EMPLOYMENT TRIBUNALS

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Date 04 November 2014

Case Number: 3202365/2013

Claimant		**Respondent**
Miss J Dippenaar	**v**	**Bethnal Green And Shoreditch Education Trust (Bethnal Green Academy)**

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment is enclosed. There is important information in the booklet 'The Judgment' which you should read. The booklet can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to reconsider a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits**. An application for a reconsideration must be made within 14 days of the date the decision was sent to you. An application to *appeal* must generally be made within 42 days of the date the decision was sent to you; but there are exceptions: see the booklet.

The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these

reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at –

www.justice.gov.uk/tribunals/employment-appeals

An appeal form can be obtained from the Employment Appeal Tribunal at: Employment Appeal Tribunal, Second Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,

MRS BC ALLEYNE-MIKE
For the Tribunal Office

Case Numbers: 3202365/2013

EMPLOYMENT TRIBUNALS

Claimant:	Miss Jeanne Dippenaar
Respondents:	Bethnal Green & Shoreditch Educational Trust (Bethnal Green Acadamy)
Heard at:	East London Hearing Centre
On:	1, 2, 3, 4 July 2014 and 16 September 2014 and 17 September 2014 (in chambers)
Before:	Employment Judge Tobin
Members:	Mrs J M Owen Mr D Kendall
Representation	
Claimant:	Mr A Engle and Mr R Engle (Solicitors)
Respondent:	Mr J Davies (Counsel)

RESERVED JUDGMENT

1. It is the unanimous decision of the employment tribunal that the claimant was (constructively) unfairly dismissed.

2. The tribunal unanimously finds that the claimant was indirectly discriminated against in respect of her age.

3. The claimant was not victimised by the respondent. This was a unanimous decision and this claim is accordingly dismissed.

4. The tribunal unanimously finds that the claimant was dismissed in breach of contract.

5. The claimant's breach of contract claim in respect of the "Formal Agreement", i.e. the compromise agreement does not succeed and is hereby dismissed. This is a unanimous decision.

6. The case will be listed for a remedy hearing and the tribunal makes further case preparation orders below.

REASONS

The case

1. This case concerned claims of unfair dismissal, age discrimination, victimisation and breach of contract.

2. An agreed list of issues was prepared by the representatives. The list of issues was reviewed by the Employment Judge on the first day of the hearing. The agreed issues to be determined were as follows:

3. List of issues

A. CONSTRUCTIVE UNFAIR DISMISSAL

1. Did the respondent breach the claimant's contract of employment by allegedly:

   a) refusing to implement the Formal Contract as such term is defined in paragraph 30 of the Details of Claim and failing to comply with its obligations there under including the giving of a reasonable reference in a compromise agreement (claimed in paragraph 41.1 of Details of Claim); or

   b) the breaking down of the personal relationship between the Principal of the Academy and the claimant including refusing to provide a reference or recommending her for a similar job and refusing to give reasons for failing to provide a revised reference (paragraph 41.2); or

   c) the unfair harassment (or treatment) of the claimant by her senior line manager Tamsin Constable in relation to the teaching capability review (paragraph 41.3); or

   d) breaching the Capability Procedure for Teachers as set out in paragraphs 24, 25 and 26 of the Details of Claim (paragraph 41.4); or

   e) discriminating against claimant due to her age as set out in paragraphs 44 to 48 of the Details of Claim (paragraph 41.5); or

   f) acting in a manner that was calculated or likely to damage the relationship of trust and confidence that should exist between employer and employee including requiring the claimant to continue to undergo capability assessments in circumstances where the Academy Principal had already decided that the claimant was not suitable to remain (paragraph 41.6)?

2. In relation to paragraph 1(f), did the respondent have reasonable and proper cause for such conduct?

3. Did any of the matters in paragraph 1 above (even alone or in combination as a "last straw") give rise to a repudiatory breach of contract?

4. If so, did the claimant resign in response to such breach on 13 May 2013?

5. Should compensation be reduced under section 123 of the Employment Rights Act 1996 to reflect the chance that the claimant would have been fairly dismissed at the date of her resignation or at some point in the future in any event due to her inadequate teaching skills as observed during lesson observations which took place on 7 and 14 February 2013?

6. Did the claimant contribute to her constructive dismissal by having inadequate teaching skills as observed during lesson observations which took place on 7 and 14 February 2013?

7. Has the claimant mitigated her loss?

B. CLAIMS UNDER THE EQUALITY ACT 2010

Age Discrimination

8. Did the respondents contrary to section 19 Equality Act 2010 treat the claimant less favourably because she belonged to the age-group 37 to 65 ("claimant's age group") as opposed to the 22 to 36 age group by subjecting her to a capability procedure and the manner in which it was conducted?

9. Did the respondent have a practice of replacing more experienced teachers with less experienced teachers [the PCP]? If so, did:

   a) the respondent apply, or would have applied, the PCP to persons not of the claimant's age group?
   b) the PCP put, or would have put, persons of the claimant's age (39) and the claimant's age group at a particular disadvantage when compared with persons not of the claimant's age group?
   c) The PCP put, or would have put, the claimant at that disadvantage.

Victimisation

10. Did the claimant do a protected act within the meaning of s27(2) Equality Act 2010 as set out at paragraph 54 of the Details of Claim?

