EMPLOYMENT TRIBUNALS

Claimant: **Mrs AJ Milton**

Respondents: **(1) North Yorkshire County Council**
(2) The Wolds and Vale Governing Body

Heard at: **Leeds**
On: **18-21 July and (deliberations only) 14 September 2017**

Before: **Employment Judge Maidment**
Members: **Mrs JL Hiser**
Mr K Lannaman

Representation
Claimant: **Mr A Mugliston, Counsel**
Respondent: **Mr A Webster, Counsel**

RESERVED JUDGMENT

1. The Claimants complaints of disability discrimination pursuant to Sections 13, 15 and 20 of the Equality Act 2010 fail and are dismissed.

2. The Claimant was not dismissed and therefore her complaint of unfair dismissal must fail and is dismissed.

REASONS

The issues

1. The issues in these proceedings were identified at a Preliminary Hearing on 21 March 2017, where both parties were represented by the same Counsel who appear at this final hearing. Since that Preliminary Hearing it has been accepted that the Claimant was at all material times a disabled person by reason of her suffering from Crohn's disease. The case management summary recorded the issues still live before this Tribunal as follows:

"Unfair dismissal claim

7.1 The claimant maintains that she was constructively dismissed and that the respondent by its treatment of her acted in a way which was calculated or (viewed objectively) likely to destroy or seriously damage the obligation of trust and confidence. In terms of the treatment to which she was subjected, the claimant relies on the acts of alleged discrimination set out below and on no other acts save that the 4 October 2016, personal development review, where the claimant says that the respondent failed to acknowledge the claimant's difficulties and confirmed that there would be no pay progression, was an effective last straw albeit such event is not pleaded as a freestanding complaint of disability discrimination. It is for the claimant to prove that the respondent was in fundamental breach of her contract of employment. It is noted that following the claimant's decision to resign from her employment she submitted a grievance which was subsequently rejected and then an appeal but no reliance can obviously be placed on acts which post date the decision to resign - it is noted that no freestanding complaints of discrimination arise and are brought in respect of the claimant's grievance/appeal and/or its handling.

7.2 Did the claimant resign in response to such fundamental breach of contract or did she delay in so doing so as to be taken to have affirmed the contract of employment?

7.3 If the claimant was dismissed, does the respondent show a potentially fair reason for dismissal and that it acted fairly and reasonably in all of the circumstances?

Section 13: Direct discrimination because of disability.

9.1 Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act, namely

9.1.1 In July 2015 determining that the claimant could not continue to act up when she needed an operation.

9.1.2 the timing of a meeting regarding potential redundancy for 6 May 2016 shortly before the claimant was due to undergo an operation so as to ensure that she was not in the right frame of mind.

9.1.3 On 6 May 2016, notifying the claimant that she was being given a warning regarding a colleague's complaint about her and without following any procedure.

9.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.

9.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

9.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 15: Discrimination arising from disability

10.1 The allegations of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 of the Equality Act 2010 are as follows:

10.1.1 In January 2016, the claimant had been asked to attend Occupational Health for the production of a report in circumstances where normal trigger points were applied for someone without a disability in the respondent's implementation of its managing attendance at work policy.

10.1.2 On 4 July 2016, the claimant being told that she couldn't move up the pay scale if she was absent for more than 7 days.

10.1.3 On 22 September 2016, the claimant being told that there would be further absence monitoring and that must be no absences in a subsequent 3 month period.

10.2 Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 10.1 above?

10.3 Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability?

10.4 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following:

Reasonable adjustments: section 20 and section 21

11.1 Did the respondent apply the following provision, criteria and/or practice ('the provision') generally,

11.1.1 A requirement to work with and the duties involved in acting as a general teaching assistant for pre-school children of 3 – 4 years old from July 2016.

11.1.2 The requirement to lift heavy items.

11.1.3 The requirement of a general teaching assistant working with pre-school children to work at their level and being at risk of being reprimanded for not doing so.

11.1.4 The requirement of employees to maintain a consistent level of attendance so as to avoid being placed on the respondent's management of attendance procedures involving warnings given at defined trigger points, the inability to progress through pay scales if absent and being monitored in the event of absence levels being unsatisfactory to the respondent.

11.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the claimant struggled to perform more physical tasks involved with caring for

younger children, the claimant struggled due to her physical condition to work at the same level as the children, the claimant had difficulty in lifting heavy objects, the claimant was more likely to pick up viruses from children of pre-school age and the claimant was at greater risk of being subjected to attendance management policies by reason of her impairment.

11.3 Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

11.1.1 Working with older children.

11.1.2 Appointing a designated employee to carry out lifting/manual handling.

11.1.3 Allowing the claimant appropriate breaks.

11.1.4 Providing equipment to assist with lifting and carrying heavy equipment.

11.1.5 Not reprimanding the claimant for failing to get down to the childrens' level.

11.1.6 Not subjecting the claimant to the trigger points and monitoring ordinarily applicable under the management of attendance at work policy nor disallowing pay progression in respect of disability related absence.

11.4 Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

[NB The claimant has confirmed today that she is not pursuing any complaint of disability related harassment and that such complaints are therefore to be treated as withdrawn]."

2. During the cross-examination of the Claimant in respect on the alleged non-renewal of her HLTA contract, it was clear that questions were being put to the Claimant (correctly) on the basis of this being a complaint of direct discrimination, Mr Webster deliberately omitting to pursue any line of questioning which may have been relevant had this been a complaint, pursuant to section 15 of the 2010 Act, of discrimination arising from disability. Mr Mugliston, whilst not considering it necessary for the complaint to be pursued also as one under section 15, made then an application to amend to include such cause of action. The Tribunal rejected his application having heard submissions on behalf of both the Claimant and Respondent.

3. On behalf of the Claimant, what was being sought was a relabelling of a set of facts already pleaded. The test to be applied by the Tribunal was the balance of hardship and interests of justice. The Claimant's request to amend her complaint was reactive in the sense that it arose out of an argument raised by Mr Webster on behalf of the Respondent. It is not accepted by the Claimant that his argument about the (legal) difficulty of

her pursuing a direct discrimination complaint is of merit. The Claimant does not feel she needs to add a claim, but wishes to do so to cover off a line of contrary argument. The Claimant, of course, still has a direct discrimination complaint related to the HTLA contract and other significant complaints in these proceedings. The timing of an application is a factor to consider in any application to amend and here undoubtedly it is made at a late stage. The Respondent can deal with an amended claim evidentially in the sense that no adjournment is necessary and no search for additional documents, but it had not anticipated having to defend this claim and may need in particular Mrs Stephenson to address the issue of justification if such a claim was to be allowed.

4. Indeed, that is in circumstances where there is no explanation as to why a section 15 complaint was not brought earlier. The purpose of the earlier preliminary hearing was to nail down the issues for the sake of clarity and certainty. The Tribunal at the Preliminary Hearing on 21 March allowed a significant relabelling of the Claimant's complaints which were looked at one by one. The Claimant, legally represented throughout these proceedings, chose to relabel a number of complaints as section 15 complaints and the tribunal allowed that relabelling. The claim did not seek to pursue this particular claim however under section 15. Given the tribunal's latitude in allowing a redrawing of the claims, tribunal made it clear at the preliminary hearing that this was the entirety of the claimant's complaints as then defined. Mr Webster sought that assurance. No new facts or information has emerged since which causes the balance of hardship and injustice to shift in the Claimant's favour. The application to amend is refused.

The evidence

5. The Tribunal had before it an agreed bundle of documents numbering in excess of 547 pages. During the hearing some brief additional documentation was submitted by the Respondent without objection.

6. Having clarified the issues with the parties, the Tribunal took some time to privately read into the witness statements and relevant documents so that when each witness came to give evidence she could do so by confirming the contents of her statement and then, subject to brief supplementary questions, be open to be cross examined. The Tribunal heard firstly from the Claimant and then, for the Respondents, from Mr David Cox, Senior HR Adviser for North Yorkshire County Council, Sara Stockill, Advanced Teaching Assistant, Rachel Smith, teacher, Alison Stephenson, head teacher and Emma Jones, HR Adviser with North Yorkshire County Council.

7. Having considered all the evidence the Tribunal made the findings of fact as follows.

The facts

8. The Claimant has worked for the first Respondent from 1 April 2002, but at the Luttons Community Primary School under the auspices of the second Respondent from 1 September 2013 as a general teaching assistant ('GTA'). References herein to the Respondent are intended to cover both Respondents and the school unless specifically stated. The school is a small rural school with around 35 pupils at any one time from early years through infants and up to and including primary school ages. Employed there were 3 teachers (2 on a job share basis) and 3 teaching assistants on varying hours.

9. Contractual documents generated at the time, but which the Claimant denies receiving, refer to her employment being linked to the provision of special educational needs assistance to a particular pupil.

