EMPLOYMENT TRIBUNALS

Claimant: Mrs A Wilford

Respondent: Evolve Trust

AT A FINAL HEARING

In: The Midlands (East) Region.

Heard: Remotely, via CVP **On:** 19, 22, 23, 24, 25 & 26 February 2021

Before: Employment Judge Clark
Mrs C Hatcliff.
Mr Woodward.

Appearances
For the Claimant: Mr J Carter of Counsel
For the Respondent: Ms E Hodgetts of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The claims of detriment and unfair dismissal on ground that the Claimant had made protected qualifying disclosures are **dismissed** upon withdrawal by the Claimant.

2. The claim of failure to make a reasonable adjustment **fails and is dismissed**.

3. The claim that the Claimant suffered less favourable treatment because of a perception that she was disabled **fails and is dismissed**.

4. The claim that the Claimant suffered unfavourable treatment because of something arising in consequence of her disability **fails and is dismissed**.

REASONS

1. Introduction

1.1 By a claim presented on 13 December 2018, Mrs Wilford claims direct disability discrimination, discrimination arising from disability and a failure to make a reasonable adjustment. Her claim originally alleged she had suffered detriments and that her dismissal was automatically unfairly on the ground of making protected qualifying disclosures. Those latter "whistleblowing" claims have recently been withdrawn.

1.2 The focus of the disability discrimination claim is, firstly, her dismissal. On 19 July 2018, Mrs Wilford was told her employment would be terminated with effect from 31 August 2018. The reason given was the belated receipt of an unsatisfactory reference from her previous employer. Mrs Wilford asserts the real reason was her periods of absence due to an actual disability and/or a perception of another disability, cancer. In a separate, stand alone, allegation Mrs Wilford alleges the Respondent failed to make a reasonable adjustment in relation to the location of her main classroom.

1.3 Whilst the issues are narrow, the evidence has traversed almost every interaction between employer and employee throughout Mrs Wilford's short period employment. We permitted this for two reasons. First, it was already before us because the evidence was prepared at a time when the whistleblowing claims were still being pursued. Secondly, both Counsel justifiably sought to undermine the credibility of the other side's witnesses on a number of key matters relevant to the remaining claims. We say at the outset that two things flow from that. The first consequence has been that credibility has been undermined, to a greater or lesser extent, on both sides. The second is that even on the Claimant's case we have been presented with a large body of evidence to show how Mrs Wilford's performance had been subject to some degree of scrutiny almost from the outset and by a number of individuals not involved in the final decision to terminate her employment. In fact, those matters take up the first 20 pages of Mrs Wilford's own witness statement before the two alleged triggers for discrimination arise. Whether or not those criticisms of her are unjustified as she alleges, we are stuck with overwhelming evidence that they existed prior to, and independently of, the impermissible reasons now alleged. They give some context for what would become the unsatisfactory reference from the previous employer and, thus, the

potential for drawing any adverse inferences from those matters to establish the necessary causal links was all but erased.

2. Issues

2.1 The issues have been clarified at the two preliminary hearings and subsequently in the Claimant's withdrawal of the detriment and unfair dismissal claims.

2.2 The parties are both very well represented and we have been presented with an agreed list of issues. We were concerned that this seemed to both limit the pleaded cases, omit elements and include matters not before us. After discussion with counsel at the outset, and further subsequent refinement, the following issues were agreed for us to determine -

Direct discrimination – Section 13 Equality Act 2010

a) Was the Claimant dismissed because of a perception that she had cancer.

Discrimination arising from disability – Section 15 Equality Act 2010

b) Was the dismissal because of the Claimant's sickness absences? (16-18 April 2018 and 1 June – 23 July 20218)

c) The Respondent asserts the reason for dismissal was the reference received from Trinity Academy on 19 June 2018 and, consequently, it does not seek to justify the treatment.

Failure to make reasonable adjustments – Section 20 Equality Act 2010

d) Was the requirement to work in Lab 13 a provision, criterion or practice or physical feature of the Respondent's premises which put the Claimant at a substantial disadvantage in comparison with persons without her disability, at any time?

e) The disadvantage is said to be the need to have ready access to the toilets when experiencing a flare-up of colitis symptoms.

f) If so, did the Respondent have knowledge of that substantial disadvantage, at any time?

g) If so, did the Respondent fail to make such adjustment as it would be reasonable for the Respondent to have to take to remove that disadvantage? The Claimant asserts that the Respondent should have relocated her to a classroom closer to the toilets.

h) If so, when should that failure be taken to have occurred for the purposes of s. 123(4) Equality Act 2010? (and if out of time, is it just and equitable to extend time?)

2.3 There was originally a further issue identified in respect of the Claimant's disability status. The Respondent had previously conceded disability in respect of colitis. The amended claim avers that the Claimant was also disabled by virtue of a phyllodes tumour

diagnosed in June 2018 (more accurately the effect of, and recovery associated with, its surgical removal). A number of issues arose from this additional disability. First, it was clarified that the Claimant did not assert this was cancer (or that it amounted to pre-cancerous cells) so as to bring it within the certain medical conditions statutorily defined as disabilities. As a result, whether or not it amounted to a disability fell to be considered against the general test in section 6 of the 2010 Act. Secondly, whilst it formed the factual foundation of the direct discrimination claim based on a perceived disability, such a claim does not require the Claimant to actually possess the protected characteristic. Thirdly, its focus, at least under the s.15 claim, was to cover the later period of the absence between 1 June and 23 July 2018 which, from 11 July, was no longer ascribed to the agreed disability of colitis. Clearly that much of the absence could not be said to arise in consequence of a disability unless the breast surgery was itself a disability. However, it became clear that the employer's decision to dismiss crystallised in mid-June 2018 and the delay in communicating that decision was explained by the delay in communications with the Claimant's trade union. In other words, if the alleged discriminator's decision to dismiss was materially influenced by her absence as alleged, that absence arose in consequence of the agreed disability of colitis. It follows that there is no need to determine whether or not the treatment associated with the removal of the tumour amounted to a disability. If it does not, her claims otherwise stand. If it does, it adds nothing to the analysis of those claims.

3. Evidence

3.1 For the Claimant we heard from Mrs Wilford herself and also:-

a) Darren Wilford, the Claimant's husband who at the material time was also a Maths Teacher at the Brunts Academy in Mansfield ("Brunts") but has since left.

b) Gavin Husband. The Claimant's NASUWT union representative who supported the Claimant with her complaints.

3.2 For the Respondent we heard from: -

a) Carl Atkin. At the time the Headteacher of Brunts and now Director of School Improvement across the Trust. His role was principally in respect of recruiting and then dismissing the Claimant.

b) Matthew Hindmarch. At the time the Deputy Headteacher Brunts but now a Geography Teacher at another school. He was involved in hiring the Claimant and dealt with issues and mediation between the Claimant and Sarah Atkin.

c) Chris Davison. At the time a Teaching and Learning Coach in Science and now a Science Teacher.

d) Kay Moore (nee Grummett). She was the Achievement Leader/Lead for Data in Science and is now a Science Teacher.

e) Sarah Atkin. Then a Science Learning Support Assistant (LSA) and now prequalification Science Teacher. She was a faculty Achievement Assistant and raised issues about the Claimant's teaching and safeguarding. She is married to Carl Atkin.

f) Adrian O'Malley. The former Headteacher of the Beech Academy and now Executive Principal of Bramble Primary and Beech Special School. He dealt with the external support for the Claimant's coaching plan.

3.3 All witnesses adopted affirmed written statements and were questioned.

3.4 We received a bundle running to 550 pages and considered those documents we were referred to. We also received a supplementary bundle containing certain medical records which the Claimant sought to rely on in support of her original contention that the phyllodes tumour amounted to a disability.

3.5 Both Counsel had provided opening skeleton arguments and supplemented these with detailed written submissions and oral responses.

4. Facts

4.1 It is not our function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before us and for the case to be seen in its proper context. On that basis and on the balance of probabilities, we make the following findings of fact.

4.2 The Respondent is an academic trust managing a number of academy schools. One such school is Brunts. It provides mainstream secondary education for 11-18 year old children.

4.3 The Claimant is a teacher of science. Before joining Brunts she had been employed at the Trinity Academy ("Trinity") in a similar role. She had an association with Brunts beyond the instant short period of employment. Firstly, her husband, Darren Wilford, was a Maths teacher employed at the school. Secondly, between April and July 2013 she had worked as a supply teacher.

4.4 In the Autumn term of 2017, Brunts needed to fill a vacancy in the science faculty for a teacher of science. We find although science teachers typically have their own specialism within the three traditional branches of secondary school science education, that specialism only tends to come to the fore at Advanced level teaching. All teachers are expected to teach all three branches of science. Accordingly, we find Brunts advertised for a "teacher of science" upon the resignation of the previous post holder and the expectation was the appointed person would teach all three branches of science.