11. The alleged protected act is the claimant's solicitor letter to the respondent's Principal dated 7 May 2013.

12. Did the respondent subject the claimant to an unfair reference because she had done the protected act to which paragraph 12 above refers contrary to s27 Equality Act 2010?

Remedy

13. If so, did the claimant suffer injury to her feelings?

14. What financial losses to the claimant suffer as a result of such discrimination (if any)?

15. Should any damages for financial loss awarded to the claimant be reduced to reflect the fact that she would probably have been dismissed in any event absent any discriminatory conduct (see *Chagger v Abbey National plc [2010] ICR 397*)?

C. BREACH OF CONTRACT

16. Did the claimant and the respondent concluded a legally binding contract between 20 March 2013 and 25 March 2013 (see page 16 and 17 of Details of Claim)?

17. Was the respondent under a contractually binding obligation to provide a "good" or agreed reference (see page 19 of the Details of Claim)?

The relevant law

4. S95(1) Employment Rights Act 1996 provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

> *"(c) the employee terminates the contract under which he [sic] is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employee is conduct."*

5. An employee may only terminate her contract of employment without notice if the employer has committed a fundamental breach of contract. According to Lord Denning MR:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself [sic] as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. Western Excavating (ECC) Ltd v Sharp [1978] ICR 221."*

6. *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84 (EAT)* held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

7. Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> *"To constitute a breach of this implied term is not necessarily to showed that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

8. *Western Excavating* established that a serious breach is required. In *Hilton v Shiner [2001] IRLR 727* the Employment Appeals Tribunal confirmed that the employer's conduct must be without reasonable and proper cause. For instance, instigating disciplinary action against an employee would not per se be a breach of mutual trust and confidence if there appeared to be good grounds for doing so. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitute a repudiation – a tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

9. If an employee contends that a particular matter amounted to a "last straw" entitling her to resign, the "last straw" must not be entirely innocuous. It need not be in itself a breach of contract, but it must contribute to the series of events alleged to amount to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

10. We have considered whether the claimant has established in the respects alleged by her the breach of the implied term of mutual trust and confidence. We have been careful to analyse not only the individual matters relied upon by the claimant but also its cumulative effect.

11. Under s25(1) Equality Act 2010 ("EqA") "age discrimination" is defined as direct discrimination because of age and indirect discrimination where the relevant protected characteristic is age. S5(1) EqA states that in relation to the protected characteristic of age:

> *(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.*
>
> *(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.*

12. S13(1) EqA precludes direct discrimination:

> *"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."*

13. However, the protected characteristic of age is unique in permitting direct discrimination if this can be justified. S13(2):

> *"If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

14. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an

appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

15. In *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others 2010 IRLR 136*, Supreme Court ruled that direct and indirect discrimination are mutually exclusive. There cannot be both. If direct discrimination and indirect discrimination is raised in the alternative, it is not open to an employment tribunal to find that the same factual matrix give rise to both types of discrimination simultaneously.

16. The concept of direct discrimination is relatively clear. However the idea behind indirect discrimination is that a provision that may at first glance appear neutral as to age may have hidden discriminatory consequences. So, a term that applies to everyone would appear, on the face of it, not to be unlawfully discriminatory. However, if that term disadvantages individuals with a particular protected characteristic then it may be termed "indirectly discriminatory". S19 of EqA states:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criteria or practice which is discriminatory in relation to the relevant protected characteristics of B's*
>
> *(2) For the purpose of subsection (1), a provision, criteria or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic;*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons to whom B does not share it;*
> *(c) it puts, or would put, B at that disadvantaged; and*
> *(d) A cannot show it is a proportionate means of achieving a legitimate aim.*

17. Therefore, under indirect discrimination, the claimant needs to establish:

- what the "provision, criteria or practice" is;
- what the "pool" of employees to be used as comparators with the claimant is; and
- whether there is evidence of a "particular disadvantage" (which the employee has or could suffer).

18. The parties have identified the provision, criterion or practice (PCP) at paragraph 9 of the list of issues, which is the alleged practice of replacing more experienced teachers with less experienced teachers.

19. In order to establish whether the claimant has suffered a "particular disadvantage" (see s19(2)(b) EqA above) compared to others, the tribunal will need to determine what the group or pool is within which to make the comparison. S23(1) EqA states that the pool must consist of people who circumstances are the same, or at least not materially different from the claimant's. The parties have identified 2 pools for comparison at paragraph 8 of the list of issues. These are teachers aged 37 to 65 compared with teachers aged 22 to 36.

20. Victimisation under s27(1) EqA is defined as follows:

> *A person (A) discriminates against another (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*

21. A "protected act" includes bringing proceedings under the EqA, as well as making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only to treatment of the victim and establishing causation that matters; it is also possible to *infer* from the employer's conduct that there has been victimisation.

22. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

23. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

> *b. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent has committed unlawful discrimination?*
>
> *c. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?*

24. The Court of Appeal in *Igen* emphasised the importance of *could* in (a) above. The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the different of age and not merely two unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have firm evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847.*

25. In respect of the breach of contract claim surrounding the compromise agreement, the parties confirmed to the tribunal that they waved the without prejudice privilege attached to negotiations over the compromise agreement and the provision of an agreed reference. The contractual jurisdiction of the employment tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The employment tribunal may hear a contract claim brought by an employee if the claim can be one that a court in England would have jurisdiction to hear and determine and must arise or be outstanding on the termination of the employment of the employee who seeks damages for breach of a contract of employment or any other contract connected with employment. Damages for

breach of contract is capped at £25,000 in the employment tribunal: Article 10 of the aforementioned Order

The witness evidence

26. Before we explain our findings of fact, we (i.e. the tribunal) feel that it is appropriate to comment upon the witness evidence.

27. We heard evidence from the claimant. Ms Kristy Harrison confirmed her witness statement although she was not cross-examined and there were no questions from the tribunal. Mrs Elaine Aird-Shariff, who was the claimant's previous manager gave evidence. We heard from Mrs Barbara Scott. Mr Richard Engel (one of the claimant's solicitors) gave evidence in respect of the statistical breakdown of staff levers and entrants. The claimant asked us to read Catherine Gledhill's statement as there was no cross-examination on her statement. We then heard from the respondent's witnesses as follows: Ms Bridget Holland, Miss Tamsin Constable and Mr Mark Keary. The key witnesses in this case where the claimant, Miss Constable and Mr Keary.

28. We found the claimant to be a convincing witness. We felt that her evidence was truthful and that she did not "over-egg" any aspect of it. We accepted her evidence as clear and genuine. The claimant became upset at two or three points during her evidence and we felt that this was a genuine sign of discomfort, and perhaps even distress, recounting what she regarded to be a very unhappy episode. We found the claimant to be an honest and reliable witness.

29. In all conflicts of evidence we believed the account of the claimant as opposed to that of Miss Constable and Mr Keary.

30. We found Miss Constable to be an unimpressive witness. We have previously commented on Miss Constable's evidence so we do not need to say much further save as to the following. Miss Constable gave what we regarded to be "stock answers" in respect to many questions. The claimant's solicitor took Ms Constable through her assessment process in considerable detail. Much of the cross-examination was irrelevant, although not overbearing. Notwithstanding that the assessments were undertaken in late 2012 and early 2013, we were struck by Miss Constable's vague answers and her inability to explain with any precision the details of her negative assessments of the claimant. We did not find any evidence that there was any animosity between Miss Constable and the claimant.

31. Mr Keary displayed a surprisingly hostile and dismissive attitude towards the claimant. When a panel member asked Mr Keary about his management style, he answered by saying that this was "variable according to circumstances". We regarded Mr Keary's management style as volatile. When he answered questions about the reference he was asked to give the claimant he displayed a surprisingly hostile, perhaps a vindictive tone, for example his tone in referring to the claimant as "your client" during cross-examination. This is not a case in which the employer is justified in displaying an angry tone to his former employee. He was reluctant to accept the claimant's motive in assisting the school when she acted up to cover for more senior staff on several occasions. He said that if the claimant worked hard she might become a "competent teacher". This is demeaning and unjustifiable having heard all of the evidence and considered the various assessments contained in the hearing bundle.

32. We were not impressed in the manner that Mr Keary spoke about the claimant's challenged to Mr Justin Smith (Assistant Deputy Head Teacher) when she was not reappointed for the Head of Year 9 role. Mr Keary described claimant as "untrustworthy". The claimant had pressed for feedback following her unsuccessful application to be reappointed to a job that she had been undertaking for two years. Mr Keary described the claimant as argumentative and confrontational. We observed the claimant's demeanour in a stressful employment tribunal hearing and we could not detect an argumentative or confrontational manner. Indeed, our assessment was to the contrary. Our assessment appears to be borne out by the claimant's response to her assessments from September 2012 onwards, where she was slow to challenge Miss Constable, through to the breakdown of the negotiations over her draft reference. In any event, the claimant had undertaken this job for two years and no doubt she was concerned why it was adjudged by the departing Mr Smith that she was not suitable to continue in this role. The panel expects managers to be able to justify managerial decision in a professional, calm and considered manner. Mr Keary did not provide evidence of untrustworthiness; he provided, at most, evidence of a challenging approach and we formed our assessment that Mr Keary did not like to be challenged nor did he like his subordinates to be challenged.

33. Crucially, in response to a number of questions about the meeting of 20 March 2013, Mr Keary emphasized that he could not remember what exactly occurred at this meeting. He sought to distance himself from the respondent's own records, provided by Ms Holland's notes, and suggested Ms Holland's account may not be too reliable. Nevertheless, he resolutely rejected any version put forward by the claimant. This was evasive and only undermined his credibility further.

Our findings of facts

34. We set out the following findings of fact, which we determined were relevant to determining whether or not the claimant was constructively dismissed and/or discriminated against on the grounds of her age and/or victimised and/or dismissed in breach of contract. We have not decided upon all of the points of dispute between the parties, merely those that we regard as relevant to determining the central issues of this case as identified above. When determining certain findings of fact we have set out why we have made these determinations, where this is not obvious and where we consider this appropriate.

35. The claimant commenced employment with the respondent on 1 September 2006. She was employed as a Physical Education Teacher.