10. The Claimant says that she applied to work as a general teaching assistant, but at interview was asked by the then head teacher, Mrs Parker, who had left before the Claimant commenced employment, if she would be prepared to work with a child with special educational needs. The Claimant had no objection, but was given to understand that her employment was permanent and not linked to the presence of the child with special educational needs. The Claimant's appointment letter dated 24 September 2013 is headed: *'Appointment of General Teaching Assistant SEN'*. The Claimant's denial of receipt of this is consistent with her denial of receipt of a number of documents where they do not assist her case and is not credible (when those denials are considered in the whole). Certainly, there is no evidence of or any reason for the Respondent to have fabricated the appointment letter unless one was to attribute an element of foresight and sophistication to the Respondent which is no more credible.

11. The Claimant had been diagnosed with Crohn's disease in 2008 and at that point considered herself to be disabled. However, after an operation in 2008 the Claimant was in effect in remission with no flare ups, such that when she started at the school the condition, she said, did not cause her a disability at the time and she had no symptoms. In a health questionnaire completed as part of the appointment process she ticked a box to indicate that she did not have a disability.

12. Certainly, by 2 September 2014 the school's new head teacher, Mrs Stephenson, was aware of the Claimant suffering from Crohn's disease. The Claimant advised her of her being in and out of hospital due to that condition by an email of that date and subsequent fit notes referred to the condition. The Claimant had previously referred to her having had a colonoscopy on 23 April, but for a period Mrs Stephenson was only aware that the Claimant was undergoing tests, not that she had an underlying condition. Notes of a meeting between the Claimant and Mrs

Stephenson on 23 May 2014 reflect the Claimant's reference only to being in hospital for tests.

13. The Claimant agreed that Mrs Stephenson was sympathetic towards her at first, including when the Claimant was absent due to sickness from September to December 2014. The Claimant emailed her on 12 October 2014 thanking her and the staff for a card and messages which had cheered her up. Mrs Stephenson responded sympathetically on 14 October updating her regarding the life of the school. She also said that in accordance with the Respondent's attendance policy, after 4 weeks' absence, an occupational health referral was necessary as part of the Respondent's duty of care.

14. The Claimant accepted that Mrs Stephenson acted appropriately in referring the Claimant on 17 October 2014 to occupational health and specifically seeking any advice regarding reasonable adjustments or support she needed.

15. Mrs Stephenson met with the Claimant on 14 November before she had seen the report produced by occupational health dated 13 November (but having spoken to them by telephone) and suggested a phased return to work and adaptions to the role. The Claimant raised concerns regarding her role and remuneration unrelated to her health issues. When received, the occupational health report referred to the Claimant perceiving that increased demands had exacerbated her condition and advised that an individual stress risk assessment be undertaken.

16. At a further meeting on 16 December with Mrs Stephenson, there was a discussion regarding the Claimant's fitness to return on a phased basis from January 2015 and her completing a stress risk assessment.

17. The Claimant saw occupational health again on 23 December having completed a stress risk assessment and occupational health advice was for the Claimant, as a diabetic, to have *"nutrition breaks*". The symptoms of Crohn's disease were said to be settling and whilst the Claimant was vulnerable to future exacerbations, she was said to be complying with all medical advice to maintain her health.

18. The Claimant advised at a follow-up meeting with Mrs Stephenson on 6 January 2015 that she was not to do heavy lifting, but not that she should not undertake any lifting at all. The Tribunal rejects the Claimant's evidence in this regard and prefers the note taken of the meeting as an accurate account where Mrs Stephenson says that she would share this information with other staff to ensure that she was not asked to lift anything with significant weight. This is consistent with the subsequent evidence heard by the Tribunal regarding the Claimant's capabilities. A direction not to lift at all was inconsistent with the Claimant being able to perform her role as a teaching assistant which, as with most jobs and certainly one caring for young children, would

involve some element of lifting. Clearly, the Claimant was not unable to lift anything.

19. Mrs Stephenson reviewed the Claimant's progress with her in brief conversations in passing. The Claimant said there were no private meetings, but none were sought by the Claimant.

20. In April 2015, the Claimant asked for time to attend a meeting with the citizens advice bureau to discuss her benefits entitlement on a reduction of the Claimants hours and pay. Mrs Stephenson asked the Claimant to arrange this outside normal working time. The appointment as originally arranged fell within the SATS testing week where two people were needed in each classroom.

21. The Claimant submitted a request for flexible working by a form she completed dated 30 June 2015. In this she stated her title to be *'Teaching Assistant SEN'* (consistent again with her awareness of her appointment as such) and sought a reduction in working hours from 28 hours 45 minutes each week to 18 hours 45 minutes from 7 September. She said that this would have a positive impact allowing her to receive treatment for her medical needs outside working time and give her time to get over her treatment.

22. The Claimant's clearly positive completion and personal submission of her request counters her suggestion that she was compelled by Mrs Stephenson to reduce her hours. Nor was the request due to pressure to rearrange medical appointments. Mrs Stephenson expected that the Claimant would seek to arrange any appointments outside her normal hours of work, but reasonably so including in the context of her working less than full-time hours.

23. The only appointment other than the meeting with the CAB which the Claimant could evidence which she was asked to rearrange, was for a *'pre-med'* on 21 October 2015 prior to an anticipated medical operation.

24. Mrs Stephenson wrote to the Claimant by letter, which the Claimant signed in agreement, on 3 July 2015 confirming a temporary reduced hours working pattern from 7 September. This was stated by Mrs Stephenson to be on a 5 month trial basis.

25. In July 2015, the Claimant agreed to act as a higher level teaching assistant ('HLTA') so that she could be in effective charge of a class for 3 hours each week which a foreign languages teacher (brought in for that specific purpose) was leading.

26. On balance, the Tribunal considers that this was always on the basis of a fixed term to 31 December 2015. On 28 September 2015, the school requested North Yorkshire Council to generate a written contract for that fixed term period of employment with a commencement date from 1 September. Mrs Stephenson had completed the form on 23 September.

27. It took time to generate the contractual document and to provide this to the Claimant, but, on 10 November 2015. she signed such a document to that effect. The document was placed on the Claimant's personnel file. The Claimant denied signing it in the sense that whilst she accepted her signature was on the final page of the document in the Tribunal bundle, she denied that this related to the preceding pages. However, the Claimant had on the final page explicitly signed an agreement in acceptance of terms and conditions and the document footer on the page signed by the Claimant matches the footer of the entire document which reflects a fixed term HLTA engagement until 31 December 2015. The languages teacher was only contracted for an initial 3 months and it is accepted that the Claimant would not have been appointed for a longer period against this uncertainty. The Tribunal does not accept there to be any basis for concluding that the document was fabricated by the Respondent as is suggested.

28. The Claimant said before the Tribunal that it was not worth her while to carry out the HLTA role for only 3 months, but the Tribunal does not consider the extra work involved to have been extensive. It was an acting up role in circumstances where the Claimant wanted to be seen to be progressing. She said that in her mind she was doing the Respondent a favour in taking the additional responsibilities which was worth no more than £10 a month to the Claimant as her GTA hours were reduced to offset the HLTA hours she performed and were paid at only a modest premium.

29. The Claimant had had an operation scheduled for 27 October 2015 after which a significant period of absence from work to recuperate was foreseen. Whilst this operation was cancelled, the Claimant expected it to be rescheduled in the near future as the Respondent was aware.

30. On 10 November 2015, the Claimant learned from Mrs Stephenson that there would be no new HLTA contract issued. This was on the same day that the Claimant signed her then current HLTA written contract. The Claimant says she was told by Mrs Stephenson that due to costs they would have to suspend any HLTA arrangement after 31 December 2015 but that on her return to work from her anticipated operation, the arrangement could be reinstated. However, on balance the Tribunal accepts that there was further discussion between the Claimant and Mrs Stephenson in December - it was clear then that the languages teacher would be returning beyond a first term and the Claimant was told that the HLTA arrangement would continue. Mrs Stephenson changed her position from a situation where the award of a new contract was dependent on the Claimant's return from anticipated future sickness absence. Mrs Stephenson accepted that she had made *'a mistake'*.

31. There was no date for the rescheduled operation at this time. IT systems' records produced evidence the generation of a request by the school on 18 December 2015 of the Second Respondent Council to

issue a new HLTA contract for the Claimant effective from 1 January, immediately on the expiry of her initial fixed-term.

32. The Claimant was absent from work in January 2016 due to her suffering from pneumonia and requiring time to convalesce.

33. On 22 January, the school was sent the new HLTA contract by email from the Council. Also, on 25 January 2016 a standard letter was sent to the Claimant from the Council enclosing the HLTA contract which was said to have been extended from 1 January to 31 August 2016. The Claimant denied receipt of such letter. The Tribunal on balance considers that it was sent to her. The Claimant was still absent due to sickness when Mrs Stephenson wrote to her by email of 25 January about her absence and referred to the need to plan to cover her HLTA hours – this does not suggest that the continuance of the Claimant's HLTA hours was unanticipated or should come as a surprise to the Claimant. The Claimant in her reply later that day did express her confusion stating that her impression was that the HLTA hours had ceased in December. Mrs Stephenson replied by return of email asking the Claimant to recall a meeting the previous term, after the Claimant had expressed unhappiness at the ending of her HLTA hours, where it was agreed that there would be a renewal and speculating that the Council might have been slow in generating the confirmatory paperwork. Whilst the Claimant may have been confused and communication with her have been less than perfect, Mrs Stephenson's account is accepted as accurate.