4.5 We find Brunts, as with all such similar schools, faces several challenges in the recruitment of teachers. Firstly, most if not all school employment is subject to only three contractual resignation dates during the academic year at which point a teacher's resignation can take effect. This necessarily puts pressure on the speed for any recruitment process as, in order to seamlessly fill the vacancy created by the resignation, the appointment process

has to be conducted, concluded and a new appointment made in time for the successful candidate to resign from their current post in the same period of the academic year. Delay could mean the new appointment cannot start until the next resignation date meaning the students go without a regular teacher for anything between 4 and 6 months. In addition, schools are under added pressures from the market which make certain schools and certain faculties particularly difficult to recruit to. Science was one such challenging faculty to recruit to. Brunts was one such challenging school to recruit to. Those factors in combination may explain why we find the Claimant was the only candidate.

4.6 On 14 September 2017, Mrs Wilford met with Mr Atkin to discuss the vacancy. She submitted a written application on 17 September 2017 providing details of two referees. They were Mr David Page, Head Teacher, and Mr Karl Benn, Head of Chemistry. The former was her then principal, the latter her chosen departmental referee. It may be true of every employment application in history, but in the context of this case it is worth stating that we find Mrs Wilford nominated those two referees because she anticipated they would provide a positive reference. There may have been little choice in the "employer" reference from Mr Page as that would be expected to be the head or the deputy head. The "departmental" reference, however, was a matter of choice and as will become clear there were others in the department whom she knew held a lower opinion of her performance and abilities such that she would not choose to identify them as referees.

4.7 Her application described her current role as a teacher of science and Key Stage 3 coordinator. In fact, we find she had given up the Key Stage 3 coordinator role earlier that year. That fact is relevant to the outgoing previous employer's view of her performance. Giving up the role had happened in the context of certain key individuals forming a view that Mrs Wilford had professional developmental needs. She had been placed on an improvement or coaching plan and this had led to the role being relinquished. The person handling her informal coaching plan was a Mr Bedford. We find this was an uncomfortable time for the Claimant. We do accept that there were reasons why it made sense for the Claimant to want to work closer to home, as Brunts was, and that that was particularly so she faced certain personal issues within her family at the time. However, we also find that the situation at Trinity was a material, if not the driving reason, for the change of employment. In fact, Mr Bedford was described by the Claimant as "the unofficial reason I left Trinity".

4.8 We find the application to Brunts continued to describe her role as having the Key Stage 3 coordinator responsibility. The associated coaching plan was not disclosed.

4.9 The application form included a health question relating to whether the Claimant consider herself to be disabled within the meaning of the Equality Act 2010. She answered no. The application form also described a process of pre-employment health checks for the successful candidate. In the first instance that is a medical questionnaire and something we imagine to be typical to the type of process we see in most other organised recruitment procedures. We were frankly surprised by the ignorance displayed by most of the Respondent's witnesses as to what that was. That included those who had undertaken a training course titled "safer recruitment" in order to entitle them to participate in formal interviews. We will return to matters of HR administration, but this is the first point on which

we can express our concern about the level of understanding of the Trust's recruitment policies amongst those making recruitment decisions. The policies themselves are impressive, their application less so and this clearly goes beyond Mrs Wilford's recruitment as none of the witnesses recalled completing such a questionnaire when they were recruited into the trust over a long period of employment.

4.10 On receipt of the application form, the Respondent immediately sought references from the individuals nominated. We find organising this fell to Ms Ball, the HR administrator at Brunts. In due course, we find it remained her role to chase up references not received. We find the reference request process consisted of an email contact to the named individual attaching a blank standard proforma. The recruitment policy is strict on references and understandably so. They form part of the picture of suitability of a candidate in the context of a working environment which is, or ought to be, highly driven by safeguarding concerns. The policy makes clear that two satisfactory references must be obtained for each appointment. One of those must be from the appointee's current or most recent employer. It says: -

> ***As part of the process of verifying the suitability of candidates to work with children, the references must be checked prior to the formal interviews. This means that sufficient time must be built into the recruitment programme for these to be requested, received and checked.***
>
> ***The purpose of references is to enable the selection panel to obtain objective and factual information to inform and support their appointment decisions. They also help to ensure selection of someone who is competent and suitable to work with children.***

4.11 The policy then sets out a number of key obligations in respect of references. One of those states: -

> ***Where a reference or further information cannot be obtained about the preferred candidate before the interview, e.g. because of delay on the part of the referee or objection by the candidate, the selection panel must ensure it is received and scrutinised and issues resolved before the appointment is confirmed; if a candidate objects to their current employer being approached for a reference prior to interview schools have discretion to accept this request. Where academies do accept such a request it must be on the basis that no appointment can be confirmed unless these references are received and judged to be satisfactory.***

4.12 We are concerned that the word "confirmed" has not been properly understood by those recruiting. It seems to us that the policy expects references to be in the hands of those recruiting at the time of interview. It recognises that that may not always be possible and provides for a successful candidate to be provisionally selected albeit the employment not "confirmed" until the necessary references have been received. This is further reinforced later in the recruitment policy which permits "conditional offers". It says: -

> ***Once a decision has been made a conditional offer of appointment can be made to the successful candidate. This verbal offer must be followed by written confirmation as soon as possible. However, Directors/Governing Bodies need to be aware that a verbal offer of employment forms a legally binding contract which can only be withdrawn in certain circumstances (see below).***
>
> ***The offer of appointment is conditional upon: -***
>
> ***(****there is then a list of various matters that may form the basis of a conditional offer including* ***'at least 2 satisfactory references from appropriate sources'*** *and* ***'satisfactory enhanced DBS check').***

> ***Schools must ensure that the above checks have been completed and appropriate records established. All checks should be confirmed in writing and recorded on the proforma which should then be retained on a central file held securely by the school as well as on the employee's personnel file in line with the recommendations of the 2006 Ofsted report. Should any discrepancies or information appear which raise doubts about the successful candidate's suitability to work with children or the candidate has apparently provided false information in the course of the recruitment process, academies should contact the Trust HR Team immediately for urgent advice and guidance. If the academy as the registered body for provision of DBS checks to Nottinghamshire schools, receives any information through the DBS disclosure about a successful candidate, this will be discussed confidentially with the CEO / Head of School I Chair of Governors as appropriate. A decision will then be taken by the school in conjunction with the registered body about whether the appointment can be confirmed or the offer withdrawn.***

4.13 There are two matters to draw from this policy. The first is the reference to the '2006 Ofsted report'. We find this report made the recommendation for the school to maintain what is now its own personnel files and records and for it to maintain a single central record ("SCR") of key data for all teaching staff as well as other key information. References and DBS checks form part of that key data. Secondly, we construe this part of the policy to be envisaging a time before the employment has actual started. Whilst it does not explicitly say "before the employment commences" it talks of a "conditional offer" and, upon receipt of the conditional information, to the appointment being confirmed or offer withdrawn. It does not explicitly refer to termination of employment which by then would have already commenced. We find those involved in the recruitment process interpret the act of confirming the appointment to be something that could happen or not after the contract has already come into existence and performance commenced. We find they were under some illusion that by not providing a written contract of employment, they were somehow minimising the legal effect of the Claimant commencing work.

4.14 It is clear to us that the policy is not followed in other cases. We heard evidence that there is an established system of sorts, rarely used but recognised, for dealing with a situation where an employee is appointed before receipt of the DBS check. Whilst this information is usually obtained very quickly, it seems there have been cases where an employee has started work before the checks are completed. During the intervening period the school puts in place measures to prevent that employee (not limited to teaching staff) having unsupervised direct contact with students.

4.15 We understand that to be a practical fix to the safeguarding risks involved when the school has had to get on and make an appointment in the limited window of one term. Despite the laudable aim of maintaining continuity to the pupils affected by the outgoing teacher's resignation, it is not a normal state of affairs envisaged by the policy. Nor does such an approach address the potential unfairness to an individual who may have resigned from previous secure employment in good faith, only for the new and insecure employment to be swiftly taken away from them because the checks were not completed in advance.

4.16 Returning to the chronology, a prompt reference was received from Mr Benn. He completed the proforma sent to him. His reference was before the panel on the day of the interview on 22 September 2017. The Claimant describes it as a fair reference from someone who knew her well and had seen her teach and develop and implement a new KS3 scheme of work. There is no dispute that it was accepted by Mr Atkin as a satisfactory reference.