36. From September 2006 to September 2012 the claimant received no inadequate or unsatisfactory reports or assessments. We accept the claimant's evidence supported by some assessments, which show that the claimant's performance ranged from outstanding to never less than satisfactory. Indeed, Mrs Aird-Shariff, who was the claimant's line manager for four years up to July 2012 and performed most of the claimant's lesson observations, ascribed the claimant's reports as all satisfactory, mostly good and some were excellent.

37. In October 2006 the claimant acted up as the Head of the PE Department after the sudden departure of a colleague. In September 2008 she became the Assistant Head of Year 9 and the following year she became Head of Year 9. In September 2011 the claimant re-applied for the role as Head of Year 9 but was not accepted. The claimant pressed for feedback on why her application had not been successful and was

disillusioned by the lack of substance to the explanation for her failure. This was after two years of effectively doing the job. It was at this point that the claimant resolved to revert to being a teacher only and not undertake additional managerial responsibilities. We accept the claimant's evidence on these points.

38. Miss Constable commenced employment with the respondent as Head of Faculty/Director of Learning on 1 September 2012 together with Mr Stewart Brown, who was the new Head of PE. A month later Miss Constable formally observed the claimant in a lesson unaccompanied. The claimant was assessed with 16 marks in box 3 (requires improvement) and 5 marks in box 4 (inadequate). This appraisal conducted by Miss Constable appeared to be at significant variance with those previously recorded. Box 1 was designated as "outstanding"; box 2 equated to "good"; box 3 equated to "requires improvement"; and box 4 was marked as "inadequate". Following OFSTED changes in September 2012 the four-grade assessment categories had been changed: box 3 only had been re-designated and had moved from "satisfactory" to "requires improvement".

39. A further observation took place on 22 November 2012. Miss Constable was accompanied by Ms Touheed Piccoli, Head of Teaching and Learning. This observation scored the claimant with 5 box 2s (good), 12 box 3s (requires improvement) and significantly no box 4s. On 26 November 2012 Miss Constable wrote to the claimant saying "due to having had two consecutive observations where your teaching requires improvements, I have arranged for Stewart [Brown] to be supporting you in order for your teaching to improve. Stuarts support will be in a variety of forms will involve joint planning, formative feedback from drop ins and learning walks, peer observation and any other support that you can suggest".

40. The claimant met with Mr Brown on 27 November 2012. She then supplied Mr Brown with copies of her lesson plans weekly on the Friday and then she met with him, usually on Tuesdays, to discuss the plans. Nothing further happened. There does not appear to be any documentary evidence suggesting that drop-ins, learning walks, peer observation or other support promised by Miss Constable was ever provided by Mr Brown. We accept the claimant's account that Mr Brown's engagement with her was cursory. This pattern of engagement continued until 20 March 2013. There is no evidence of any complaint from Mr Brown about any poor performance of the claimant. The claimant did however criticised Mr Brown for a lack of engagement and support. From the tribunal's review of Mr Brown's notes of the support and intervention given after Christmas 2012, it would appear that there was some engagement between Mr Brown and the claimant and that Mr Brown made suggestions to the claimant to improve her teaching and the claimant appeared to be willing, indeed she sought guidance, on how to improve upon the purported deficiencies highlighted by Miss Constable. We find that the claimant was receptive and engaging with the respondent's performance initiatives.

41. The next observations where on 7 February 2013 and a week later, on 14 February 2013. Miss Constable's narrow approach is set out in her witness statement at paragraph 10: "on 7 February 2013 Alison Brannick, then Vice Principal, and I observed Ms Dippenaar's lesson which was graded as "inadequate". This was followed by a revisit to the same lesson a week later on 14 February 2013. The outcome was the same". Miss Constable refers to the lesson observation forms contained in the hearing bundle but her statement provides no explanation of where the claimant was falling short.

42. The claimant was scored 6 box 3s and 3 box 4s for 7 February 2013 assessment and exactly the same score for the assessment a week later with the same marks in the

same boxes. The comments differed between assessments. They were not expansive or revealing and none of the comments read as positive. We suspect that Miss Constable did not anticipate the need to justify her assessments; nevertheless as a consequence she was subject to detailed cross-examination from the claimant's solicitor. It was remarkable to us that there was so little substance and concrete example of the claimant's purported poor performance or inadequacies.

43. Astonishingly, Miss Constable's observations/assessment were not shared with the claimant. Miss Constable said that she gave verbal feedback to the claimant within 24 hours. Miss Constable did not make a note of that verbal feedback. If the matter was discussed with the claimant it was not discussed in any open and meaningful manner because the claimant remained unsure of what she needed to do to satisfy Miss Constable. We find the claimant entirely genuine in her confusion – she did not know where she fell short and how she might change or improve her performance so as to satisfy Miss Constable's performance scrutiny. The claimant spoke to friends and colleagues and they could not see from the reviews what was wrong with her method nor what Miss Constable found so objectionable.

44. Miss Constable wrote to the claimant on 25 February 2013. She confirmed the key areas requiring improvement were:

- questioning for and of assessment to support students' progress
- Appropriate differentiation to meet the needs of all learners.

She said that as a result, students make inadequate progress over time. This is an important letter because it records the respondent's concerns in a formal manner. We spent some time trying to understand what these identified points meant and, with the benefit of counsel's input, the witness statements and evidence and the documents we also could not really understand where the claimant was supposed to be falling short with any precision. We did not understand how the students could be said not to be making adequate progress because there seemed to be no objective measurement of this either. Ultimately, this appeared to the tribunal to be a case where Miss Constable was saying to the claimant that she was not up to the job based upon a series of arbitrary snapshot visits that had little explanation or apparent justification.

