishaq and the Claimant. The Tribunal found that Ms Mursheda Haque was a disgruntled former employee of the School and an acquaintance of the Claimant; they used to go home from work together. Ms Mursheda Haque alleged that she saw a heated conversation on the last day of term (not the 19 July, as the Claimant alleged), taking place in an intervention room. Given that she heard no words spoken in the meeting, and could not explain in evidence why it was heated (save for a vague reference to body language which she was unable to explain in her evidence), we preferred the clear evidence of Ms. Ishaq to this account.

68. Ms Lisak-Khan did not see the OH report before the end of term, and she was not aware of its contents; it had been sent by OH to the Head or Deputy Head, not to Ms Lisak-Khan.

69. On 20 July 2018, the final day of the school year, the Claimant approached Ms Lisak-Khan to ask where she would be working after the holidays. Ms Lisak-Khan stated that she would be going to the PMLD room, and the position would be reviewed in September 2018. We found that this was a reasonable management instruction, which, objectively viewed, was not likely to damage the relationship of trust and confidence between the employer and employee.

70. We preferred Ms Lisak-Khan's evidence about that meeting. We found Ms Lisak-Khan did not state that the Claimant would be "carrying out duties just like everyone else" in the PMLD room. Having heard Ms Lisak-Khan's evidence, we accepted that she was committed to ensure that both children and staff in the PMLD room were kept safe; she would not have permitted the Claimant to work with children in the PMLD room without training, and she knew that the training would take at least three weeks.

71. Moreover, we accepted Ms Lisak-Khan's evidence that she did not make the half-uttered statement which was alleged to be "*if you are in so much pain maybe you should …*". In any event, we found that the Claimant's evidence on this point demonstrated how her level of anxiety affected her perceptions. The Claimant did not give evidence that Ms Lisak-Khan had in fact said that she would have to leave her job; the Claimant inferred that Ms Lisak-Khan was going to say that, but we found there were no reasonable grounds to draw such an inference. The Claimant found the meeting with Ms Lisak-Khan on 6 June 2018 supportive, and she had had no complaint about Ms Lisak-Khan before. Moreover, given that Ms Lisak-Khan had not read the OH report at that time, we could not understand why she would have made such a comment.

72. Given that it was the last day of the academic year, and that she had not had time to read the OH report, and given the planning that went into the deployment of TAs, it was impracticable and unreasonable to expect Ms Lisak-Khan to agree to re-deploy the Claimant at that time.

73. Indeed, in cross-examination, the Claimant accepted that one option was that reasonable adjustments could be made so that she could work in the PMLD room; and the Tribunal heard from Ms Mursheda Haque that she had worked in that room with adjustments made due to a back condition.

74. The Tribunal found that redeployment from the PMLD room may well not have been necessary. But, in any event, we agreed with Ms Lisak-Khan that it would have been very disruptive to make such a decision on 20 July given the planning that had gone into the deployment of TAs and the end of the school year.

September 2018

75. The School re-opened on 3 September 2018, which was an inset day during which the staff undertook training. The Head Teacher and Ms. Ishaq had considered the OH report before the Claimant's return to work, as explained above.

76. The Claimant attended the PMLD room, where hoist training had been arranged. No pupils were present. There was no strenuous activity for the Claimant on that day. There was no reason why the Claimant could not attend the hoist training; it put her at no disadvantage and, if anything, amounted to a form of professional development.

77. On 3 September 2018, the Claimant did not request to speak with Ms Lisak-Khan nor with any member of the SLT nor the PMLD teacher.

78. Ms Lisak-Khan went to find the Claimant after about 3pm on 3 September 2018. By this time, the Claimant had left school with permission at 3pm to attend to a family matter.

79. Ms Lisak-Khan had planned to meet with the Claimant on 4 September 2018. In the event, the Claimant was signed off sick for four weeks (with tennis elbow). The Claimant did not return to work during her notice period.

80. By email sent at 21.12 on 3 September 2018, the Claimant resigned (C19). The resignation letter did not make any allegation that bullying or threatening conduct of the Respondents' witnesses had caused her to resign. The letter stated that there were no other positions outside of the PMLD room for her, and that she could not work in the PMLD room. We found that this was a misrepresentation or a misinterpretation of events. Once the OH report had been read, there had been no time before the end of the academic year for consultation with the Claimant about what adjustments could be made to enable her to work in the PMLD room, nor whether redeployment was possible given the symptoms of her physical impairment.