4.17 The reference from Mr Page was still outstanding by the time of the Claimant's interview. That interview included a classroom assessment and an exercise involving data analysis. There was some challenge to exactly who was present at this observation and for how long which we do not need to resolve save to comment that it is one further example of an unstructured recruitment process that the Respondent cannot demonstrate with certainty of who did what. The lesson observation was felt to be less than dynamic for someone operating at the Claimant's apparent professional level but it was also recognised that this was an artificial exercise taking place in a classroom of children she had never met. For that reason, although her assessment was described as merely average, it did not appear to cause any serious doubts about her basic teaching abilities, and she progressed to the interview stage of the assessment. At the end of the day we find the Claimant was informed that she would be offered the post subject to references and DBS checks. This was confirmed in writing in an undated letter. The letter could express the intention of making a conditional offer more clearly than it does. It says (with our emphasis added): -

> ***On behalf of The Evolve Trust, I am pleased to <u>confirm your appointment</u> to the above position. Your commencement of employment will be 1st January 2018.***
>
> ***All recruitment is subject to two references satisfactory to the Trust and all employment checks including DBS. Once references are received a contract of employment and a job description will be provided.***

4.18 It is clear to us that where the policy intended a conditional offer, this letter has confirmed the appointment without the necessary checks in place. At its highest, it has turned what the policy anticipates will be a condition precedent to the formation of a contract into a potential future reason for termination based on a condition subsequent. It is also clear that the condition is not specific to the Claimant's situation. The provision of the contract and job description appears to rest on the provision of references (plural) and DBS which we find was received December. Mrs Wilford was not told of the outstanding reference from Mr Page nor was she asked to do anything about it to assist the process. This Tribunal's industrial experience of such situations is that it is far from uncommon for a recruiting employer to have to chase up references. Many employers face that problem and many would put the burden of facilitating the reference back on the prospective employee. We suspect, however, that based on what was then before the recruiting team, everyone anticipated not only that it would arrive imminently, but that it would also be satisfactory. On the strength of this offer, Mrs Wilford resigned from Trinity with effect from 31 December 2017, ready to start at Brunts on 1 January 2018.

4.19 We find that in the days that followed the interview there was some attempt to chase up the missing reference from Mr Page. We do not, however, accept the Respondent's evidence that it continued to chase frequently and certainly not every 4 weeks or so. In the time that elapsed between the interview and when the reference was eventually chased the Respondent's case would have generated around 8 contacts with Trinity chasing it up and we find it would be unlikely that that level of contact would not have been recalled by Mrs Seagrave, the contact at Trinity, when she was later contacted about it. We also find it unlikely that chasing a reference would have been very high on Mr Atkin's agenda against all other matters he had to deal with. We also note the relative ease with which a reference was

later provided when we can be sure it was chased in May 2018 which makes the notion that Trinity were simply ignoring repeated requests an unlikely explanation. Finally, we have some concerns about the effectiveness of the HR record keeping and associated systems at the time. We do not place great weight on the apparent effect of the Trust's IT policy on the deletion of emails 30 days after Ms Ball left. Against all the surrounding evidence, we doubt there would have been anything of relevance had the email account not been deleted. We have already referenced the absence of a medical questionnaire being sent to the Claimant. We were also taken to the internal personnel file checklist in respect of the Claimant's record which clearly had not been completed by Ms Ball or anyone else.

4.20 However, of greater significance in this case is the fact that we are equally satisfied that Brunts did not receive a reference from Mr Page. Suffice to say, however, there a number of matters that justify Mrs Wilford's concerns. First, whilst references can be delayed the provision of reference is part of the established and reciprocal role of senior staff in schools. As staff move between schools, a school will rely on the promptness and integrity of references coming in and so will generally recognise the importance of its role in providing outgoing references similarly. Secondly, Mr Page was the person to whom the Claimant resigned or at least the person who formally acknowledged her resignation from Trinity on 23 October, about a month after her interview. If he had not provided a reference by then, that would have served as a prompt to remind him to do so. Thirdly, the fruits of the Claimant's later data subject access requests of Trinity showed there was some sense that Mr Page may have written a reference although the evidence is less than certain and a copy of any such reference that may have been drafted was not retained by Trinity in the same way that the reference from Mr Benn was in fact retained. There is nothing in the evidence to suggest Mr Atkin might conveniently pretend to ignore a positive reference from Mr Page and if he did, the chances are that a second request for a reference would only produce another positive one. Similarly, had it been negative, we can be confident the employment would have not have been offered (or would have been terminated at that point). We might speculate that there could be more force in no reference being written at all as the later negative reference that was in fact provided might provide a basis for concluding that Mr Page may have struggled to complete it knowing the effect it might have on Mrs Wilford's application but we don't need to go that far. In short, we do not have to make a finding as to whether the reference was written and sent, it is sufficient for present purposes that we are satisfied no second employer's reference from Mr Page or anyone else was received by Brunts.

4.21 The parties proceeded in ignorance of the absence of the second reference. On 22 December 2017, Mrs Wilford attended an induction day at Brunts. The Claimant says this was a tour and opportunity to meet staff. She says there was no formal induction programme and nothing before us to show any formalities in respect of policies or systems. It is clear to us the day did not have the formality of the induction expected by the Trust's recruitment policy. That leads us to another significant finding going to the context of this employment. That is that the management of the science faculty was in a disorganised state. It may be unfair to call it chaotic as was put to us, but it was certainly without clear leadership. Mr Ruston was the key contact for the Claimant's induction day and was a wholly appropriate person in his capacity at the time as head of the science faculty. He was, however, about to

step down from that role from the new year and although he remained a teacher and continued to offer some input due to his seniority and past role, by the time the Claimant joined in January there was officially no head of department. We do not accept that Mrs Moore or Mr Davison filled that gap. They were not appointed to any specific duties; they were not temporarily acting up. They were not remunerated and there was no division of labour involved in sharing out the head of department role. The apparent reliance on them to keep the science department running was nothing more than the fact that each happened to have a particular additional responsibility in the department. We find those lead roles were professional, not managerial. Neither had any experience in management. During the months that would follow, they would from time to time find themselves pressed to deal with matters that should fall to the head of department, if not more senior school leaders. We make no criticism of them. As is often the case in professional workplaces, people try to do what is needed to keep things running and we find Mrs Moore and Mr Davidson did just that in good faith and to the best of their abilities. However, it is no wonder that from time to time issues were not addressed adequately or at all.

4.22 It is during the induction day that Mrs Wilford says she disclosed to Mr Ruston that she suffered from ulcerative colitis. We have not heard from Mr Ruston. There is no medical questionnaire given to the Claimant on which such information might have been disclosed. Whilst we do not seek to place the responsibility on the employee for something that the employer's policy professes to require, the Claimant may be expected to press such matters to some limited degree where they are important to her. We take the view that the absence of any pressing of it in these circumstances informs our assessment of the nature and extent of disadvantages such condition might present and, certainly, that it presented at the time. It does not go to the fact of whether there was any form of disclosure. We are satisfied that there was a disclosure sufficient for Mr Ruston, and therefore Brunts, to be on notice of a potential health issue.

4.23 As to the condition of ulcerative colitis, the Claimant describes being diagnosed in late 2005. She describes the symptoms arising during what she calls a "flare up" giving the effects of the impairment a variable or fluctuating nature. During such a flare ups she suffers from severe stomach pains from trapped wind which may require her to sit down. She says she becomes more flatulent, creating embarrassing situations and will remove herself from the proximity of others. She describes some incontinence and needing the bathroom frequently for either toilet relief or a change of clothing. She told us how she had learnt over the years to control her illness with both medication and diet and that she had for some time had little time off with symptoms of colitis and managed the flare ups. We accept her evidence. It is clearly a well-managed condition and we also accept her evidence that in the years she spent teaching full time at Trinity, including during her pregnancy, she did not need to use a toilet during lesson time, her medication was used as and when required but she had not needed any prior to the flare up in 2018.

4.24 We find, therefore, that although the discussion with Mr Ruston was sufficient to pass on the fact of a medical condition, it was conveyed more as a matter of fact question and answer that any new employee may ask on an induction day about the location of toilets. Further, the Claimant has not given evidence of the response. It is not suggested that Mr Ruston failed to

answer the question. We therefore find he did. She had been assigned what all regarded as the better of the science labs as her normal base, that was L13. The distance between L13 and the nearest staff toilets was approximately 65 metres along the corridor. We find this answer was not felt by Mrs Wilford to be a problem for her and her condition. It follows that whilst the conversation may have been sufficient to convey a medical condition relevant to the existence or not of a disability, it did not convey any disadvantages about the relative physical layout of the classroom and staff toilets.

4.25 On 1 January 2018 the Claimant's employment with the Respondent commenced as Teacher of Science, actually starting in school at the start of term on 8 January 2018.

4.26 Like most schools, Brunts employ teaching assistants ("TA"), Faculty achievement assistants ("FAA") or learning support assistants ("LSA"). These are all non-qualified teaching staff who will be typically assigned to a particular student or group of students. Often these are students with a statement of special educational need or a pupil premium. That is, in receipt of free school lunches or otherwise identified as likely not to achieve their full potential. We find that the proportion of lessons in which any one teacher would also have a TA or FAA joining their class would vary from group to group. Every teacher would have some lessons including a TA or FAA but no teacher would have more than about half of their class contacts with a TA or FAA. This provides some measure of the balance of ability groups being taught by a teacher as the prevalence of TA or FAA would typically, but not exclusively, corollate to their ability stream. As a generalisation, the more able groups typically present teachers with fewer difficulties or disruptive incidents.