34. The Claimant responded on 26 January expressing a lack of awareness at the change of decision and saying that if she had known, she could have planned the lessons. Mrs Stephenson replied apologising for the confusion. However, the Claimant informed Mrs Stephenson on 2 February 2016 that she wished to revert back to her GTA contract only, i.e. she did not wish to work as a HLTA.

35. Mrs Stephenson had been seeking updates during January regarding the Claimant's likely return to work and it is clear that the Claimant had a number of concerns about her health in respect of which she was awaiting test results and further medical opinion. The Claimant was again referred to occupational health on 27 January 2016. The referral referred to a *'significant amount of absence'*. Mrs Stephenson recognised within it that the Claimant, by reason of Crohn's, was more susceptible to pick up illnesses and could take more time to get over an illness. She, however, stated on the form that the absences were for different reasons, mentioning *'Chrohn's disease, sickness and diarrhoea and pneumonia'*. She said that the Claimant was due to be admitted for a hernia operation in the near future.

36. The Claimant accepted that this was an accurate statement, albeit she said that all absences were related to her Chrohn's disease.

37. The Claimant's main issue was that Mrs Stephenson had attached to the referral an 'absence calendar' kept (and updated) routinely for all employees, but which the Respondent agreed was not routinely provided to occupational health.

38. This referred to the Claimant's medical appointments as well as sickness absences. The record of appointments on the calendar provided to occupational health was accurate and clearly recorded them as medical appointments rather than sickness absences.

39. Mrs Stephenson said that she provided the calendar to give occupational health a full picture as to the Claimant's attendance.

40. The Claimant agreed that Mrs Stephenson asked occupational health to advise on any necessary adjustments which might facilitate a return to work. Before the Tribunal she said that she now realised that it was imperative that she had occupational health referrals. At the time she had thought that the Respondent was trying to make out that she was more ill than she actually was.

41. The Claimant accepted that there was nothing inappropriate in her being invited to a long term sickness review. This was arranged for 8 February but then rescheduled for 24 February. As at 8 February, the Claimant was still awaiting test results but her doctor was recommending a phased return to work. The Claimant returned on Tuesday 9 February and met with Mrs Stephenson, who agreed a schedule for a phased return. Notes of the meeting were emailed to the Claimant, who raised no queries regarding their contents – Mrs Stephenson recorded that notes were being provided to avoid any misunderstandings as had arisen previously. The Claimant at the meeting said that she was a lot better than she had been and, in response to a direct question, said that no adjustments to her role had been recommended other than a gradual build up. The Claimant agreed that no adjustments were needed at that point.

42. On 12 February, Mrs Stephenson emailed the Claimant attaching the minutes (albeit in a form which the Claimant could not open – the minutes were subsequently copied and pasted into a further message of 22 February) and requesting that GP appointments be made outside normal working hours. The Claimant emailed Mrs Stephenson in response about her still needing to attend medical appointments. She said she was grateful about the flexibility given to her to attend hospital appointments. She said that the main reason for her decision to go on flexible working had been any impact on the school of those appointments.

43. The Claimant also emailed her union representative on 12 February describing Mrs Stephenson as having been *'offish'* with her at the meeting on the Tuesday that week. That contrasted with the gratitude

and friendly tone shown in the Claimant's email that day to Mrs Stephenson.

44. Occupational health produced their report on 19 February confirming the Claimant's fitness to undertake all her duties on the phased return.

45. The Claimant's attendance review meeting duly took place on 24 February. Notes of that meeting were taken to which the Claimant objected and provided her own amendments which were incorporated into a final version. The Claimant, in response to a question, said that she was feeling fine and coping at work. The Claimant read out a note stating that she was fit to undertake all duties and asking to revert to her full increased hours as per her original contract once her phased return was over. She said that she enjoyed her job, did not want to be treated differently just because she had a disability and wanted to feel valued and fairly treated. She wanted to avoid stress as this impacted on her Crohn's. She also, however, then raised a number of issues about which she said she felt aggrieved.

46. The Claimant raised as an issue one hour in December 2015 for which she was not paid, effectively by her having in compensation to work one session at the homework club without pay. She agreed, however, that this was nothing to do with her disability. She also raised the disagreement over the circumstances of the continuance of her HLTA contract. Within their discussions, the Claimant raised that she had planned ahead in November for the HLTA work the following Spring. Mrs Stephenson countered that she could not have known then what the Spring term curriculum would be.

47. Initially, on 26 February, Mrs Stephenson wrote to the Claimant, having taken some advice from the Council's Human Resources Department, saying that she could not revert to her previous increased hours as only one request could be made for flexible working within a 12 month period. However following discussion with the Claimant it was agreed that she would go back to working 28.75 hours per week from the week commencing 14 March 2016.

48. The Claimant received a letter dated 1 March 2016 regarding a proposed restructure of Key Stage 2 ('KS2') GTA SEN provision and potential for her redundancy. A meeting to discuss this was arranged for 14 March. The Claimant attended together with the other general teaching assistant colleague also working with KS2, Mr D'Angelo-White. They were told that they were in a pool for selection for potential redundancy as they were both general teaching assistants with special educational needs responsibility. It was explained that a consultation process would run until 3 May 2016. Claimant received at this meeting a timetable document for the redundancy exercise which reflected a period of consultation to be then followed by a selection process. This was also confirmed to the Claimant in a letter of 14 March.

49. The Claimant said she had told Mrs Stephenson on 28 February that her forthcoming hernia operation would be in May. However, that day was a Sunday and therefore it is unlikely that the communication took place on that particular day. It therefore felt to the Claimant, she said, that Mrs Stephenson had tailored the redundancy exercise to conclude around the time of her operation and to target her with that date in mind.

50. On 17 March 2016 the Claimant emailed Mrs Stephenson advising her that her operation was to take place on 11 April. The Claimant did not accept this email as being a genuine document, but it appears as a genuine date and time recorded email, giving personal information about the Claimant's condition. The Tribunal has no basis for concluding that it was fabricated. The Claimant has not produced an alternative version which she says was sent by her.

51. On 24 March, the Claimant wrote to the Respondent regarding a pre-operative assessment on 26 April. From this, the Tribunal's conclusion must be that any operation scheduled for 11 April had been cancelled.

52. The Claimant referred in a letter of 1 April to Mrs Stephenson now being aware that her operation was to be on 10 May. A letter from York Hospital to the Claimant of 27 April confirms that arrangement.

53. The Claimant, in her letter of 1 April, also contested the redundancy proposal. The Claimant suggested that the GTAs' work could be organised flexibly and she was happy to work with Key Stage I children. The Claimant says she was fighting to keep her job but accepted it was her idea that she move to Key Stage I and that the other permanent general teaching assistant, Mr D'Angelo-White, stay with Key Stage 2. The Claimant had experience of early years teaching and the younger Key Stage I children. Mr D'Angelo-White did not.

54. The Claimant said she received an email on 2 May to say that, having taken advice on proposals put forward, she and Mr D'Angelo-White would be getting a letter. She denied however then receiving a letter addressed to her, a signed copy of which the Tribunal has seen, which informed her that it had been agreed that a new staffing structure could be put in place with the result that there was, after all, no redundancy situation affecting her. The Claimant was still to attend a meeting on 6 May to discuss the alternative staffing arrangements.

55. The Claimant's contention was that the timing of these communications was deliberately just before her scheduled operation. The Claimant agreed that the alternative would have been her not knowing that her job was safe, her potentially still worrying about the redundancy situation and the Respondent being unable to plan for the future. When this proposition was put to her she responded: *"In a way, yes".*

56. At the meeting on 6 May, the Claimant and Mr D'Angelo White were told that the Respondent had decided that rather than a redundancy

exercise affecting them, the employment of a teaching assistant in KS1, employed under a fixed-term contract until 31 August 2016, would be ended. The Claimant was offered a continuing role of general teaching assistant with no SEN element working with early years children during the morning and early years/KS1 on afternoons. This offer was put in writing to the Claimant by letter of 6 May.

57. After the meeting, Mrs Stephenson asked the Claimant to stay behind. Mrs Stephenson told her she wished to raise 2 letters of complaint which had been received – the Claimant says that only 1 letter of complaint was mentioned but the Tribunal has seen 2 letters predating this meeting and it is more likely that Mrs Stephenson's account, reflected in her meeting notes, is accurate. The Claimant quickly guessed that a complaint had been made by the fixed-term teaching assistant, Adele, saying that Adele had told her that she was being made redundant. Mrs Stephenson said there was a suggestion that the Claimant had been discussing what had been discussed earlier in the consultation process and that Adele felt as if the Claimant was *'rubbing it in her face'*, i.e. the preservation of the Claimant's employment in place of her own.