45. Miss Constable set out her decision to refer the claimant to a further *informal* capability process, although seemingly a more formal *informal* capability process. The letter said "please be assured that I genuinely hope that actions under the formal Capability Procedure will not be necessary, and will assist you in any way that I reasonably can to help support you to make improvement that is required in relation to your performance". We do not believe her. By raising the progression to formal capability procedure in such a manner, we regard this as an implicit threat. We so find particularly because three days later Miss Constable wrote to Ms Parker instructing her to put a copy of the formal capability procedure in the claimant's pigeonhole.

46. If an employee was assessed to be deficient in a structured observation on four separate occasions then we are puzzled why she was not referred through a properly applied formal capability process. A formal capability process should provide the necessary structure for deficient performance to be addressed. Miss Constable sought to circumvent a properly applied process and this is highly suspicious.

47. This letter was also copied to Liz Parker and Bridget Holland (both of human resources), Alison Brannick and Mark Karey. This was unnecessary for an informal process and we are satisfied that this reference to whom Miss Constable shared the letter was to give the claimant an indication that the pressure was on her and that she was under close scrutiny from others. We are also satisfied that Miss Constable was demonstrating to her colleagues, and Mr Keary (the Principal) in particular, that she was on the claimant's case.

48. The claimant's response to Miss Constable's letter of 25 February 2013 was to seek further assistance from Mr Brown. He provided no real help and there were no other experience qualified PE teachers in the Department. The claimant therefore asked Ms Tessa Blair (Assistant Principal in charge of CPD) for help. Ms Blair observed two lessons and, once she made allowances for the claimant's worry and tensed state, said the claimant's teaching was better and with a few adjustments could be good. Ms Blair confirmed arrangements for a "formative observation" on the morning of 28 February 2013. The claimant was to film a lesson on 4 March 2013 and sent her an electronic version. Ms Blair and the claimant were then to meet on 7 March 2013 to discuss the lesson. A "physical" observation would then follow the following week. Miss Constable was sent a copy of this email and invited to view the film and meet with both in the ensuing discussion.

49. Four hours after receiving this email Miss Constable wrote to the claimant setting a "formal lesson observation" for 6 March 2013. Which would be then be followed by one further lesson observation, which was said, must take place before 22 March 2013. We cannot account for this a response other them to conclude that Miss Constable did not want a record of any other formal observations on the claimant. She sought to deliberately evade Ms Blair's assistance and input.

50. The claimant worked on her lesson planning and met with Mr Brown the day before her observation, We accept the claimant's account that Mr Brown found the lesson planning to be adequate.

51. On 6 March 2013 observation Miss Constable was accompanied by Ms Brannick. At this observation she scored the claimant with 3 box 2s and 7 box 3s. Significantly she did not score the claimant any box 4. The claimant had shown improvements, even by Miss Constable's standards, nevertheless Miss Constable wrote to her saying "just clarify, after our next formal observation it could move to an extended period of lesson observations informally or it could move to the formal stage." Miss Constable indicated that the lesson planning was not satisfactory and she criticised the claimant not providing adequate instructions for "gifted and talented" students – of which there were none in the class. We conclude that whatever the claimant did or did not do, Miss Constable was going to find inadequacies. We are convinced that Miss Constable was never going to treat the claimant fairly. She was determined to use a performance appraisal process as a means of dislodging the claimant.

52. On 11 March 2013 the claimant wrote to Miss Constable asking her to "make time before her next lesson observation to go through my lesson plan, for that observation in order for me to get an improved grading". Miss Constable dismissed this plea saying "unfortunately I cannot be involved in this due to being involved in the observation process. Please refer to Stewart for support". This email was copied to Mr Brown, Ms Piccoli and Ms Brannick. The claimant was engaged in an informal assessment process and she was asking for help. Miss Constable's rejection of the claimant's plea was nothing

other than an attempt to keep the pressure on the claimant. If she was genuinely concerned with improving the performance of a more junior member of staff then she would have assisted her, particularly as Mr Brown could not detect the purported problems with the claimant's lesson plans prior to the previous observation. There was no evidence that the individuals copied into Miss Constable's email offered any help and we are not satisfied that any assistance was offered from any of the respondent's more senior members of staff.

53. The claimant took the lead in the email chain that followed. This demonstrates Miss Constable's lack of engagement with the claimant, had she genuinely sought improvement from an underperforming colleague then she should have met with or at least provided her with very detailed, meaningful assessment points. Miss Constable did highlight two areas but her performance as an assessor, in this instance and throughout this whole process, appears to the panel to be worryingly inadequate.

54. In contrast to Miss Constable's defective assessment approach, there was an objective standard to measure the claimant's capability as a teacher. Students were assessed every six weeks and throughout the academic year 2012/13 there was nothing adverse in how the claimant's students had performed.

55. This finally convinced the claimant that she was not wanted in the respondent's department. The claimant had 12 years service and was on the highest grade for a teacher of her status. A newly qualified teacher in PE would earn around half of the claimant's salary and a Teach First trainee even less. The claimant said that she could think of no other reason for this treatment of her but for her expense as a long serving teacher.