4.27 Mr Atkin's wife, Sarah Atkin was employed as an FAA. Her focus was on the science faculty. She would move from class to class according to her own timetable and the students she supported. This timetable would put her in Mrs Wilford's science classes for 2 double lessons each week.

4.28 We do not accept the Claimant's perception that she was ostracised by Mrs Atkin from day one. We do accept it took some time for Mrs Wilford to establish working relationships with her colleagues, TA's and technicians supporting the science faculty. We find that was more about the fact she was new and, we regret to say, any such difficulties in that area reflect as much if not more so on the Claimant's approach to building relationships as they do to those other individuals. The evidence we have seen in the contemporaneous emails with teaching colleagues appears warm, supportive and welcoming.

4.29 As early as February 2018, relations had become strained between Mrs Wilford and Mrs Atkin. Mr Hindmarch was involved in facilitating a mediation meeting between them following a complaint made by the Claimant against Sarah Atkin.

4.30 On 22 January 2018, Brunts was informed that the Claimant had been approved for a promotion to the higher band of the Upper Pay Scale (UPS2). The correspondence came from Mr Page at Trinity. We find this does not flow from Brunts assessment of her performance. We find it can often happen when experienced teaching staff are appointed to start in the January term. We accept Mr Atkin's account of the system that all schools subscribing to these national pay scales adopt. In short, an assessment of staff eligible for

this promotion is usually undertaken in or around October or November each year based on their performance against the national teacher standards before going through various stages of approval. A decision is typically made early in the new year and, if approved, the pay rise is usually back dated to the start of the academic year. As this process straddles one of the three resignation dates in the academic year, the previous employer's decision is, by convention if not contract, honoured by the new employer. The Claimant therefore became paid at the UPS2 teacher scale. It leads us to conclude that either the view of the Claimant's performance at Trinity was not universal or the entitlement to UPS2 was less about demonstrating performance as other factors. The contact from Mr Page at this time is another reason to reject the notion that there were regular and frequent attempts to chase him for the missing reference.

4.31 It is important to put the Claimant's apparent status into context. Teachers below leadership roles may be grouped into three broad stages of their teaching career. Newly qualified, main scale and upper scale (sometimes called the upper range). The upper scale is a senior promotion scale to reflect that teachers' professional development and competence. The upper scale is itself divided into two grades, UPS 1 and UPS2. Progression from UPS 1 to 2 should reflect further still on that individual's competence as a teacher. At the time of the application to Brunts, Mrs Wilford was already a UPS1 grade teacher.

4.32 Much of the assessment of a teacher's performance and development is made against the national teaching standards (TS1, TS2 etc). As with most organised and regulated professions, a scheme of competencies has been developed as part of raising and maintaining professional teaching standards. Whilst all teachers are subject to the teaching standards, the measure of what could be expected from a teacher, and how they perform in various classroom situations will vary. What is expected of how a UPS2 teacher deals with any particular issue will demand far more than what might be expected of a NQT in any given situation.

4.33 We find observations of teaching practice, where one teacher observes another leading a class, is now embedded as a form of quality assurance in Brunts as we expect it is in most schools. The lesson observations occur in varying degrees of formality. There may be short drop-ins or learning walks or longer, more structured, lesson observations. Some are termed "due-diligence" observations which we understand to be more focused on the class getting the standard of teaching that they should at that time of the syllabus. We find they would be deployed for a range of purposes. Sometimes, it may be to ensure a newly appointed teacher is settling in. It may also be about a particular issue with a student or students. Sometimes it may be driven by a focus on a particular aspect of teaching practice, perhaps identified through some other route such as Ofsted. Sometimes it may relate to the time of academic year, for example revision focus as exams approached. Sometimes it may be about the result of the school's "data drop", that is a periodic update of the pupils' progress towards their individual potential targets, which might show a particular cohort appears to be behind their expected level of achievement. Individually, they might form part of the support plan for, as well as being the origins of, concerns about the individual teacher's own teaching practice.

4.34 We do not need to address the various forms of observations of the Claimant that took place between January and March 2018. Suffice to say there were a number of drop ins and lesson walks. Some were about supporting her as a new appointment to the school. Some were part of planned lesson walks organised as part of Mr Davison's obligations as a teaching and learning coach. We are satisfied that the Claimant was not singled out. We are also satisfied that the approach to feedback for all these observations was to identify positives seen during the observation (seen in the reports as "WWW" or 'what went well') and also suggestions for things that could have been done to improve the lesson (seen in the reports as "EBI" or 'even better if'). From the observers' point of view, we find the consensus view was that the Claimant's performance was average at best. The main conclusion being that the lessons did not contain the sort of class interactions one would expect from a UPS teacher, still less someone now on UPS2. We do not accept that there was anything untoward about these observations or the conclusions that were honestly formed about her.

4.35 We find that very early on in the Claimant's employment at Brunts she engaged the support of her local trade union representative about a number of issues and particularly her relationship with Mrs Atkin and her perception of her various lesson observations. She was supported in this by her husband and it is impossible for us to say which one was driving this over the other. Mr Wilford had had his own exchanges with Mrs Atkin in the past which resulted in them not working together and which may well have been a source for some lingering suspicion which manifested in their strained relationship. The initial referral to the union was itself principally triggered by Mrs Wilford's relationship with Mrs Atkin and one exchange in particular. The Claimant's perception of serious relationship issues and challenges to her performance can be seen by that fact that by the end of February, a matter of 8 weeks into her new employment, she and Mr Husband were in near daily contact about her situation and considering getting further advice from regional officers.

4.36 Again, we do not need to deal with the detail of all of her relationship issues but in one case Mrs Wilford was experiencing difficulties with the behaviour of one particular class. We find she asked Mrs Atkin why they were misbehaving, which Mrs Atkin initially tried to avoid answering. The question was asked directly a second time and in circumstances which meant Mrs Atkin could not avoid giving an answer. The answer, however, had already been provided to Mrs Atkin from the students themselves. It was that they found the Claimant's lessons boring. This student group was also taught science by Mr Ruston who Mrs Atkin felt was able to capture their interest in a way that the Claimant had not. She answered Mrs Wilford's question directly, relaying what the students had told her and honestly, suggested observing Mr Ruston with them. We do not find it either unprofessional or inappropriate. Frankly, the suggestion of it being unprofessional stems from the Claimant's allegation that what was said could have been heard by the students. We do not accept that but, even if that was the case, it must follow that what the Claimant said about them misbehaving could also have been heard by them.

4.37 The initial union advice, from Mr Husband, was to keep a diary of issues, whether in respect of observations or drop ins or interactions with others. We found aspects of Mr Husband's view of events suggested he might have been less than objective about things.

4.38 Mrs Wilford had been slow to engage with her colleagues at a social level and from around this time began distancing herself further, taking her breaks in her room instead of joining colleagues in the staff room. For Mrs Atkin's part, we find all these interactions led her to be cautious of the Claimant. She continued to support students in two of Mrs Wilford's double lessons each week throughout the time she remained at the school. However, she ensured she arrived with the students and left as they were packing up. We find this was to avoid an opportunity for her to find herself alone with Mrs Wilford. In turn, Mrs Wilford would suggest those actions demonstrated further distancing from her which we find to be an example of Mrs Wilford's tendency to see the negative in most of Mrs Atkins actions. Another is an allegation that she failed to wear eye protection during experiments. Mrs Atkin's position was that she did when she was engaged with the experiment but not if observing from a distance. Whatever concerns that the Claimant may have had at the time they did not prompt her to suggest or require Mrs Atkin to wear eye protection.

4.39 Conversely, however, Mrs Atkin had a number of concerns about Mrs Wilford's approach to health and safety. These led to two issues being raised involving the supervision during the use of a boiling kettle and students waving lighted splints. Underlying these, and other observations, was a concern that the Claimant spent lesson time sat at her desk either checking emails or marking work, both of which were certain to raise a concern about her professional practice should they be observed. They were, and they did. There may well have been an explanation, and we certainly heard various explanations explored in evidence at length. We do not have to deal with the merits of the justification, although for our part we did not find the Claimant's case of following an instruction to check emails as being particularly credible, particularly as it was one of a number of varying explanations over time. It is enough that this and all these other early interventions, low level as they each individually may be, began to form together to build a growing concern about the Claimant's teaching practice.

4.40 On 28 March, just before the start of the Easter Holiday, the science department held a faculty meeting. This is a professional meeting to include, amongst other things, a review of the students' progress towards the impending exams. It is "directed time" for teachers and carries the same status in the timetable as any other directed time such as face to face classroom teaching. In other words, special permission would be needed to be absent. We find the Claimant had booked an MOT for her car that clashed with this meeting. She wanted to be excused. We find she asked permission of Mrs Moore and Mr Davison. We find both answered vaguely in the sense that they had no personal objection but that she would need permission. Who they directed her to is not clear but it is clear that no one with the authority to excuse her was asked or gave that permission. We accept the Claimant, as a new employee of about 12 weeks' service by that time, believed she had permission not to attend. As a fact, however, she did not but the fault for that is principally with the lack of organised systems and management structure in the science department which, we find, remained in some unstructured state. Other reference points in the evidence support that conclusion including the lack of structured plan on the head of department, Mr Ruston, stepping down; the record of problems it had with data collection and the fact the school relied on two

teachers, competent in their area but without any training or clear expectation of what they needed to do, to fill any gaps left by Mr Ruston stepping down.