58. The letter of complaint of 4 May from Adele referred to the Claimant disclosing matters discussed at that consultation meeting on 14 March, that the Claimant said she had felt bad that matters had come to this i.e. the Claimant's suggestion that others had been employed knowing that there would be a future reduction in staff and that she was to have a meeting on 6 May to discuss which class she would be working in. She said the Claimant had told her she had received a letter telling her that she was safe and felt that the Claimant was gloating. Another complaint letter from a member of staff dated 5 May alleged a breach of confidentiality on the Claimant's part.

59. The Council's disciplinary procedures adopted by the school allowed for informal action to be taken outside of the disciplinary procedure. Believing that such action was appropriate, Mrs Stephenson issued the Claimant with a written *'line management warning'*. This was said to be outside the disciplinary procedure albeit a note would be put on file and formal action would be considered if any future concerns arose. The Claimant wrote to Mrs Stephenson on 8 May on receipt of this letter complaining, amongst other things, that the complainant's story had been accepted over hers and that the whole situation had been blown out of proportion.

60. This resulted in a further meeting of the Claimant and Mrs Stephenson on 9 May. The Claimant said that Adele had in fact breached confidentiality in speaking to her and that she had just been trying to sympathise with Adele. Mrs Stephenson said she would speak to Adele again and see if she was willing to speak to the Claimant. The Claimant raised concerns again about the redundancy exercise stating that her original employment was not inked to any SEN child and that she had not been given a pay increment since her first year at the school. The

Claimant was told that there would be a further attendance meeting on her return from her operation as she would have had 4 periods of absence in a 2 year period. There was then a discussion about the future during which the Claimant said she was glad to be back working with 'Class 1' and *'thrilled'* to be going back.

61. The Claimant's entitlement to a pay increment had been discussed between Mrs Stephenson and Emma Jones, one of the Council's HR Advisers in April 2016. The Claimant had been identified as ordinarily due to receive an increment, but Mrs Stephenson had queried with the Council the effect of her absence record. The Council's policy makes it clear that there is no automatic entitlement to a pay increment which is said to encourage and reward good performance, including a positive approach to attendance. The first question to ask is whether the employee has had more than 7 days' absence in the preceding 12 months. If so, the increment will still be awarded unless there have been more than 21 days of absence over a 3 year period. If there has been absence above that level, an increment will only be awarded if an exception applies, which means effectively an acute episode of a serious illness, and if the employee (discounting the preceding 12 months) has an average of 4 days or less absence over his/her entire period of employment dating back to April 2001. Separately, if an absence is related to a disability, consideration should be given to excluding this from the calculation. The policy provides: *"Whilst from a school perspective, up to 10 days disability related sickness may be considered reasonable in terms of service delivery, each case should be decided on its own merits….It may not be reasonable to discount disability related absence in every case."*

62. On the review undertaken with Ms Jones, the Claimant had been absent for 30 days in the preceding 12 months. Allowing the longer recent period of absence as an exception was considered, but was not possible in circumstances otherwise of an average number of days of absence of in excess of 24 days per annum for the duration of the Claimant's employment at the school. Neither Ms Jones nor Mrs Stephenson considered the possibility of any of the periods of absence being classified as disability leave under the terms of the policy. As has been seen, the Claimant expressed her unhappiness at not receiving a pay increment at her meeting with Mrs Stephenson on 9 May.

63. The Claimant was absent from 10 May for her hernia repair operation returning to the school on 11 July 2016, a couple of weeks before the end of the Summer term.

64. On 9 June a further occupational health referral of the Claimant was made. This recorded the Claimant as having indicated an uncomplicated post-operative recovery and being able to undertake a phased return from 10 July. It was anticipated that, apart from manual handling, the Claimant would be fit for usual duties by the start of the new term in September. A recommendation was made to risk assess all

manual handling and make any reasonable adjustments to reduce loads and avoid any lifting/stretching which requires straining. It was said that this was likely to be a permanent adjustment. It is undisputed that no risk assessment was in fact carried out. The Claimant was not experiencing any symptoms related to her Crohn's.

65. On 4 July, the Claimant attended a return to work meeting with Mrs Stephenson and Ms Jones. The Claimant was positive about the success of her operation. She said that the only thing to avoid was that she shouldn't do any heavy lifting. The issue for her was the lifting of the heavier toy boxes. All of the toys used by the children were relatively light but these were packed away in boxes and an individual box might be heavier than others depending on the type of toy packed within it. Also, some boxes might be awkward to get out of and to put back into the storage area – a daily task. Otherwise heavier playground equipment tended only to be moved at the start and end of each half-term.

66. The Claimant was told that there would have to be another sickness management meeting in September as the Claimant had by now hit a trigger point under the attendance management policy of 3 absences in 6 months. The Respondent recognised and explained to her that it saw no point in setting targets whilst the Claimant was still recovering and that would indeed wait until September. The Claimant re-raised her complaint about a lack of incremental progression and was told that the matter could be taken up by her union as the challenge related to the terms of the Council's policy.

67. The Claimant commenced a phased return to work on 11 July 2016, a couple of weeks before the Summer term ended. Mrs Stephenson told the Claimant's colleagues that the Claimant was (straightforwardly) not to lift. Mrs Stockill, a teaching assistant, and Mrs Smith, a teacher, with whom the Claimant worked, understood that the Claimant was not to lift anything at that point in time.

68. An Ofsted inspection of the school took place on 20 and 21 July. Mrs Stephenson said that the Ofsted inspector picked up and reported to her that the Claimant was not always working at the children's level. She told the inspector about the Claimant being on a phased return to work. Mrs Stephenson then raised this with the Claimant who said that she was unable to bend. The Claimant said that the conversation felt like she was being reprimanded. On 21 July Mrs Stephenson sent a personal email to the Claimant congratulating her on the Ofsted assessment made of the school and thanking her for her help. The Claimant responded: *"It was a team effort. What great news! I'm so pleased."* Mrs Stephenson sent an email on 26 July to all staff thanking them for their hard work that term. The Claimant responded thanking Mrs Stephenson and saying that they wouldn't have achieved what they had without Mrs Stephenson's guidance. The Tribunal cannot in the face of these communications accept that the Claimant felt at the time as she

now describes – she says indeed that she was visibly upset when Mrs Stephenson *'reprimanded her'*. The Tribunal prefers Mrs Stephenson's account that she asked the Claimant to work at the children's level by sitting next to them – something she was able to do. There was no suggestion of the Claimant having to bend down to ground level or get down on the floor as the Claimant maintained before the Tribunal. The evidence of Mrs Stephenson's request to colleagues that the Claimant not be required to lift suggests that Mrs Stephenson was sympathetic to the Claimant's limitations at that time. On 22 September, at an attendance review meeting, there was a discussion regarding adjustments required and the Claimant agreed that a higher junior chair would help her. She had said that her concern was being with the little ones and having to get very low down on the floor. The Claimant did not raise the attitude allegedly taken by Mrs Stephenson at the time of the Ofsted inspection which the Tribunal finds she would in all probability have raised had her view of the situation then been what she now suggests. In fact at this review she said that she could get down on the floor, certainly by that point in time, but just not for as long as before. She went on: *"I'm going to get better."*

69. On 22 September, the Claimant was given a target of 3 months with no absences. She said that she felt like she could not take a day off, but accepted that Ms Jones said there was an understanding that she had an underlying condition and that she should put her health first. She agreed this was the usual target and that, in her case, if it was not met the Respondent said it would look at the underlying condition and refer her back to occupational health. Ms Jones told her that it was not being questioned that the Claimant's absences were genuine and serious. In cross-examination the Claimant agreed that this was a reasonable way of dealing with the matter.

70. The Claimant agreed that in the subsequent discussion regarding adjustments, the only matter she referred to, as already set out above, was the provision of a higher chair. She made no reference to any problem working with KS1 children because, she said, the other teaching assistant was still supporting the Claimant. They had worked out a system in terms of moving the boxes and the Claimant said that she had been better in terms of her need to go to the toilet.

71. The Claimant agreed in evidence that she was the person best placed in KS1 to assess what she could and could not do. She agreed that by September 2016 she was in a better state of health, but that it had to be recognised that she had recently undergone major surgery.