81. Having seen and heard the evidence of the parties, the Tribunal found that the Claimant did not want to work in the PMLD room, because of what she perceived the risks to be. As a result, she could not accept the reasonable instruction for her to start there on 3 September 2018. We found that the requirement for her to attend at the PMLD room on that date was, when viewed objectively, incapable of damaging the relationship of trust and confidence between the employer and employee. After all, the School was only doing what it said that it would do in July 2018; and the Claimant had been told that the position would be reviewed in September.

82. The list of issues refers to TAs being moved in September 2018. These were moved because they were better placed to meet the needs of the pupils that they were placed with. We accepted Ms Lisak-Khan's evidence about the reasons for this. The Claimant has failed to appreciate the weight that the School had to place on meeting the needs of its pupils. In any event, the Claimant resigned before any such potential move was raised by her as an option or discussed with SLT.

83. The Claimant accepted in cross-examination that lots of consideration went into the decisions to change TAs. However, her evidence was that in her circumstances, it should have been straightforward and that she should have been redeployed from the PMLD room back to working with the same child that she had worked with in 2016-2017. The Tribunal found that this would not have been in the best interests of that child, given the risk of him developing over-reliance on the Claimant and the potential disturbance to his school experience when the Claimant was redeployed again. We found that the Claimant's evidence demonstrated that, such was her anxiety about her own health, she was unable to recognise that the School needed to balance the level of priority that the School was required to give to the interests of the children with the needs of staff members.

84. Furthermore, if Ms Lisak-Khan had moved the Claimant immediately on 3 September 2018 to work with another SEN child or children, we found that this would have had a wider, knock-on, effect, leading to a larger reorganisation of the SEN TAs, because Ms Lisak-Khan would need ensure the training and experience of the TAs again matched the children or room in which they were to work. Such a re-organisation, which could well have been temporary (if it transpired after further OH advice that the Claimant could not have continued to work with the child or children with whom she was now placed due to the strenuous nature of the work and the deterioration of her pelvic pain symptoms over the months immediately following September 2018), would not be in the best

interests of the children affected, particularly if there was then a further change of TA required later in the year.

85. We concluded that by not making the adjustments alleged by the Claimant (set out at issue 1l), the School did not, when objectively viewed, act in a manner that was likely to damage the relationship of trust and confidence between employer and employee.

86. The delay before the School could hold the proposed meeting to review the Claimant's deployment to the PLMD room was inevitable given the following:

86.1. The date that the OH report was received;

86.2. The fact that the SENCO and SLT of the School were extremely busy at the end of the School year and the beginning of the next School year;

86.3. The degree of planning that had to go into the deployment of TAs, and SEN TAs in particular;

86.4. The fact that the School was closed from 20 July until 3 September 2018, and TAs were on holiday over that period;

86.5. The inset day was a day on which the staff received planned and necessary training.

87. In any event, the Tribunal found that the Claimant was not placed at any disadvantage by attending the PMLD room on 3 September 2018. She did not suggest in evidence that she could not do the hoist training, nor that she was given any other tasks which had an adverse effect on her physical condition.

88. We found that the Claimant was not bullied and forced to leave her job. We concluded that, retrospectively, the Claimant perceived that she had been bullied, when she misinterpreted past events. At the time of her resignation, she expressed gratitude for having the opportunity to work at the School (C19). The Claimant never raised any formal or written complaint about her treatment, nor did she seek to speak to the Head Teacher or SENCO before resigning, nor did she file any grievance. Viewed objectively, the evidence led to the inference that at the time of her resignation, the Claimant did not think that she had been forced to resign.

The Law

Disability Discrimination

89. In this case, complaints of failure to make reasonable adjustments (section 20-21 EA 2010) are alleged. The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

90. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

"*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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

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 ...*"

91. Paragraph 20 of Schedule 8 EA 2010 provides a limitation on the duty where the Respondent lacks the requisite knowledge:

"20. Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

92. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("the Code"). The Courts are obliged to take it into consideration whenever relevant.

93. Chapter 6 of the Code is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

93.1. The phrase "provision, criterion or practice" (which is not defined in the Equality Act 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. (paragraphs 4.5 and 6.10).

93.2. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

93.3. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

93.4. Under the heading "Reasonable adjustments in practice", paragraph 6.32 provides:

> *It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.*

93.5. Paragraph 6.34 explains that it may sometimes be necessary for an employer to take a combination of steps.

94. In *Carrera v United First Partners Research*, the Employment Appeal Tribunal held that a PCP did not require an element of compulsion. HHJ Eady gave the following guidance at paragraph 31-37:

94.1. The identification of the PCP was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.

94.2. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".

94.3. The Tribunal had taken an unduly narrow view of the Claimant's identification of the PCP, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.