4.41 She did not attend the faculty meeting which went ahead without her.

4.42 During the morning of 29 March 2018, Mr Davison conducted a learning walk involving a lesson observation with the Claimant. Issues were identified again under the WWW and EBI principals. The same general conclusion was reached of an average performance not demonstrating the UPS level expected.

4.43 On 29 March 2018 there was an 'i4' meeting with Mr Atkin, Mrs Moore, Mr Davison and Mr Hindmarch. We accept the purpose of the i4 meetings is to look at school performance and student achievement data generally and it also serves as a forum for leaders to discuss faculty matters generally. At this meeting the focus was on year 11 students as they had their exams scheduled imminently. The aim was to identify whether any actions were needed to support teachers and students. The data was analysed and this process identified one of Mrs Wilford's classes as being particularly behind on their expected level of achievement. We accept she was not the only teacher of this particular class and, of course, she had only taught them for three months. However, she was the designated teacher of that double award for science (double in so far as it led to a double award but retaining the trilogy of traditional science subjects) and we find she was the person who answered for their progress.

4.44 We find this prompted a discussion about her classes and her teaching. That in turn became the conduit through which a number of the individually minor issues came together to form something of more substance. Some concerns were more abstract. They included negative feedback from students and parents which, whilst we accept these were genuine matters raised, we do not understand to be anything more than informal comments. To illustrate the point, Mr Davison was able to recall these were mentioned at the meeting but not the detail of the concern. The meeting led to some level of agreement to look at areas of support Mrs Wilford as might be necessary to address the perceived deficiencies in standards. In turn, it was this discussion which led to the disclosure of the fact she had missed the faculty meeting the previous day. The meeting decided this needed following up.

4.45 On 29 March 2018 Chris Davison verbally raised the concerns with the Claimant regarding her performance. Questions were put to her by Mr Davison on behalf of the i4 meeting in a manner which was little more than literally relaying the substance and noting the reply and focusing on her absence from the faculty meeting the previous day.

4.46 The school planned a series of lesson observations of Mrs Wilford which would include the Claimant to take place in the critical term after the easter break. There was, however, a more structured intervention planned in respect of the Claimant by way of a data gathering and observation period to be led by Matt Hindmarch. The detail of this was set out in an email of 11 April 2018 from Matt Hindmarch. It identified the concerns regarding her performance and confirmed that an information gathering exercise would commence. As part of the Claimant's response, she stated that she had an ongoing back condition and referred to her ulcerative colitis. The Respondent contends that this was the first time the Claimant had disclosed her ulcerative colitis. We find this is the date that the Respondent has to accept it

was on notice of the condition. We have already found the exchange in December 2018 was sufficient to put it on notice.

4.47 On 12 April 2018 Mrs Wilford provided a fit note from her GP which advised that she had an ongoing back condition which was likely to continue for 3 months. It recorded that she was fit for work with amendments or adaptations.

4.48 On 13 April 2018 Mrs Wilford says she informed HR about ulcerative colitis. On the face of it, we are satisfied that around this time there was mention of it and its potential effect.

The Claimant was promptly provided with a key to the nearby disabled toilet and a prior authority was put in place for her to leave her classroom by obtaining temporary supervision from any TA, lab technician or others nearby including Mrs Atkin the Science FAA. Whilst the Respondent's employment systems were under strain at this time with an absence at head of science, we find that the culture of adjustments for disabilities and other informal adjustments is something the individuals in this school willingly adopt and support. Ms Moore gave evidence of her own experience of being supported and steps were promptly taken with the Claimant when it was known there might be a disadvantage. We heard other evidence of the role senior management take in consultation with HR, medical evidence and the relevant head of faculty to put in place adjustments. We found nothing to suggest any dismissive culture towards disability or adjustments or anything to suggest the Claimant's health was seen as a problem.

4.49 We find there were no adjustments proposed by the Claimant in the form now before us. There was no complaint and no evidence that she in fact suffered any disadvantage arising from the relative locations of the classroom and toilets. The notion of changing classrooms was not raised and in the evidence before us, Mrs Wilford accepted it was something she thought might be capable from the following academic year after the annual timetabling exercise. There is some logic and reasonableness to her stance in this regard as although changing classrooms is not impossible mid-term, we find the art of academic timetabling to be a complicated process of matching multiple resources in any number of permutations of subject, teacher, pupil group, the available estate etc., etc.. This is notoriously a complicated task undertaken once a year.

4.50 On 16 April 2018, the Claimant emailed Matt Hindmarch stating that she had some points she wished to be considered as part of the information gathering exercise. Matt Hindmarch responded to the Claimant's points by email of the same date. We find Mr Hindmarch approached his task in a way that we characterise as generally supportive. Whilst we do not doubt that any teacher faced with any form of observation would be anxious about it, we accept that those undertaking the process viewed it genuinely as a process of supporting improvements and outcomes. It was far from a punitive process.

4.51 On 18 April 2018, the Claimant was absent from school due to a colitis flare up. This is the first of two periods of sickness absence said to be relevant to the s.15 allegation of unfavourable treatment and this episode is said to form part of the "something arising" being a period of sickness absence arising in consequence of the colitis. It was a short spell of absence lasting only a few days**.** On the Claimant's return to work, there is no evidence that

she suffered any disadvantage or that the adjustments that were put in place were in fact needed.

4.52 On 23 April 2018 the information gathering exercise commenced. We find it seemed to all involved in the process that it started reasonably well although, as we have already observed, it no doubt meant the Claimant felt under additional pressure. On 27 April 2018 the Claimant and Mr Husband attended a meeting with Mr Hindmarch and Mr Atkin to discuss the outcome of the information gathering exercise. The Claimant was advised that her performance did not meet the required standard and that support would be provided by a teaching and learning specialist to enable her to meet the required standard.

4.53 From around this time in May, the Respondent became aware that the Claimant was seeking employment elsewhere. There is no problem with this decision. It does, however, fall into a similar state of affairs as existed at Trinity. The Claimant's performance was now under scrutiny, she looked outside the organisation for alternative work and needed to secure a positive reference. On 1 May 2018 Mr Atkin received an email from Magnus Church of England Academy requesting a reference for the Claimant for the post of Second in Science. On 3 May 2018 the Claimant emailed Mr Atkin to advise that she had not been successful in her application. The Claimant later informed Mr Atkin that she was going to be interviewed for a main scale teaching post at the same school.

4.54 From the week commencing 7 May 2018, the Claimant was subject to the informal coaching plan. Adrian O'Malley, then the Head Teacher of The Bramble Academy, was appointed as her external coach to support her through the informal coaching plan. The plan appears to us to have been focused and both the Claimant and Mr O'Malley engaged with the issues it raised. The progress was documented and a plan for its duration agreed. There was much time spent on questioning the duration and extension of this plan and whether the Claimant's time under it was unfairly extended. We find it lasted for the time it was planned to save only to the extent that Mr O'Malley's own urgent commitments at his own school meant that the coaching plan was extended by a further week. We accept Mr O'Malley's evidence that this was not a punitive act but was done so as not to disadvantage the Claimant. In fact, we find the Claimant engaged with this process and, once again, there seemed to be a positive approach taken by all.

4.55 On 11 May 2018, Mr Atkin received an email from All Saints' Academy requesting a reference for the Claimant in relation to the post of Teacher of Science. At this stage there was some engagement with the Claimant at the request of her trade union in respect of the content of any reference to be provided. On 12 May 2018, Mr Atkin shared the proposed reference with the Claimant. Through various emails, proposals and responses were exchanged leading to a meeting on 16 May 2018 to discuss the reference. It is not in the gift of the employee to determine the content of a reference, but it is incumbent on an employer that agrees to provide a reference to give a fair, balanced and accurate reference. We find Mr Atkin reasonably took on board some of the proposals and modified his reference in some, but not all, respects to the extent he felt able to.