72. She disagreed with Ms Stockill, whose evidence was that the Claimant appeared to be happy to take on more and more work. Shortly after 22 September, Ms Stockill had approached Mrs Stephenson to say that the Claimant had started to move boxes of her own accord. She was told by Mrs Stephenson that she should take the Claimant's lead in terms of what she was or was not capable of, but that she should support her

whenever the Claimant felt there to be a need. This approach of Ms Stockill to Mrs Stephenson corroborates the Claimant taking on more physical activities. Ms Stockill tidied the outside play items away at lunchtime (predominantly the heavier toys and some equipment used which was put away each day) before she completed her work at the school and went over to another affiliated school for her afternoon work. Over time, however, the Claimant indicated that she was happier to do more in the way of tidying up toys and equipment. Nevertheless, the Tribunal finds that the Claimant knew that she was not expected to do anything she did not feel capable of.

73. The Claimant said in evidence that *"it all went wrong"* (in terms of the physical demands placed upon her) at the end of September, correcting that to then say it went wrong around a week after a performance review meeting which took place on 4 October. She commented that: "*things were okay until then and things then changed*" saying that until then she had been *"coping*". The Claimant then reverted in her evidence to her being okay a week after the 22 September attendance meeting.

74. She said that she raised concerns about lifting with Mrs Stephenson on a number of occasions before the performance review meeting. She claimed that she said that it was lifting heavy items which caused her a problem. Mrs Stephenson denied that the Claimant raised this with her and on balance the Tribunal prefers her evidence. The Claimant was not consistent on the point and from 22 September to 4 October Mrs Stephenson was not at the school on many days and the Claimant herself was absent on a course on 2 of her working days. It is likely to have only been on 23 September that they were both in the school on the same day. The Tribunal does not accept that the Claimant raised a lack of support and an expectation now that she would lift heavy boxes. The Claimant did accept that she had been provided with the higher chair to sit on as agreed.

75. The 4 October meeting between the Claimant and Mrs Stephenson was the annual performance review as was undertaken with all teaching and teaching support staff. Mrs Stephenson's intention was to set targets for the school year 2016/17 rather than consider the Claimant's performance against targets set for 2015/16 given that the Claimant had been at work for only 14 out of 40 term time weeks. This ought to have come as no surprise to the Claimant. She herself had raised at the return to work meeting on 4 July that she would need some new targets as her current ones were not achievable after her absence. Mrs Stephenson said that they would look at resetting targets in September. The Claimant nevertheless on 4 October wished to present evidence of pupils' work to demonstrate that she had met the previous year's targets. Mrs Stephenson explained that the copies of pupils' work did not provide that evidence and that she would need to bring a starting point piece of work and another piece of work completed a few weeks later to show what impact her input had had. The Claimant maintained that Mrs Stephenson did not look at her folder of work, albeit when

cross-examined she admitted that Mrs Stephenson had, in her words, *"flicked through"* it.

76. The Claimant requested later that day by email another meeting to share more evidence in support of her having met targets to which Mrs Stephenson agreed, making an arrangement to see her on 7 October – this does not support a contention of Mrs Stephenson refusing to consider the Claimant's case at all.

77. In terms of future training, the Claimant at the 4 October review meeting asked to attend a Forest School training course taking place over 3 days from 10 October. This involved building outdoor shelters and playing outdoor games which were activities of an obviously physically demanding nature. Mrs Stephenson suggested the Claimant instead supported the implementation of a Forest School with which the Claimant agreed. Mrs Stephenson told the Claimant that there was already another member of teaching staff attending the Forest School course. The Claimant's suggestion of this type of training does not suggest her having any particular concern regarding her physical capabilities and the Tribunal rejects the Claimant's contentions, which were denied by Mrs Stephenson, that at this meeting the Claimant expressed that she was struggling to cope with her work with the KS1 children and that it was not appropriate for her to be working with that group.

78. The Claimant came out of that meeting and wrote her letter of resignation that evening but dated it with the date of the next meeting arranged for Friday 7 October. She said that whatever she might have been told on 7 October, she was not going to change her mind. Indeed, on 7 October she produced to Mrs Stephenson further copies of pupils' work, but then handed over her letter of resignation. Mrs Stephenson asked whether her decision was health related, but the Claimant said that she was resigning for *"personal reasons"* which she did not wish to discuss. The letter gave notice of the Claimant's resignation with effect from 4 November. It gave no reason for leaving but thanked Mrs Stephenson for the opportunity and the skills she had been allowed to gain. She said she was very grateful and wished the school every success in the future.

79. Mrs Stephenson accepted the Claimant's resignation by letter of that day, also thanking the Claimant for all of her hard work.

80. She then put in motion a recruitment process for the Claimant's replacement with the post being advertised on the Council's website.

81. On 21 October, the Claimant said that she lifted some larger boxes. A teacher, Ms Wright, had asked her to do so and had, she said, seen her struggling. Mrs Stephenson was not in the school at the time and the Claimant did not try to contact her. The Claimant said in evidence that she moved the boxes as requested by Ms Wright because she felt that

she would be disciplined if she refused. The Tribunal does not consider that to be a view arrived at on any objectively sound basis and obviously in circumstances where the Claimant's employment would soon be ending in any event.

82. Before the half-term, likely to be on 21 October, Ms Stockill recalled the Claimant moving some boxes of toys, but none of these were, in her opinion, heavy. Mrs Smith's evidence was that the Claimant had started to take it upon herself to move boxes prior to the October half term. The Claimant had indeed started to reduce the limitations she had placed upon herself (quite understandably to protect her whilst she was recuperating from her operation) as indeed she recovered her strength and confidence. A suggestion that the Respondent's teaching and teaching support staff sought that the Claimant carry out more and more onerous tasks is roundly rejected. If the Claimant had been faced with a task which she considered might have been harmful to her, the Tribunal is convinced that she would have said so and that the staff would have, without objection, made alternative arrangements.

83. Immediately after the Claimant moved the aforementioned boxes on 21 October, she had a period of holiday during the October half-term. Her evidence was that during that period she spoke with her family who encouraged the Claimant not to leave just because of the way she had been treated and that the school should be providing her with the necessary support. She said that she hoped that Mrs Stephenson would reflect on her actions. The position the Claimant reached over that week is inconsistent with her having just experienced what she described as the hardest weeks of her life due to an alleged lack of care on the part of her colleagues.

84. The Claimant called Ms Jones of human resources on 28 October expressing a view that she now felt she should not have resigned. Ms Jones emailed Mrs Stephenson about that conversation in which she confirmed that the Claimant had said that the bending and lifting in the Early Years class was a bit much for her and that she was happier in KS2. Ms Jones was careful not to express any views of her own to the Claimant, particularly given that she was not fully conversant with the Claimant's situation. She advised the Claimant to contact Mrs Stephenson. She went through some potential options such as looking for redeployment or medical retirement but in general terms only. Mrs Stephenson then subsequently received an email of that date from the Claimant (which she said she did not read until 30 October) saying that she wished to retract her resignation. In this, the Claimant said she had resigned under duress as she had found it difficult working with the younger children getting down on the floor, bending, stretching and lifting boxes after major surgery.

85. Mrs Stephenson telephoned the Claimant and told her that the Respondent was too far down the recruitment process to allow her to

retract her resignation. She sent a confirmatory email to the Claimant on 31 October. The Respondent was on the point of interviewing candidates for the Claimant's position, but had made no appointment decision and did not yet know whether any of the candidates were suitable for appointment.

86. Mrs Stephenson said that she did not have an opportunity to speak to the other staff about the Claimant's comments regarding her stated difficulties at work, but agreed that she could have spoken to them if she had felt this to be appropriate.

87. On 31 October, the first day back after the half-term, Ms Stockill asked the Claimant to move some boxes of play food. She said these were of a similar size and weight to boxes the Claimant had been moving at times before the half-term. She told the Claimant that she was able to help her if needed but the Claimant said that that was not necessary. The Claimant duly moved the boxes and continued to work as normal that day. She did not raise any issues of concern with Ms Stockill.

88. The Claimant attended work as normal on 1 November and worked that day without any indication of concern. She was however absent due to sickness on 2 November and did not return to the school. She emailed Mrs Stephenson on 2 November about her absence and notifying her of the return of her hernia which she attributed to the physical duties she had been given to perform. She also asked for an incident to be logged in the accident book for 31 October describing a very sharp pain and noticing a big lump on moving the boxes on that day, as already described.

89. Mrs Stephenson responded to the Claimant by letter of 3 November. In this she said that since the meeting on 22 September, she had had no indication that the Claimant was struggling or that any of her duties were slowing her recovery. She continued that the school had been mindful not to ask the Claimant to do any duties which might be too strenuous for her and that Mrs Stephenson's door was open to her if she had wished to discuss this. Correspondence continued between the Claimant and Mrs Stephenson followed by then an internal investigation and grievance process.

90. The Tribunal notes that the Claimant took the opportunity to provide corrections to notes of a meeting she attended on 2 December 2016. In doing so she referred to medical advice that she should not do, as per her correction, *'heavy lifting'* after her surgery. At various points in cross examination about the limitations on her, the Claimant had been adamant that the advice was to avoid *'any'* lifting and not just *'heavy'* lifting.

Applicable law

91. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. The burden is on the claimant to show that she was dismissed.

92. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

93. The Claimant asserts there to have been a breach of the implied duty of trust and confidence.

94. In terms of the duty of implied trust and confidence the case of **Malik v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he *"will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee".* The effect of the employer's conduct must be looked at objectively.

95. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer. The Claimant brings her case (albeit not exclusively) on such basis.

96. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative

effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

97. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

98. The claimant complains of direct discrimination and harassment.

99. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

100. *"Disability"* is one of the protected characteristics listed in Section 4. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case".*

101. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

102. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

103. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the

balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

104. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. More recently the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

105. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability,and

A cannot show that treatment is a proportionate means of achieving a legitimate aim."

106. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

"(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."

107. The Tribunal must identify the provision, criterion or practice applied/physical feature/auxiliary aid, the non disabled comparators and

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

108. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

109. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

110. In the case of The **Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."*

111. The Tribunal should confine itself to those issues raised and agreed as the reasonable adjustments sought by the claimant. It is not permissible for the Tribunal to seek to come up with its own solution without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**).

112. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

113. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so, but time limits are strict, the person seeking an extension needs to provide an explanation for the delay and there will be a balance to be conducted between the parties in terms of the interests of justice and the risk of prejudice.

114. Applying those findings of facts to the legal principles the Tribunal reaches the following conclusions.

Conclusions

115. The Claimant brings complaints of direct discrimination because of disability.

116. Firstly she complains of less favourable treatment in the respondent's determination in July 2015 that the claimant could not continue to act up when she needed an operation. This allegation in fact relates to whether or not there was an early termination or failure to renew a contract to perform the HLTA work. No such decision was taken in or around July 2015 clearly on the tribunal's findings of fact but there was a decision made by Mrs Stephenson in November 2015 not to renew the HLTA contract which by agreement with the claimant was due to expire on 31 December. The tribunal's findings do not support the claimant's contention that the fixed term contract agreed was for the duration of the entire school year and up to therefore 31 August 2016 or otherwise.

117. The decision not to renew the contract initially taken by Mrs Stephenson was related to her consideration that the claimant was shortly to be absent for potentially a significant period convalescing from a medical operation and she thought it therefore appropriate in terms of the school's resources not to simply renew or extend the contract in circumstances where the claimant might not be present at the school to perform it. The facts are sufficient for the Tribunal to potentially draw an inference of discrimination such that the burden of proof transfers to the Respondent to show that its reason for its treatment of the Claimant was in no sense because of her disability. For the purposes of this claim the necessary comparison in terms of less favourable treatment must be

with someone in not materially different circumstances to the Claimant but who is not a disabled person. The Tribunal is entirely satisfied that Mrs Stephenson decided not to renew or extend the contract because of the anticipated period of sickness absence of the Claimant and that she would have reached such a decision in the case of any employee likely to be absent for an uncertain duration for a significant part of the period of work to which the new fixed term contract would relate. Her status as a disabled person had no bearing on Mrs Stephenson's considerations. Mr Webster pointed out and the Claimant accepted in cross examination that this decision by Mrs Stephenson related to the consequences of her disability and was not because of the disability itself. The Claimant rightly accepted such suggestion and the effect of the Tribunal's conclusions is that whilst there might have been the potential for discrimination arising from disability which might have caused the Respondent to seek to defend its position on the basis of its pursuit of a legitimate aim and it having acted proportionately in all of the circumstances, no claim of direct disability discrimination can be maintained.

118. Of course, Mrs Stephenson's decision was short lived in the sense that she appreciated an effective mistake on her part and having spoken to the Claimant, on the Tribunal's findings, reversed her decision such that the Claimant could have continued on her HLTA contract from 1 January 2016. Further, whilst the removal of the contract might have amounted to detrimental treatment and ordinarily might easily be viewed as such, particularly given that it attracted a higher rate of remuneration, evidence of the Claimant contradicts that view. The Claimant's evidence was that her performance of the HLTA contract was not worth the Claimant's while in terms of the very slight increase in remuneration for what she sought to argue was a significant increase in responsibility and work. She attached no importance in terms of status to herself of her working under that contract and of course when it was clear that she could continue to work as a HLTA, she decided that she would prefer not to and reverted to the work of a general teaching assistant only. The Claimant's complaint at issue 9.1.1 fails.

119. The next complaint of direct discrimination relates to the timing of the meeting at the end of the consultation process in respect of her potential redundancy. The meeting took place on 6 May shortly before she was due to undergo an operation and the Claimant maintains that the meeting was deliberately timed so that she was not in the right frame of mind. On the facts, this claim cannot succeed. The Respondent arranged the timing of the ending of the consultation process in accordance with its own business planning and without reference or consideration at all of the timing of the Claimant's absence for her medical operation. The date was set, on the Tribunal's findings, before the Respondent was aware of the timing of her operation. The Claimant's complaints are difficult to understand in that she recognised that having to undergo her operation and then being absent from sickness in a state of uncertainty regarding her future employment would

have been a difficult situation for her. Instead, she was told of the result of the redundancy process in advance of her absence and indeed to give her the positive news that she was no longer at risk of redundancy.

120. The Claimant's real complaint, as emerged from her evidence, was that she believed the redundancy process that placed her at potential risk was, from the outset, a sham in that she ought never to have been placed at risk as illustrated by the Respondent's acceptance of what she would maintain was a very obvious solution which would avoid the redundancy of any permanent member of staff. Again, the Tribunal has rejected any such assertion and accepts the Respondent's evidence that this was a genuine redundancy consultation process where the Respondent had a genuine rationale for the Claimant's redundancy in circumstances indeed were there was a perceived overstaffing of general teaching assistants working with Key stage 2 children and where the Claimant's position, or at least employment, was preserved through a genuine consultation process when the claimant raised a willingness to transfer to work with key stage 1 children which in turn brought into play the consideration that the temporary teaching assistant currently working with that age group might be the person to be placed at risk. The Claimant's complaint at issue 9.1.2 fails.

121. Finally, as a complaint of direct disability discrimination, the claimant complains of her being notified of a form of disciplinary warning on 6 May 2016 regarding a colleague's complaint about her and without following any procedure. The Tribunal has found no facts from which it could conclude that the decision taken by Mrs Stephenson to issue a formal management advice which was an option under and effectively circumvented the Respondent's ordinary disciplinary procedures was in any sense because of the Claimant's disability. Firstly, Mrs Stephenson had a genuine reason unrelated to the claims disability for raising with her a matter of a potential disciplinary nature in that there were complaints and indeed on the evidence 2 letters raising complaints which suggested that the Claimant had discussed her and another employee's redundancy situation with that other employee so as to cause her a degree of upset. It was therefore legitimate for Mrs Stephenson to raise this with the Claimant. Furthermore, whilst Mrs Stephenson might be criticised as having acted unreasonably in terms of the way in which the nature of the complaint was presented to the Claimant and her decision making without a full investigation and weighing up the Claimant's version of events as against that of the complainant, Adele, she clearly believed that she was adopting a legitimate procedure anticipated as a less formal route to a form of low level disciplinary sanction and took the decision to do so out of expediency and not indeed regarding the matter as one of a more serious disciplinary nature. Again, her decision had nothing at all to do with the Claimant being a disabled person. The Claimant's complaint at issue 9.1.3 fails.

122. The Claimant next brings three separate complaints of discrimination arising from disability. Firstly, she complains about her

referral in January 2016 to occupational health where normal trigger points were applied in the Respondent's implementation of its managing attendance at work policy without any discounting or allowance made in respect of the Claimant's absences being disability related. Again, this complaint came out somewhat differently in the Claimant's evidence to how it had been pleaded. The Claimant now appreciated the reason for her referral to occupational health and how such a referral might be indeed positive in terms of identifying assistance which might be provided to her. Instead her complaint was that within the referral there had been an exaggeration of the level of sickness absence she had had.

123. Indeed, the Tribunal does not accept the referral to occupational health as being an aspect of unfavourable treatment given the positive aims behind such a referral. If it was unfavourable treatment the referral itself was clearly with the aim of identifying support which might be provided to the Claimant and any adjustments to her duties which could assist in her sustaining an improved level of attendance at work. In circumstances of the Claimant's periods of absence it cannot be said that this was not a proportionate response by the Respondent to the situation.

124. Furthermore, whilst Mrs Stephenson went further than ordinarily would be the case in a referral to occupational health, in that the full calendar of sickness absence was provided to occupational health, this again did not amount to unfavourable treatment in that it straightforwardly gave occupational health a factually accurate statement of her absence history so that they based any advice on proper and full information. There was no explicit or implicit attempt to influence occupational health one way or the other by providing a factual summary and certainly not in providing it in this particular form. It was not misleading. Similarly, the inclusion within the calendar of the Claimant's medical appointments was a reflection of how they were marked up on the calendar as they occurred and again were not provided as relevant information for occupational health, were clearly distinguishable as medical appointments and again in no sense influenced the outcome of the report. The Claimant's complaint at issue 10.1.1 fails.