56. On 11 March 2013 the claimant went off work on sick leave with stress. She subsequently asked for a meeting with the Principal, Mr Keary. This meeting took place on 20 March 2013. The claimant had prepared a note for this meeting to act as an aide memoir. This note makes clear that the claimant was asking for a breathing space in order to find another job. Effectively she saw the writing on the wall and was prepared to move on if she could rely upon a good training record and reference. If this were a marginal teacher who was having problems improving then surely that would be enough for the respondent. However this was not good enough for Mr Keary. Mr Keary seized upon the claimant's offer to leave. As a device to bring this about quickly he threatened that the capability process would be made formal. We accept the claimant's evidence that Mr Keary said that he was in charge of decisions on capability and that he said, as a threat, words to the effect that "sometimes it is better to get off the wave before it breaks and one is thrown up on the beach".

57. We prefer the evidence of the claimant that Mr Keary pressed her to leave at the end of the spring term, which was at the end of April and that Mr Keary introduced the discussions around a compromise agreement. The claimant was to be offered a purported tax-free payment equivalent to 3 months salary, which equated to her notice period.

58. We have no doubt that the claimant was unsure of the process she was in, convinced she would not fare favourably however the respondent chose to apply a capability process and that such a settlement would offer her a way to resume her teaching career in a more conducive environment. Consequently, she accepted the deal that Mr Keary proposed. However, termination discussions and compromise agreements are normally subject to contract, which means that nothing becomes binding until it is

translated into a formal compromise or settlement agreement. Although the money and the termination date had been agreed at the meeting of 20 March 2013 the substance of a reference had not and the claimant was aware that she would need to seek advice from a National Union of Teachers representative and sign a formal agreement before the deal was concluded.

59. Notwithstanding the claimant had said her goodbyes to colleagues and pupils before the Easter holidays and that she had been taken off payroll and subsequently received a P45 (which stated her date of leaving as 30 April 2013) a concluded agreement did not exist. She was not dismissed and her resignation depended upon a concluded agreement existing. The original deal and the ensuing compromise agreement were dependent, or conditional, upon an agreed reference and flowing from this, an obligation to answer any enquiries in a manner consistent with the agreed reference. The claimant maintained that she was entitled to a "good" and "fair" reference. She equated fair with good as the reference was to reflect the totality of her teaching experience and she did not accept that she was a poor teacher.

60. The claimant was given until 22 March 2013 to accept the compromise agreement and throughout the subsequent discussions Ms Holland, Ms Brannick and to a lesser extent Ms Bashar (all human resources advisers) were careful to keep the pressure on the claimant in respect of impending observations and recourse to the capability process.

61. The claimant first saw the proposed reference on 28 March 2013. This was not acceptable to her. The claimant then sent a revised reference to the respondent, which Mr Keary refused to accept. In all five versions of a reference were drafted. The claimant's NUT representatives made little progress towards securing an agreed reference with the respondent so the claimant instructed her current solicitors, who were soon to be linked to her by marriage.

62. The claimant's solicitor wrote to Mr Keary on 7 May 2013. He said that he had been asked to act for the claimant in connection with her leaving the respondent. He asked for Mr Keary to review the reference again. He said that could be no argument over the factual matters and that what was an issue was the opinion which the Principal would give about the claimant which was important in recommending her for future employment. He warned Mr Keary that there would be consequences of any failure to conclude an agreed reference.

63. Mr Keary took this as a threat and dug in his heels. He said "I am not prepared to make assertions regarding Ms Dippenaar's performance that cannot be substantiated by the facts or express opinions about her that I do not hold". He replied that his stance on this matter remained unchanged and that if the claimant did not sign the compromise agreement she was to return to work on 13 May 2013. He said that any absence beyond that date would be treated as unauthorised and subject to the relevant procedure. He wrote direct to the claimant in broadly similar terms. He also told the claimant that in the absence of a concluded agreement she was to liaise with Miss Constable regarding return to work arrangements. This was effectively saying to the claimant: either accept the deal on offer or return to work to face the consequences. We are in no doubt that the consequences would have been a resumption in either formal or quasi-formal performance procedures and that such procedures would ultimately have led to the claimant's dismissal.

64. The claimant's solicitor responded initially on 10 May 2013 informing Mr Keary that the claimant would not be returning to college on 13 May 2013 and that he would be writing to him formally shortly. The formal letter was sent to Mr Keary on 13 May 2013 notifying him that the claimant had treated her contract of employment as terminated and that she would be claiming constructive dismissal, age discrimination and breach of contract. The alleged repudiatory breaches were described in the Details of Claims as follows:

a. the refusal of the respondent to implement the compromise agreement (described as the Formal Contract) and comply with the obligations thereunder; and

b. the breakdown of the claimant's relationship with the Principal and in particular the Principal's refusal of a "reasonable" reference (with the implication that he could not recommend the claimant for a job she was currently doing for the Academy) and his refusal to explain his reasons; and

c. the unfair harassment over the claimant's teaching capability review by her senior manager [i.e. Miss Constable] and a lack of support she was given to improve; and

d. breaches of the Schools Capability Procedure for Teachers; and

e. age discrimination [which was the first time that age discrimination was raised]; and

f. breach of the implied duty of trust and confidence including (without limitation) the knowledge that any return to work would require the claimant to undergo further capability assessment in circumstances where the person making the final decision, namely, the Principal, had already decided that the claimant was not suitable to remain at the respondent's Academy.