4.56 On 23 May 2018 Mr Atkin sent an email to Trinity Academy chasing a reference for the Claimant. Why this omission had not been noticed sooner was not initially clear to us. The timing of this in the midst of Mr Atkin's own recent difficulty in preparing a balanced but accurate assessment of the Claimant's skills in an outbound reference led us to speculate whether that may have played some part in prompting him to reflect on the task that those at Trinity Academy had undertaken only 6 months earlier leading to the realisation that it had not in fact been received. In fact, we find the reason is far more direct and the timing purely coincidental. The Respondent had not been keeping its SCR up to date in the way it should. There were gaps where there should not be in areas such as references, safeguarding training and professional registration numbers. The SCR had been subject to an audit and a Ms Dawn had identified the problems amongst a large number of staff. The SCR was an important document and the first reference point for any unannounced inspection by Ofsted. There had to be an immediate response. Ms Dawn had telephoned Mr Atkin that day and he had immediately chased the reference. The next day, Ms Dawn emailed with a full list of deficiencies in the SCR. We find Mr Atkin and Ms Ball immediately set about remedying the gaps. We find in most cases the issue was not that the relevant matter did not exist, but simply that the data confirming that state of affairs had not be transcribed onto the SCR. In a handful of cases, the audit did identify a genuine omission in respect of training and that member of staff was immediately put on the relevant update training. In one case, it identified an employee that did not have the necessary two references. That one case was the Claimant. When this was checked, Mr Atkin then realised that the second reference from Trinity had not been received. It is largely the circumstances of this being uncovered in this way which led us to reject the contention that Ms Ball had been chasing Trinity frequently throughout the intervening period.

4.57 On 1 June 2018 the Claimant was signed off sick due to 'flare up of colitis'. This is the start of the second of the two episodes of sickness absence which are said to amount to the something arising. It is clear that the initial reason for the absence was colitis. The fit note describes as much and certifies her unfit for work for the period 1 June until 14 June 2018.

4.58 On 2 June 2018 Mr Atkin received an email from Darren Wilford asking to meet with him to discuss the Claimant's health. They met on 4 June 2018 and at the meeting Mr Atkin was advised that the Claimant was now receiving treatment for a lump in her breast. The diagnosis turned out to be a phyllodes tumour, a form of tumour that cannot be classified as malignant or benign but which, we find, is not clinically classed as a cancerous or precancerous tumour. That understanding of the clinical implications is less important than the perception. The issue in this case is whether those making decisions on behalf of the employer assumed it was cancerous and made decisions influenced by that erroneous presumption. We do not accept that. It is clear to us that the clinical evidence produced to the employer together with the Claimant's own contact with Mr Atkin and others was to the effect that it was not cancerous. There are references to the initial biopsy being benign and we accept Mr Atkin's evidence that all the information given to him about the situation leant towards the tumour not being cancerous. We find there was general relief in that state of affairs. We do not accept the Claimant's contention that questions posed to her seeking to clarifying this state of affairs to the effect of "so it's not cancer?" disclose a malevolent

intention or a pre-existing belief that it was cancerous. We find they demonstrate the opposite, that there was relief for her in the diagnosis against a normal recognition of the uncertainty at the outset that the discovery of any tumour might be. There is nothing else in the surrounding circumstances which supports a finding that anything about that was instrumental or material to the actions or decisions of anyone acting on behalf of the Respondent.

4.59 On 14 June 2018, a second fit note was provided in this episode of absence which extended the reasons for absence to include the surgery to remove the tumour. This fit note declared the Claimant unfit for work for four weeks until 11 July. It describes the reason to refrain from work as "colitis and awaiting breast surgery". It follows that Colitis remained a reason for that further period of sickness absence. In fact, it seems to us has the breast lump been the only issue, the period of "waiting breast surgery" would not on the balance of probabilities, lead to time off work until the surgery itself and the obvious period of physical recovery from that surgery. Later that day the Claimant sent an email to Mr Atkin confirming that she was due to undergo surgery in respect of a benign tumour.

4.60 On 19 June 2018, the Respondent received the missing Trinity reference. It was dated 15th June 2018. It had been prepared by Mr David Bedford, the Vice Principal of Trinity Academy. We find the original person at Trinity to whom the reference request had been directed had struggled to complete it and referred it to a more senior teacher on the basis he may not be able to provide one that Mrs Wilford would like. Mr Bedford's reference was critical and advised that Trinity Academy would not re-employ the Claimant. We accept Mr Atkin's evidence that his assessment of it was that it was probably one of the worst references he had seen for someone working at the level of the Claimant. We find that had that reference been received before the appointment was made, Mrs Wilford would not have been offered the job. We also find that the fact that he belatedly now had an unsatisfactory reference was the reason he came to the decision that he had to terminate the Claimant's employment. We can find no link or influence between this negative reference and the other events happening at the Respondent school. By 20 June, that decision was made.

4.61 Mr Atkin was concerned about how to deal with this with the Claimant in view of her personal circumstances at that time. We find he was aware of the sensitivity and did not want to put any additional stress on the Claimant at the time she was undergoing surgery. We find he approached Mr Husband and advised him of the receipt of the reference and was asked to assist in discussing the matter with the Claimant. In fact, we find there was some mix up or delay within the regional office of the union which caused delay in engaging with Mrs Wilford about this issue and in respect of which senior officers of NASUWT had to get involved.

4.62 On 26 June 2018, Mr Wilford had the surgery to remove the breast tumour.

4.63 On 10 July 2018, a Mr Ed Brown contacted Mr Atkin about the inadequate reference. He was an official of the NASUWT who, it seems, was by now leading on the Claimant's case. He said he would review the matter.

4.64 On 11 July, the Claimant's surgeon prepared the final fit note dated to last until 20 July. The reason for absence is the obvious post-operative recovery and it states the reason as "Surgery for phyllodes tumour in breast". Whilst the fit note certifies the Claimant as unfit for

work during this period, it is also qualified by the statement that she may be fit for work during the period taking into account the advice expressed as “Light duties, no heavy lifting after 20 July”. There is nothing to suggest this final 9-day period was due to colitis.

4.65 In fact, the Claimant returned to work 3 days before the end of term on or around 17 July. There is some complaint by the Claimant about why she returned and whether the advice from the trade union was appropriate or not. We do not need to resolve that. Suffice to say she did return to light duties in the sense there was no student contact and it may well be that by that time of the academic year, there was in any event a reduced student body still in school.

4.66 Also, on 17 July, there is some discussion between Mr Atkin and the full-time trade union official, Mr Brown. It is not clear to us whether what Mr Brown records in his note is what he and Mr Atkin discussed or what he advised the Claimant. There is enough for us to be satisfied that there was an acknowledgement that the reference was unsatisfactory and the employment could be terminated. We do not accept Mr Atkin was contemplating delaying dismissal pending further capability procedures or necessarily inviting Mrs Wilford to resign although if she had done so it would no doubt have been a solution. On balance, we suspect these notes reflect more what Mr Brown brought to the table as alternative proposals rather than what he was told by Mr Atkin. Nevertheless, Mr Brown contacted Mrs Wilford on or around 18 July and passed on his view of the situation. We find it likely he was pressing for a means of minimising the consequences by way of delay. Mr Wilford emailed Mr Atkin immediately and conveyed his understanding that his wife had been given options within Mr Brown’s advice but that the school was terminating her employment based on the fact it had not received the necessary two satisfactory references. In further correspondence between Mr Brown and the local representative, Mr Husband, it is clear to us that Mr Brown’s position was that the dismissal would be a fair dismissal as the employment was subject to two satisfactory references which she did not have.

4.67 The school’s position was confirmed in writing in a letter to the Claimant dated 20 July 2018. It made clear that her employment was terminated with effect from 31 August 2018 due to the receipt of an unsatisfactory reference. We find the Claimant received this letter on Saturday 21 July.

4.68 There is some understandable confusion on the Claimant’s part about the state of her references 7 months after being appointed and she chased up the situation with Trinity. She learned Mr Page did not send one and could not initially understand how that could be treated as a negative reference.

4.69 Mr Brown subsequently sought to broker the Claimant’s request to resign without success as the dismissal had already been actioned and confirmed in writing.

4.70 On 20 September 2018, the Claimant set out a detailed grievance raising issues of discrimination, victimisation and dismissal. It was not an appeal or a grievance to the employer but a letter of complaint to her union in respect of the support she received at the time and in pursuing matters further. We have been cautious in how we treat this letter insofar as it appears to be based on a decision by the union not to support her claim. We

were, however, taken to its contents in evidence in respect of various issues and had regard to it insofar as it was of assistance in reaching our findings of facts of events as they happened.

5. The Direct discrimination – section 13 Equality Act 2010

Law

5.1 Section s.13 of the 2010 Act 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.***

5.2 By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (**Amnesty International v Ahmed [2009] IRLR 884 EAT**). In this regard, the "because of" and "less favourable" questions are not always apt for separate consideration, particularly where the comparator is hypothetical.

5.3 Where the reason why is not readily apparent, we will turn to s.136 of the Equality Act 2010 which provides: -

> ***(2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

5.4 We applied **Madarassy v Nomura International PLC [2007] IRLR 246** as authority for the proposition that the burden does not shift by proving a difference in treatment and difference in characteristic alone, something more is required but that something more may be drawn from inferences.

Analysis

5.5 There is no dispute the Claimant was dismissed. We are concerned with the reason why that happened and whether a perception that the tumour she had been diagnosed with was cancerous was in any way a material motivation for the decision to dismiss. We reject that for two reasons.