125. The Claimant next complains as an act of discrimination arising from disability of her being told on 4 July 2016 that she couldn't move up the incremental pay scale as she had been absent for more than 7 days in the previous 12 months. On behalf of the Respondent it is accepted that this was an act of unfavourable treatment and it must indeed be accepted that, if so, this was something which arose from the disability in the sense that it was a consequence of the Claimant's ill health absences which were in turn because of her suffering from Crohn's disease. The Respondent puts forward that the policy regarding incremental pay progression is in place for a legitimate aim of safeguarding funds, maintaining consistent and optimum attendance,

encouraging and rewarding attendance, reducing sickness absence and is the implementation of a policy arrived at after consultation with recognised trade unions. Such aims are not seriously challenged on behalf of the Claimant but it is said that the Respondent cannot be said to have acted proportionally in pursuit of that aim in refusing a pay increment.

126. It is difficult to see how the Respondent can have acted proportionately if, in its implementation of its policy, it failed to act in accordance with its duty to make reasonable adjustments which indeed is a separate and freestanding complaint brought by the Claimant. It is appropriate therefore to deal also with that separate complaint at this earlier point in time. Certainly, there is no argument but that the policy regarding pay increments was a practice which put the claimant at a substantial disadvantage when compared to non-disabled employees in that by reason of her disability she was less likely to and hampered in showing a satisfactory level of attendance such as to be awarded an incremental pay rise.

127. Would it have then been a reasonable adjustment to allow the Claimant to be awarded an incremental pay rise? This has to be viewed against the allowance within the policy already for exceptions to be granted such that, if the level of sickness exceeded that given as an effective hurdle in respect of the preceding 12 months, it was permissible to look at the absence levels over the preceding three years. If the Claimant still did not surmount the further/new bar on progression, a period of exceptional absence might be discounted and the increment awarded provided a minimum average non-attendance rate was not exceeded over the length of the employee's employment. The Respondent of course considered the Claimant against all these alternative criteria. Whilst the Respondent did not turn its mind to a further allowance within its policy of the discounting of disability-related absence of up to 10 days, if it had done so the Claimant would still not have been awarded an additional increment. This allowance in respect of disability absence forms part of the policy agreed with the trade unions as an effective adjustment to alleviate the effects of disability related absence on a person's ability to progress. The Claimant accepted in evidence that there had to be a cut off point somewhere in terms of the amount of even disability related absence to be discounted. The claimant did not narrowly miss out on the award of an increment and, had the full 10 day discretion within the policy been applied in the Claimant's favour, she would still have been a substantial number of days of absence over the threshold in respect of the preceding 12 month period and still over the alternative threshold when her absence was viewed over a three-year period. There was no failure to make a reasonable adjustment.

128. The Respondent's aims in requiring that attendance criteria be met before awarding incremental pay rises was a legitimate aim and the Tribunal on balance considers that it was proportionate for the

Respondent not to award a pay rise against the level absence shown and, again, that there was no breach in its duty to make reasonable adjustments in discounting the claimant's disability related absence to the point needed for her to have become entitled to an incremental progression under its policy which again was designed and operated already to provide a relaxation of requirements in the case of disability related absences. The Claimant's Section 15 complaint at issue 10.1.2 and seeking the reasonable adjustment in respect of incremental pay awards at issue 11.1.6 fail.

129. The Claimant's final complaint of discrimination arising from disability relates to her being told on 22 September 2016 that there would be further absence monitoring and that there must be no absences in a subsequent three month period. Again, the sickness absence monitoring to which the claimant was subjected arose out of her historic levels of absence which in turn arose from her Crohn's disease. In applying the attendance management procedures the Respondent was seeking to achieve the aims already set out above. Did it therefore act proportionately in so doing? Again, the question arises as to whether at the same time in this context the respondent complied with a duty to make reasonable adjustments which the tribunal again finds is a duty which did in all the circumstances potentially arise.

130. In evidence, the Claimant said that she had no issue with being invited to an attendance review meeting on 22 September albeit she objected to her attendance being expressed as a "*cause for concern*". The Tribunal agrees with the Respondent that her level of absence was self-evidently and with justification a cause for concern in the sense that the Respondent hoped that the Claimant would be able to attain a higher level of attendance at work to ensure efficiency of its own operations and of course so that there were sufficient staff in place to enhance the learning environment for the children at the school.

131. The Claimant again accepted that it was legitimate for there to be a target regarding future attendance, albeit she did not put forward at what level she thought that ought to have been set. The Respondent set the standard target of achieving a period of three months 'absence free' as it would have done in the case of any employee with the Claimant's level absence. This was of course a target with no defined consequences if it was not met. In fact, it is absolutely clear from what the Claimant was told at the absence review meeting that the Respondent recognised that the Claimant's previous absences had been for genuine and unavoidable reasons which arose out of her underlying condition. The Respondent clearly committed to viewing any future failure to meet the target set against the background of the Claimant's underlying disability. In all the circumstances, the Tribunal does not conclude that it failed to make a reasonable adjustment in not setting a less strict target. Any disadvantage might reasonably have been alleviated at a later stage depending on the attendance level attained in the period under review. Further it acted proportionately in setting the target for future attendance

at work given that there was clearly going to be, as the Claimant understood from the meeting, consideration given to the claimant by reason of her disability if the target was not met. The Claimant's complaints at issue 10.1.3 and 11.1.6 in respect of absence monitoring fail.

132. The Tribunal now moves to consider the separate and freestanding complaints alleging a failure to comply with a duty to make reasonable adjustments. The Tribunal notes in this context that the Respondent did take a number of steps to assist the Claimant in a return to work and maintaining her attendance at work including in terms of her ability to carry out her duties as a general teaching assistant. Occupational health advice was sought at various relevant times. Such advice was sought with an acceptance that the Claimant was a disabled person and with requests of occupational health to advise if and, if so, what adjustments might be made to the Claimant's duties/working arrangements which would help her overcome the difficulties arising from her Crohn's disease.

133. The only specific recommendation made by occupational health which was not followed was the implementation of an individual risk assessment around manual handling. It is rightly not maintained that a risk assessment in itself would have been a reasonable adjustment as of course such an assessment itself would not alleviate or remove any disadvantage.

134. The Respondent at various relevant points did consider and implement phased returns to work, the Claimant had additional breaks allowed, a flexible working request was granted, a stress risk assessment took place, the Claimant was allowed time off work to attend medical appointments and the Respondent recognised that it would be self-defeating from the Claimant's point of view to set an attendance target in May 2016 as would ordinarily have been triggered. The Tribunal's findings are such that the Respondent also put in place arrangements whereby staff understood that the Claimant was not to lift, as was the original advice given to them by Mrs Stephenson, then certainly that the Claimant was not to become involved in any heavy lifting and then to effectively follow the Claimant's lead and provide any assistance she required. A higher chair was provided.

135. The Claimant firstly relies on the requirement for her to work with pre-school children from July 2016 as placing her at a disadvantage. The Tribunal accepts as a matter of fact that working with younger children put the Claimant at a disadvantage when compared to non-disabled colleagues in that there would inevitably be a greater need to get down to a lower level when working with the youngest children, more need to provide practical assistance to the children rather than being able to direct them to do things for themselves and more risk of physicality in terms of more excitable and boisterous behaviour.

However, the Claimant working with younger children has to be put in context in that it was a proposal arising from March/April 2016 which she promoted that she moved to work with Key stage 1 and younger children including with an appreciation that she would soon be having an operation which would necessitate a period of recuperation thereafter. She did so again in full knowledge of the type of work involved with younger children having worked successfully with them before. When the Claimant was told on 6 May 2016 that she would be working with early years and key stage 1 she was positive in asserting soon after that she was glad to be going back to that class. Up until after she gave her notice of resignation she did not suggest that being placed with the younger children was inappropriate.

136. In the circumstances, whilst it was obvious to the Respondent that working with younger children brought with it different and in some respects heavier physical demands, in the light of the Claimant's positivity about working with the younger age group it cannot be said that it had knowledge that this arrangement in itself put the Claimant at a particular disadvantage - if reasonable adjustments were in place in terms of how the claimant performed her duties, any such disadvantage was removed which in turn leads to a consideration of more specific requirements relied upon by the Claimant firstly to lift heavy items and secondly to work at the children's level.

137. There was no requirement ever placed upon the Claimant to lift heavy items and indeed an adjustment was effectively in place which allowed the claimant to avoid any heavy lifting or any lifting at all which caused her concern. The Tribunal's findings of fact are that the Claimant could lift but that heavy lifting or lifting which required her to strain might be harmful to her and cause her pain.