65. Notwithstanding that Mr Keary corresponded with the claimant's solicitor previously he wrote direct to the claimant acknowledging the letter from her solicitor whom he said "claims to be instructed by you". Mr Keary said that he was advised that any termination of employment should have come directly from the claimant and not a third party "purporting to act on [her] behalf". He requested confirmation if it was the claimant's intention to terminate her contract with the respondent in such circumstances and that until he received such confirmation he would treat her absence as unauthorised and subject to further procedures. If Mr Keary received such advice, then it was bad advice in the circumstances, so bad that it was foolish for him to rely upon it. In the circumstances of this case, he was not in a position to dictate how the claimant should proffer her resignation and notice of constructive dismissal. She had clearly engaged solicitors; a solicitor's letter bringing the claimant's employment to an end was entirely predictable. It was mischievous not to accept it and a further example of Mr Keary's awkwardness. Indeed, in such circumstances Mr Keary did not have the option to refuse to accept the resignation relayed by the claimant's solicitor. Nevertheless, the claimant confirmed that she had treated her employment contract as terminated by unfair constructive dismissal as at 13 May 2013.

66. The claimant's position was that she wanted a reference that would not make it difficult for her to obtain another permanent job. Given that her previous performance was regarded as no less than satisfactory and even with the vague concerns expressed by Miss Constable, this should have been a relatively straightforward task. Mr Keary told the employment tribunal that he did not want to say anything that he was not entirely comfortable with and could not back up if called upon. We are puzzled by this assertion because seemingly Mr Keary had no direct knowledge of performance concerns about the claimant and formal performance improvement proceedings had not been instigated let alone completed. We are satisfied that there was a degree of vindictiveness demonstrated by Mr Keary in respect of the claimant's reference. This is demonstrated when ultimately Mr Keary confirmed that he was prepared to vary his final reference to include the most important aspect that the claimant required namely that she could be recommended for future employment. However, initially this was conditional on the claimant agreeing that she would receive no financial compensation and then that the claimant's financial compensation should be reduced from the £11,250 previously agreed to £5,000. The claimant believed that Mr Keary reneged on a deal and this is our conclusion; although we find that the "deal" did not amount to a concluded agreement finalised contract.

Our determination

67. The claimant's representatives have proffered various arguments in the factually complicated series of events. Many arguments were made in the alternative because, as often happens with complex case; solicitors seek to cover all the bases the which means that the tribunal is often presented with differing, mutually exclusive and often convoluted legal analysis.

68. We will begin with the dispute over the compromise agreement because if the claimant's case is upheld on this point them we may not need to unravel the antecedent claims. The claimant's solicitors proffered a labyrinthine argument about the compromise agreement. It is significant that the claimant's representatives called it a "Formal Contract" or "Leaving Contract" to distinguish this from a compromise agreement (now properly called a "settlement agreement"), which is a commonly used arrangement to enact termination packages. Mr Richard Engel is no doubt a clever contract lawyer. Mr Anthony Engel professed not to understand his brother's submissions on the compromise agreement point and, for that matter, neither did we. The points made were an over analysis that did not fit a rather straightforward situation.

69. The claimant and Mr Keary (on behalf of the respondent) agreed a termination arrangement. A financial package was agreed and so was the termination date. The terms of the termination package also provided for an agreed reference which the claimant took to be a full and fair reference reflecting her six years of teaching with the respondent. The reference was an integral part of the termination package because the claimant needed such a reference to secure work elsewhere. She felt she was entitled to a good reference. Crucially the parties had not agreed a reference at the meeting of your 20 March 2013.

70. The respondent had secured its objective, which was to dislodge the claimant. Had Mr Keary demonstrated good sense, commercial acumen and resisted the urge to settle scores then the matter would have ended there. Nevertheless, Mr Keary's version of a fair reference was at variance with the claimant's. He tried to humble the claimant by providing a sub-standard reference. Having heard from Mrs Scott, who we regard as an impressive witness, we are entirely satisfied that the draft references provided by Mr Keary would not

help and would possibly hinder the claimant's search for alternative work. Mrs Scott was very experienced in teaching although she was not an "expert witness". The tribunal would have probably reached a similar conclusion to Mrs Scott because, even to a panel not experienced in recruiting teachers, Mr Keary's draft references did not present the claimant as a particularly satisfactory candidate.

71. The claimant was perfectly justified in rejecting the references proffered. The reference was subject to agreement. Mr Keary was not contractually obliged to provide a reference to the claimant satisfaction although we accept that the claimant would have been satisfied with a fair or reasonable reference.

72. We are in no doubt that Mr Keary reneged upon the deal of 20 March 2013. This was an outline settlement that is typical of such termination arrangements. The claimant saw a potential recommendation for a similar job as integral to her reference and, as we saw from the respondent's own forms, there can be little dispute on this point. Mr Keary did give reasons for not agreeing to the claimant's draft references, he said he would not sign up to anything he did not believe. We do not believe him. He was being spiteful. He did not like being challenged, he believed he had the claimant in a vulnerable position and he wanted to settle scores.