5.6 First, in analysing the facts of this matter and the views of the witnesses questioned on this matter we are entirely satisfied that this simply did not operate on anyone's thought process at all. We noted that all witnesses were questioned on their understanding of the Claimant's diagnosis and the necessary negative thought process that would have had to follow for the claim to succeed on this basis. That includes a fear that a diagnosis of cancer might lead to other adjustments or time off in the future. For what it adds, we did not find anyone gave any consideration to the Claimant's diagnosis. Whilst all witnesses were questioned on this issue and rejected the suggestions put to them, it is only Mr Atkin as the

decision maker that we need to be concerned with. There was no basis in evidence that there had been any wider debate or discussion amongst the senior leadership team during which anyone's view or belief as to the Claimant's surgery was an issue. Nor did we detect any influence at all being exerted over Mr Atkin in the decisions he made. As we accepted as a fact his own rejection of the suggestions put to him that there was a perception of cancer affecting his decision, the entire premise of this particular claim fails to achieve any traction.

5.7 The second more straight forward explanation is that there is a contrary reason why the Claimant's employment was ended which has nothing whatsoever to do with her tumour or any perception of it being cancerous. That is the unsatisfactory reference received by the Claimant's previous school. Our criticism of how this state of affairs was allowed to happen when it did does not undermine our conclusion that this was the genuine and sole reason for the dismissal.

5.8 There has been no actual comparator advanced for us to analyse the reason why and the hypothetical comparison has been largely left for us to wrestle with. However, where we are satisfied of the actual reason, we can make that determination without having to go through the analysis required by s.123 and the concept of a shifting burden. In this case we are satisfied that the unsatisfactory reference is the reason why the Claimant's employment was terminated. However, even if we put that to one side and considered the evidence short of the Respondent's explanation for the reason for dismissal, we are not satisfied that the Claimant has established facts from which we could conclude that a perception of cancer was material to the decision so as to shift the burden of disproving it onto the Respondent.

5.9 The direct discrimination claim necessarily fails.

6. Discrimination arising from a disability under s.15 of the 2010 Act

Law

6.1 Section 15 of the 2010 Act 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***
> >
> > ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

6.2 There is no dispute that the Claimant was treated unfavourably in that she was dismissed. The parties agree the relevant date for that alleged discriminatory decision was 20 July 2018.

6.3 To succeed in this form of discrimination, Mrs Wilford must establish that the something relied on arises in consequence of her disability. She must then establish the causal link either directly or prove facts from which the tribunal could conclude that the

unfavourable treatment arose because of that something, in the sense that it played some material part in the reasoning. We have been referred to *Pnaiser v NHS England [2016] IRLR 170* and *IPC Media Ltd v Millar [2013] IRLR 707* broadly in respect of that causative enquiry. We have been referred *to Dunn v Secretary of State for Justice [2018] EWCA Civ 1998* and *Robinson v DWP [2020] EWCA Civ 1859* on the mental processes.

6.4 A Respondent may then seek to defend the claim either by showing the unfavourable treatment was in no way whatsoever because of the something arising or that it did not have the necessary knowledge or that the treatment was itself justified, being a proportionate means of achieving a legitimate aim. In this case, the Respondent defends the claim on the lack of causal connection to the disability. It does not seek to justify the treatment.

Analysis

6.5 The something arising relied on in this case is sickness absence. There are two episodes. The first episode is of 3 days in mid-April and the second the final episode from 1 June 2018. We have found the reason for that first absence was Mrs Wilford's flare up of Ulcerative colitis. We are satisfied that that absence was therefore "something arising" in consequence of that disability and the Respondent does not dispute this.

6.6 The second absence has more than one reason. It started as a further flare up of the ulcerative colitis but changed to the breast surgery. There is a point in time when that absence ceases to be because of colitis. We found that to be from 11 July when the final fit note from the surgeon ascribes the reason as being the recovery from surgery. Whilst that latter part of the second absence is no longer something arising from the disability, it is of little significance as the earlier bulk of the period of absence does arise in consequence of the disability and, in any event, the operative decision to dismiss had by then already been made.

6.7 As is often the case in claims under s.15, the key question is the reason why the treatment occurs. The "because of" test is essentially the same as that under s.13 albeit the reason has to be the something arising, as opposed to the disability itself.

6.8 In this case, as with the claim under s.13, the answer can be expressed relatively directly. We are not satisfied that the absences were in anyway related to the decision to terminate the Claimant's employment. The reason for that is this. Firstly, there is an episode of disability related sickness absence in April as a result of which the Claimant experienced no adverse consequences at all at the hand of her employer. Secondly, there is a clear line of evidence linking the unsatisfactory reference to the reason for dismissal. Again, we can be rightly critical of the Respondent for the manner in which this state of affairs was allowed to come about in the first place and had to be addressed so late in the day. That, however, is an issue that would only go to the *reasonableness* of its decisions in July. In this claim we are not concerned with reasonableness beyond the extent to which unreasonableness may lead us to doubt the genuineness of a reason. In this case we are satisfied that it was the sole and genuine reason for the decision to dismiss the Claimant and that the decision was in no way affected by the something arising or the disability. The unreasonableness of the employer's actions flows from its failures at the start of the recruitment process and do not undermine our conclusion the negative reference was the genuine reason for dismissal.

6.9 The something arising claim must therefore fail also.

7. The Reasonable Adjustment Claim

Law

7.1 So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the 2010 Act 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.***

7.2 In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn. That is, to identify the provision, criterion or practice ("PCP"); the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered by Mrs Wilford. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. (*Environment Agency v Rowan [2008] IRLR 20 EAT*)

7.3 Whether a disadvantage is substantial or not is to be measured against the statutory definition of more than minor or insignificant. It is a low threshold, but a threshold nonetheless which we must be satisfied is passed.

7.4 Paragraph 20 of part 3 of schedule 8 of the 2010 Act imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. Unless there is, or ought to have been, the required level of knowledge of both elements, the duty to make a reasonable adjustment does not arise**.** (*Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283*)

7.5 Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. As to what amounts to reasonable, the old test as it was in s.18 of the repealed Disability Discrimination Act is now found across aspects of the statutory code. Its essence is to strike a balance between the need for the adjustment, its effectiveness at removing the disadvantage against any competing factors on introducing the adjustment. At the extremes of that balancing process, some measures cost nothing and cause no disruption to the employer's systems or other business interests. They are likely to be reasonable to make even where their utility to removing the disadvantage is limited. At the other extreme, some adjustments may completely remove the disadvantage but are so costly, so disruptive or cause other relevant problems that they may still not be reasonable to implement.

7.6 In assessing the reasonableness of the adjustments, *Linsley v Commissioners for Her Majesty's Revenue and Customs UKEAT/0150/18* is relevant insofar as it reminds us the test of the reasonableness of the adjustment is an objective one and the employer is simply under a duty to make a reasonable adjustment which addresses the disadvantage encountered by the convergence of the disability and the PCP. It is not required to select the best or most

reasonable adjustment from a selection of possible adjustments nor is it required to make the adjustment preferred by the employee.

Analysis

7.7 We start with knowledge of disability. We have found that there was some discussion of the Claimant's health in the previous December when she attended the induction day. We might have reached a conclusion that the discussions about the toilets, even in the context of having colitis, was so matter of fact that it could have fallen outside the scope of something which the employer ought reasonably to be taken to have knowledge of. However, we have not reached this conclusion and we do so principally because we were satisfied that there was a policy/procedural expectation of a pre employment medical questionnaire being conducted. It wasn't and the Respondent ought not benefit from its own failure to comply with a process its policies clearly require. Had it been completed we are satisfied it would have mentioned the condition although, as we return to below, that it was well managed. Coupled with the disclosure that was made, we are therefore satisfied that the Respondent ought reasonably to be taken to have knowledge of the disability from December 2017. This is not a conclusion that the Respondent disputes.

7.8 Turning to the PCP relied on, this is working from classroom L13. The nature of this PCP is apt to fall within the concept of a physical feature and how ever it is defined legally, is a state of affairs arising from the employer's arrangements for the Claimant's performance of her work. It is a PCP or physical feature of the employment. We accept that the convergence of the disability of ulcerative Colitis and the distance between workplace and the nearest toilets is a state of affairs which is capable of putting the Claimant to the potential disadvantage we have described. The knowledge from April meant the duty to make a reasonable adjustment under s.20(3) or (4) was thereafter engaged.