138. Of course, heavy lifting was never defined by occupational health or by the Claimant. Nor was it explored by the Respondent in terms of particular items which the Claimant might or might not be able to comfortably handle. That is not surprising or unreasonable in all of the circumstances, where many of the Claimant's duties were reactive and, where not reactive, involved potentially moving boxes with a variety of different contents which would materially affect their weight and the potential strain of completing the task at hand. The Claimant was obviously recovering from a medical operation, but in circumstances where she made positive statements regarding her health and prospects of future recovery and where it would be expected by everyone that there would be a gradual recuperation and increase in the Claimant's capacities.

139. When the Claimant returned to work for a two-week period in July before the summer holiday there was an understanding among staff that the Claimant would, in straightforward terms, not lift and the evidence was that other staff made sure that they carried out routine tasks which involved, for instance, the lifting of boxes of toys or movement of

equipment. After the Claimant had been back at school for a couple of weeks in September Ms Stockill clearly felt the need to clarify with Mrs Stephenson exactly what the Claimant should be safely allowed to undertake herself in circumstances where the Claimant was taking it upon herself to do more and more lifting and shifting. Mrs Stephenson made it clear to her that the Claimant might still require assistance and that if so this had to be provided to her, but that the other staff should essentially follow the Claimant's lead. This was not an unreasonable position in that the Claimant was best placed to assess whether something was within or outside her capabilities at any particular point in time and indeed knew that she only had to ask for assistance for it to be forthcoming. The Claimant told Mrs Stephenson that there was no issue indeed around lifting and that she was being given any help she needed. On 22 September 2016 the Claimant said that the situation regarding the movement of boxes had been worked out. The Tribunal has rejected the Claimant's assertion that after 22 September matters deteriorated to the point where she was being asked, i.e. instructed, to carry out tasks she was unable to undertake and was seeking to do so in circumstances where she was at risk. The Claimant could assess what she was unable to do and request assistance if required by her. The Claimant did not raise concerns about lifting between 22 September and 4 October.

140. There was one occasion on 21 October where the Claimant said that she had been required to lift/move heavy boxes. It appears that this did involve her dragging heavy boxes along the ground. However, the Tribunal considers that the Claimant did not have to undertake this task and, as she knew, it was open to her to say that it was too much for her in which case someone else would have done it.

141. Mrs Stephenson certainly on reading the claimant's email of 28 October understood that the Claimant considered that she was being put in a difficult situation regarding lifting and whilst Mrs Stephenson could have re-raised the issues with those who worked with the Claimant, the essential situation for the Claimant was unchanged. Other staff would expect the Claimant to say if she found a particular task difficult and they would be expected (as they knew) to then provide assistance.

142. A further incident of lifting occurred on 31 October which in fact involved light boxes albeit in an awkward situation, but again arrangements were in place for the Claimant to be permitted to raise any difficulty and need for assistance with her colleagues. The Tribunal rejects the contention of the Claimant that, given her difficulty in lifting, a reasonable adjustment would have been to appoint a designated employee to carry out lifting/manual handling. The situation was that the claimant could self assess any lifting/manual handling task as too onerous for her, request and be provided with assistance from any of her colleagues.

143. The Claimant has also raised, as an alternative reasonable adjustment, the provision of appropriate breaks. The Tribunal has already found that at relevant points additional allowances in terms of breaks were made for the Claimant and the Claimant has not put forward a case regarding any disadvantage caused to her by her working hours in any alleged lack of appropriate breaks. Similarly, the claimant has not identified any equipment which ought reasonably to have been provided to assist with lifting and carrying heavy equipment. Again, instead of having to lift such heavy items with any form of mechanical aid, the Claimant had the ability to decline to lift the items and to seek assistance from a colleague if she felt that she could not manage.

144. The Claimant maintains that it would have been a reasonable adjustment in the context of the requirement for her to work at the children's level for her not to be reprimanded for failing to get down to their level. On its factual findings, the Tribunal does not consider that the Claimant was ever reprimanded or under the threat of a reprimand for not getting down to the children's level.

145. The issue obviously arose at the time of the Ofsted inspection in July 2016. Mrs Stephenson's genuine and accurate understanding of the issue was that the Ofsted inspector considered that the Claimant had not been working at the children's level when they had been seated at their bench and that any difficulty could be overcome from the Claimant's point of view by her sitting herself on the bench. Again, the Claimant was not reprimanded in the manner she maintains.

146. The Claimant did not raise this as a difficulty until 22 September when she said indeed it was her only concern i.e. getting down to the children's level. It was identified that this difficulty could be overcome by the provision of an appropriate larger junior chair for her to sit at when interacting with the younger children and such a chair was swiftly provided. Indeed, the provision of a chair was a reasonable adjustment which alleviated the disadvantage suffered by the Claimant in terms of the affects of her operation preventing her from comfortably getting down to a child's level or staying at that level for protracted periods of time. There was no failure again to make a reasonable adjustment.

147. In summary, the requirement in the most general sense of working with the younger children put the Claimant at a disadvantage, but not one of which the Respondent had actual or constructive knowledge until around the point of the Claimant seeking to retract her notice of resignation – the 28 October 2016 email. Even if it had such knowledge earlier, such that the duty to make reasonable adjustments arose, it was not a reasonable adjustment to transfer the Claimant to work with older children in circumstances where the specific disadvantages in the role working with younger children could be alleviated by alternative reasonable adjustments which would allow the Claimant to continue in that role. There was no vacancy in KS2 and a move there would have

required the transfer of Mr D'Angelo-White to KS1 and an age group of which he had no experience which would inevitably be a negative in terms of the assistance provided to the children. The disadvantages suffered by the Claimant in specific terms arose out of a requirement ordinarily in the role to lift sometimes heavy (or perhaps more accurately 'heavier') items and to work at the children's level. The Respondent was certainly as regards those specific disadvantages subject to the duty to make reasonable adjustments. The Tribunal's findings are, however, that it complied with that duty in the steps it took to assist the Claimant. It was not a reasonable adjustment for the Claimant to have been provided with a designated employee to assist with lifting although in effect those who worked with the Claimant were so designated, nor to provide any form of lifting equipment. The Claimant was not reprimanded as alleged and the issue of breaks was a separate one which had been provided for by the Respondent.

148. The Tribunal has already dealt with the remaining complaints alleging a failure to make reasonable adjustment in terms of sickness management, setting of targets and not allowing incremental pay progression. All of the Claimant's complaints alleging a failure to comply with the duty to make reasonable adjustments fail.

149. This leaves the Claimant's complaint of unfair dismissal which is dependent upon her having been constructively dismissed and therefore resigning from her employment in response to a fundamental breach of contract. The claimant relies on the implied duty of trust and confidence and upon primarily the acts of alleged discrimination already addressed by the Tribunal. Obviously, the Claimant's allegations of discrimination have not been held to be well founded.

150. The Claimant also relies separately on the 4 October 2016 meeting to review performance and set performance targets for the following year. The issue of the Claimant not receiving an additional pay increment was discussed at that meeting and has of course already been dealt with by the Tribunal. This was a matter which had been given full and genuine consideration by Respondent and the decision not to award an additional increment was in line with policy which in turn was not applied in a way which amounted to unlawful discrimination of the Claimant.

151. Nor was it unexpected or a matter of anticipated contention that the Claimant found her targets to be reset for the new teaching year. Previously there had been recognition from the Claimant herself that given her absence during the school year, the targets previously set would not be achievable and that new targets needed to be set. Mrs Stephenson was not acting in a way which, when viewed objectively, might be in breach of the duty of trust and confidence in not addressing the previous year's performance but instead looking forward and seeking to set performance targets for the new year. Nor, in any event, did Mrs Stevenson refused to engage with the Claimant when she

sought unexpectedly to raise her performance against targets in the previous year and to present evidence in support of her having attained them. Again, on the Tribunal's findings, Mrs Stephenson did on 4 October look at the evidence provided by the Claimant, albeit briefly, but, in any event, did agree to a further meeting on 7 October in circumstances where she would allow the Claimant an opportunity to present any additional supporting evidence and would consider it. The Claimant understood that was the case and gathered together her evidence but having decided that, whatever Mrs Stephenson's reaction to that might be, she was resigning from her employment.

152. The Tribunal notes the Claimant's subsequent attempt to retract her resignation and remain in the Respondent's employment and notes that she did so in circumstances where the situation at work was unchanged and there were no promises regarding her future treatment or how the Respondent might resolve any outstanding grievances or issues of concern which she had. That does not assist the Claimant in her argument that viewed objectively the Respondent's actions were in fundamental breach of contract. However, her decision to resign must be judged at the time of her resignation and the Claimant was quite entitled to change her mind regarding her leaving without any change in her position if as at the date of her tendering her resignation the Respondent was in fundamental breach of contract entitling her to resign, indeed, had she wished, with immediate effect. Fundamentally, the Tribunal does not consider that the actions of the Respondent as found whether singularly and more particularly cumulatively amounted to a fundamental breach of contract/breach of the implied duty of trust and confidence. The Claimant therefore was not dismissed and has no ability to pursue a complaint of unfair dismissal.

Employment Judge Maidment

Date: 9 November 2017