95. An Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

95.1. the relevant provision, criterion or practice made by the employer; and/or

95.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

95.3. the identity of non-disabled comparators (where appropriate); and

95.4. the nature and extent of the substantial disadvantage suffered by the Claimant.

96. The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.

97. In his submissions, Mr. Moher relied on *Newham Sixth Form College v Sanders* [2014] EWCA Civ. 734, which applied the guidance in *Rowan*:

> *"14. In my judgment these three aspects of the case — nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments — necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable."*

98. Substantial disadvantage is such disadvantage as is more than minor or trivial. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same" as those of the disabled person.

99. In *Archibald v Fife* [2004] IRLR 651, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

100. Even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

When does breach of the duty arise?

101. In respect of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010, to determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been recently considered in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 at paragraphs 11-15:

101.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.

101.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.

101.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.

Burden of proof in complaints of failure to make reasonable adjustments

102. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

103. It is important, however, not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

104. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, guidance is set out in *Project Management Institute v Latif* [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54 that.

105. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Constructive dismissal

106. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

107. The Claimant's contract contained the implied term of trust and confidence. For there to be a breach of the implied term of trust and confidence, the Employment Tribunal must be satisfied that, viewed objectively:

107.1. the employer has conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

107.2. that there was no reasonable or proper cause for the conduct.

Malik v BCCI [1998] AC20 34h-35d and 45c-46e.

108. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

108.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp* [1978] IRLR 27.

108.2. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a.

108.3. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied upon as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in his employer.

108.4. A breach occurs when the proscribed conduct takes place: see *Malik*.

109. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16) on the "last straw" doctrine. Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

109.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

109.2. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F).

109.3. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

109.4. 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. 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.

109.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

109.6. 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 referred to.

109.7. 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.

Submissions

110. Written submissions were received from each party, for which we were grateful. Each party supplemented these with oral submissions. We considered each and every submission even if we do not refer to each of them within these Reasons.

Conclusions

111. Applying the above principles of law to the findings of fact made, the Tribunal reached the following conclusions on the issues for determination.

Issues 1-6 Constructive Dismissal

112. As we have explained in our findings of fact above, some of the conduct alleged in issue 1 simply did not take place, such as the alleged rudeness and alleged statements (or half-utterance) that she could not be placed or should leave.

113. In respect of that conduct which the Tribunal has found did take place, the School did not conduct itself in a manner which was calculated or likely to destroy the relationship of trust and confidence which is necessary between employer and employee. We concluded that the actions of RLK, NI and TSV were taken for good, professional, reasons. The instructions given to the Claimant were reasonable when viewed objectively.

114. We concluded that the Claimant had real difficulty in viewing events objectively. Her perceptions led her to believe that she had been forced out, when this was certainly not the case. Her perceptions and her anxiety were further fuelled by the OH report, despite the fact that it was largely reflecting her perceptions and anxieties.

115. In any event, we found that there was no “last straw” event on 3 September 2018. There was nothing which happened on that date which contributed at all to the earlier events so as to entitle the Claimant to resign.

116. Although the conduct of the Respondents was a factor in the Claimant’s resignation, because the School had failed to redeploy her away from the PMLD room, the main reason that the Claimant resigned was because of her perception that she would have to undertake more strenuous work in the PMLD room which would harm her health; and this perception was created by her anxiety about her disability.

117. The School acted appropriately in the all the circumstances on the evidence that it had. As the RLK explained, the School could not simply redeploy the Claimant without

knowing what tasks she was capable of performing. The School would have removed her from the PMLD room or any other role if there was any risk to the children or to herself. Further evidence would have been obtained from a further OH report and from discussions with the Claimant.

Issues 9 -12: Whether disability discrimination under sections 20-21 EQA

118. We concluded that the relevant PCP in this case was the provision or practice that TAs were required to work in any part of the School as directed, including within the PMLD unit. Although this was not the precise PCP identified in the list of issues, the parties were given an opportunity to address this as the potentially relevant PCP in submissions. The Tribunal found that this was the relevant PCP, which was demonstrated by the evidence, particularly that of Ms. Lisak-Khan.

119. The Tribunal recognised that this PCP could require an SEN TA to perform more or less strenuous work, depending on the needs and the behaviour of the individual SEN child or children that they were placed with.

120. However, the Tribunal concluded that, in this case, the Claimant had not been placed at a substantial disadvantage compared to a non-disabled SEN TA by the PCP. In particular:

120.1. The Claimant had not undertaken any work in the PMLD unit, save that she had attended one inset day of hoist training. The PCP had not, as at 3 September 2018, placed the Claimant at more than minor or trivial disadvantage.