7.9 Turning to knowledge of a disadvantage, we have concluded that there is no basis for the Respondent being reasonably fixed with constructive knowledge of the disadvantage until April 2018 at the time of the first relevant period of absence. In this case, the question of knowledge goes hand in hand with the question of whether there was in fact disadvantage. We are reinforced in reaching the conclusion that the Respondent ought not reasonably to be taken to have knowledge by the fact that there was no disadvantage evidenced in January, February, March and from the absence in April, in the context of a flare up, there still was no evidence of actual disadvantage being encountered. On balance, had there been the initial pre employment medical enquiry we cannot say that it would have resulted in anything more than the Claimant's own case now that her condition was managed and she had not experienced any issues for some time. The question of disadvantage is then reduced to the future prospect of the urgent need to use a toilet from April onwards. We do not seek to diminish the meaning of "disadvantage" by reference to the mere prospect of a situation arising in the future. We accept that as a matter of law that a risk of something occurring in certain circumstances is enough to satisfy the concept of disadvantage. However, the fact the prospect did not materialise goes to two issues we have to assess. The first is that there are no further reference points in the chronology from which the reasonableness of what he employer ought to know or not is to be established. Secondly, it goes to the assessment of

the reasonableness, or suitability, of the measures available in any event and which might now form the basis of adjustments. We therefore conclude, and in any event the Respondent accepts, that there was both a disadvantage and knowledge of a disadvantage from the first flare up in April 2018.

7.10 We found that the Respondent's responses to this level of knowledge was both prompt and effective in addressing the potential disadvantage. First, having been made aware of the situation it provided the Claimant with a key to the disabled toilets. As these were closer to the classroom than the ordinary staff toilets, their existence is something the Claimant must have become aware of during her employment and if she had tried to access the toilet, she would have learned that it was locked. Either way, nothing about their existence had previously prompted her to enquire about obtaining access. Secondly, it put in place options for the Claimant to call upon others, such as teaching assistants including Mrs Atkin or the lab technicians, should she need to leave hear classroom to use the toilet.

7.11 We need to say a little more about that latter measure of calling on others. Firstly, it potentially illustrates a different PCP which has not been relied on. It has nothing to do with the proximity of toilets to the classroom but goes to the fact that students are not expected to be left unsupervised, particularly in a science lab environment during classes. The case has not been put on that basis although we accept the disadvantage of needing "ready access" could engage with system issues as well as physical proximity. In any event, this was something recognised by the employer and addressed at the time. The second issue goes to Mrs Wilford's response to this measure. She rejects it on grounds which seem to us to unreasonably relate to the personalities involved as opposed to the practicality of the measure. We found the option of contacting a lab technician or LSA was a workable solution even involving Mrs Atkin. We are told that a similar solution is in place in the Claimant's new school without problem. The reasons now advanced for it being unworkable at the time were not the practical objections now relied on. At the time they were focused on the personality of the individuals who might provide that support. That is not a reasonable stance to take. Moreover, we are satisfied that those measures worked insofar as there is no evidence of Mrs Wilford experiencing any difficulties of any description during the remainder of her employment nor was there any fear expressed that they would not be sufficient. Moreover, the fact that the adjustment contended for before us goes only to the physical proximity of the classroom leads us to conclude this "system" issue was not actually a source of disadvantage, either at all or because the measures put in place remedied it adequately. In any event, for reasons mentioned above this does not go to the actual PCP of proximity and engages with a different PCP not relied on.

7.12 Sa to the adjustment itself, the claim before us now seeks the Claimant's relocation to a science lab/classroom closer to the toilets. We have set out our observations of the principal of distance having some benefit but do not see that that would remove the disadvantage as every classroom will inevitably have some distance between it and the nearest toilet. We accept that the closer it is the sooner an individual could reach the toilet when experiencing a sudden urgency. However, we have not received any measurable evidence of disadvantage, perhaps understandably so, but it leaves us in a position of having to measure and assess reasonableness against something of a generalisation expressed in the abstract. There is no

evidence that the distance between L13 and either the staff toilets or the disabled toilets was too far to reasonably meet the Claimant's specific needs. In particular, there is no evidence that there was an episode of urgent need which demonstrated that the distance was too far. The Claimant did not think it too far in December when she asked about it on the induction day or after the keys to the disabled toilet were provided.

7.13 As a matter of logic, we are prepared to conclude in the abstract that a closer toilet is better than a distant one and therefore goes some way to mitigate any degree of disadvantage to anyone whatever their disability or health circumstances. Beyond that however, we cannot say what difference was made to the measure of the potential disadvantage by the improvement of having the key to the disabled toilet approximately 45 m from class L13, and the original staff toilets which were approximately 20m further along the corridor. The margins of a matter of metres is not something that the evidence allows us to assess on any reasoned basis. We cannot say that 45m is insufficient. If it is insufficient, how close does it have to be? Would 30m be close enough? Does there have to be a toilet next door? If there was a toilet next door, would that still present problems? All these questions have not been addressed in the evidence save to the extent we are able to conclude that there were no apparent difficulties experienced by the Claimant even after the time of the first flare up in April. The most that can be said, therefore, is that a closer toilet would be better. Such an adjustment would not remove the disadvantage. The degree to which this adjustment would mitigate the disadvantage is therefore marginal. We have to consider that against the extent to which it was reasonable to make that adjustment at that time.

7.14 The classroom location in a school is one of a number of factors which knit together in a complicated way to form the annual timetabling. This is an extremely complicated processes of drawing together variable teachers, variable subjects, variable combinations of students, fixed use and flexible use estate (the science classes being one which would typically draw on the fixed estate). Changing one element could unpick the entire timetable. The Claimant recognised this and her evidence was that a different classroom could have been organised from the next academic year. We agree but we are not satisfied the circumstances warranted a mid-term variation although such a change would not be impossible. Mrs Wilford's expectation was that the adjustment could be made during the next annual review of timetable over the summer to begin in September 2018. That seems to us to be a recognition that the balance to be struck between the Claimant's needs for the adjustment and the disruption to the school of an immediate change tipped against the adjustment being a reasonable one to make at that time.

7.15 The adjustment that was in fact made was therefore a reasonable one to make to address the potential disadvantage and appears to have been successful. The possibility of a classroom move is something which we conclude would potentially have amounted to a further reasonable adjustment to make in the future, but we reject there was a failure to make a reasonable adjustment in the circumstances of this case for two reasons. Firstly, a reasonable adjustment was already in place and for as long as that continued to meet the demands of the particular disadvantage it meant the duty to make an adjustment was reasonably satisfied. Secondly, by the time of the new academic year when the adjustment

could have been implemented without any cost or disruption the employment had already ended. It follows that we cannot say that the Respondent failed to make that reasonable adjustment.

7.16 Finally, this is the only claim which is arguably out of time. In cases based on a failure to do something, the time starts to run under s.123 of the 2010 Act in accordance with subsections (3)(b) and (4). It is in some respects an artificial exercise where the concept of the adjustment in question before us was not raised or contemplated at the time but it can still be applied as it is the duty of the employer to make a reasonable adjustment. However, the circumstances in this case arise not from an employer doing nothing, but from an employer taking different steps. There is therefore a potential for considering both the reasonable period in which the actual adjustment could have been made and the potential for the steps being taken by the employer as acts which are inconsistent with making that particular adjustment.

7.17 We have concluded that the fact that the adjustment actually made in April 2018 appeared to satisfy the situation for all concerned and no other identified adjustments were left in abeyance means what did happen is inconsistent with any other adjustments being made. The time limit begins to run from then. At the latest that is the end of April 2018. The necessary early conciliation to commence the claim process therefore had to start by the end of July. It actually started on 14 October, some 2½ month's later. That is not the longest delay we have ever seen but is significant at almost double the statutory time limit and more than merely marginal. The extent of delay is only one factor and we must consider all relevant factors. However, we have heard next to nothing on the time limit issue in submissions and the evidence does not address it directly. The Claimant has not explained why the claim was not presented in time, particularly as there clearly was consideration of the situation with the trade union's involvement. The evidence does not address the various factors that might typically arise in assessing the justice and equity of extending time. On the one hand, it may be said that the parties have been able to determine the issues before us. On the other hand, taking that approach in isolation would undermine the time limit and generate a different test to that which exists in law. The burden remains with the Claimant to persuade us to vary the default position established in the Act and to exercise the discretion given by it. She has not done so. The Respondent has not supressed information giving rise to the knowledge of a potential claim, the Claimant has been supported by her trade union. She has not been under a legal disability. The effect on cogency of evidence is neutral. On that basis, we decline to extend the time limit.

7.18 Alternatively, however, it is arguable that making the adjustments that were made is not in fact inconsistent with not making the one now contended for. If that is the correct approach the legal analysis is different, but the end result is no better for the Claimant. On that basis we consider that the claim is in fact in time under s.123(4)(b) by virtue of our finding on liability that a reasonable period in which to make the adjustment had not yet expired. This is not just a case of the effluxion of a period of time. We concluded it was not reasonable to make the adjustment in April or at any time during the remainder of that term, but it would become reasonable to make it during the annual timetabling process. If and to the extent that that delayed point in time can fall within s.123(4), it would seem to lead to the unusual

consequence that the claim was not out of time. However, even if such a conclusion is legally correct, it is practically pyrrhic as although it would engage jurisdiction, it is only engaged because we have otherwise rejected the claim on the basis that it had ended before the time had expired within which it was reasonable for it to be made and there was no failure on the part of the employer to make a reasonable adjustment.

7.19 The claim of failure to make a reasonable adjustment therefore fails.

Employment Judge Clark

25 May 2021