120.2. The Claimant would be training for a minimum of three weeks and observing within the PMLD room. During this time, it was planned that her position would be reviewed and any necessary adjustments put in place.

120.3. The fact that the pupils in the PMLD room were more "physically dependent" (to use the words of the OH report) than other pupils was mitigated entirely by the fact that equipment aids were provided, specialist training was provided, and there was a team of TAs ensuring that certain tasks were done with TAs working together.

120.4. The Claimant did feel anxiety; but this was not caused by the PCP, but by her misperception about the TA duties within the PMLD room and how these were carried out.

120.5. The Claimant was not placed in a position where she had to resign; on 3 September 2018, the Claimant was in the same position as a non-disabled SEN TA who had been deployed into the PMLD room for the first time. Both would have required training before they carried out any work specific to that room, strenuous or otherwise.

121. Given the above conclusion, we find that the duty to make reasonable adjustments did not arise at the point at which the Claimant resigned, nor did it arise during the month leading up the end of her notice period, given the Fit Note that stated she could not work during that time.

122. If we are wrong about this, the Tribunal concluded that the Respondent knew or could reasonably have been expected to know that the Claimant would be placed at substantial disadvantage from about 19 July 2018 when Ms. Ishaq read the OH report.

123. However, even if the duty to make reasonable adjustments was engaged, it was not breached for the following reasons:

123.1. Applying section 123(4)(b) EQA, as explained in *Abertawe*, the failure to comply with the duty is to be treated as occurring at the end of the period in which the School might reasonably have been expected to make the adjustments sought.

123.2. At the time of the material events (in contrast to her subsequent perceptions of those events), the Claimant knew that the School proposed to review her deployment in the PMLD room in September 2018, in the new academic year. Moreover, the Claimant knew that planning the deployment of TAs required considerable care; and that a decision to move the Claimant out of the PMLD room would have a significantly wider effect, and mean that other TAs would need to be moved from the pupils or classes with which they worked. We concluded that, even from the Claimant's perspective at the time, the School could not reasonably have been expected to comply with the duty by 3pm on 3 September 2018, because:

123.2.1. This was only the third working day at the School after the OH report had been received; and the second working day after it had been read by the Deputy and the Head Teacher.

123.2.2. Those working days were very busy days for the SLT at the School, being the last days of the school year, and the first day of the new school year.

123.2.3. The context was that the Claimant had been told by the School that her concerns would be addressed in September 2018.

123.2.4. The Claimant had not raised any form of complaint about any alleged delay in making the adjustment sought.

123.3. As Paragraph 6.34 of the Code explains, it is sometimes necessary for an employer to take a combination of steps in order to discharge the duty. In this case, the School had taken the first step in discharging the duty by obtaining the OH advice at the first opportunity.

123.4. The OH advice and the information provided by the Claimant up to September 2018 was insufficient for the school to understand the nature and extent of the disadvantage suffered by the Claimant. The School did not know the tasks that the Claimant could not do, or only do with difficulty or at risk to her health.

123.5. The School planned to meet with the Claimant in early September 2018 in order to discuss the OH report with her and to assess the what adjustments

were required in the PMLD room. In other words, the School planned to make further adjustments when it understood the nature and extent of the disadvantage faced by the Claimant by the PCP and, in particular, by her placement in the PMLD room.

123.6. It was not a reasonable adjustment to move the Claimant to another TA position without any consultation or further investigation as to the risks that she faced in delivering the duties in that position. The School had to be sure that the Claimant was capable of meeting the needs of any SEN child or children with whom she was placed in any room. This was a reasonable approach to take, which was in the interests of the children and of the Claimant herself.

123.7. Between 4 September and 30 September 2018 (during her notice period), the Claimant was absent sick. No further investigation of the nature and extent of any disadvantage suffered by the Claimant could take place before her employment ended.

124. As explained in the passage cited from *Newham Sixth Form College v Sanders* above, the duty is not breached until an employer knows the nature and extent of the disadvantage, because until then, it cannot assess the reasonableness of the proposed adjustments. In this case, if the duty was owed, at the time the Claimant resigned and went absent sick, the School was in the process of determining the nature and extent of the disadvantage imposed on the Claimant by the PCP. We have concluded that that process, to the Claimant's knowledge, was not complete.

125. For the avoidance of doubt, we would have reached the same conclusions if we had found that the PCP was exactly as set out in the List of Issues.

Summary

126. For all the above reasons, each complaint fails. The Claim is dismissed.

Employment Judge Ross

14 February 2020