73. Miss Constable started at school in September 2012. She quickly assessed the claimant's performance as significantly deficient. This assessment was at considerable variance to the claimant's previous assessment and having heard her unconvincing attempt to explain this we have little doubt that Miss Constable sought to make a point and unsettle the claimant. She then embarked upon a course that we determine was to make things so difficult for the claimant so that the claimant would either leave of her own volition or ultimately be dismissed through the eventual application of the formal performance procedures. We could detect no animosity or ill-feeling against the claimant emanating from Miss Constable. Nevertheless, Miss Constable's treatment of the claimant was grossly unfair. We could see very little justification in Miss Constable's criticism of the claimant's performance. This lacked substance or consistency. Whatever initiatives the claimant tried to enlist did not satisfy Miss Constable because Miss Constable had a close mind. We accept the claimant's contention that Miss Constable had a job to do; this job was to force the claimant out. Given that we do not believe Miss Constable's and Mr Keary's evidence, we accept the claimant's version that Miss Constable was implementing an agenda set by Mr Keary. The implementation of a process that would inevitably lead to the claimant's departure or dismissal was analogous to *Hilton v Shiner* above. It was a breach of trust and confidence because there were no reasonable or proper grounds for so doing.

74. The school had in place a capability procedure – the Schools Capability Procedure for Teachers – yet Miss Constable set about managing the claimant's purported poor performance completely outside this process. She placed no reliance upon this in her evidence and indeed the respondent's did not provide the policy to us for our consideration. This is suspicious because the respondent of this size and experience should know that if there is a policy for handling a contentious matter then the policy ought to be followed. Throughout the course of this matter we detected the involvement of at least three HR officials yet seemingly none of these seemed to be able to advise Miss Constable how to implement a performance management policy effectively or treat an employee fairly.

75. When the compromise agreements negotiations broke down the claimant was invited to return to work. It was plain for all to see that the claimant would be dismissed should she return to work regardless of whether her performance would improve.

76. Mr Keary said in evidence that no one was dismissed without his authority. On that point we believe him. Mr Keary said that before anyone was put through the formal Schools Capability Procedure for Teachers he would undertake a "due diligence" consideration. We do not really understand what Mr Keary meant by due diligence; this was not commercial transaction. A properly drafted capability procedure should be a whole process of *due diligence* affording the opportunity for firm and decisive corrective measures set against a balance of safeguarding the individual's employment rights. Mr Keary sought to persuade us that the "due diligence" exercise was a precursor to commencing the formal capability process. So presumably once an individual failed his "due diligence" consideration a decision would be taken about dismissal before the formal process commenced. We wonder then what the point was of having a capability process if this was going to be circumvented by Mr Keary's own assessment of whether or not an individual passes what he determines as "due diligence".

77. It was dishonest of Mr Keary to refuse to give the claimant the reference of the types that she proposed and then seek to persuade us that had not made up his mind about the claimant's performance. Of course he had and any claim that the claimant would have had a fair hearing through the capability process is rejected. The claimant knew this and so did Mr Keary. We find that he acted in a manner that destroyed the relationship of trust and confidence between an employer and an employee. At least by the time of the breakdown of the compromise agreement he demonstrated that he had already decided the claimant was not suitable to recommend for employment.

78. It is evident from what we say above that the respondent's did not have reasonable and proper cause for such conduct. The matters identified in the list of Issues at 1b, 1c and 1e gave rise to repudiatory breach of contract. The claimant resignation at paragraph 64 above was justified on points c, d, e and f. The employer's conduct was something that as per Brown-Wilkinson J in *Woods* above such that the claimant should not be expected to put up with. We accept that the claimant resigned as a result of the repudiatory breach of contract.

79. We reject any contention that the claimant would have been fairly dismissed either at the date of her resignation or at some date in the future because of her purported inadequate teaching skills. As stated above we find that the claimant's teaching skills were no less than satisfactory and that she was working hard and showing steady progress even by Miss Constable's standards, such that an independent and unbiased evaluator, such as Ms Blair, would assess the claimant's skills as, at least, progressing towards the level of "good". Similarly we reject any argument that the claimant contributed to her constructive dismissal. There is a significant difference between blameworthy conduct and purported inadequate teaching skills, which does not appear to be appreciated by the parties drafting the list of issues. Miss Constable's observation on 7 and 14 February 2013 were not fair observations. These were the third and fourth observations where the claimant was identified as deficient and if Miss Constable had genuine cause for concern claimant should have been referred through the formal process, at least by that stage. The fact that the claimant was not makes us more convinced that Miss Constable's concerns were not genuine.

80. The claimant was confused with her claims of "direct" and "indirect" discrimination. The Employment Judge attempted to clarify these claims at the outset of the hearing and during the course of the hearing. The tribunal took the view that a direct discrimination claim could not be made out because, on the claimant's case, Miss Dippenaar was not dismissed because of her age but as a consequence of working her way to the top of the teachers' scale which meant that she was an expensive staff cost for the respondent such that she could be readily replaced with a cheaper teacher. Consequently, the claimant's case on alleged age discriminatory dismissal was more appropriately assessed in her alternative claim of indirect discrimination, as one resting on the consequence of the claimant's age rather than directly because of the claimant's age.

81. We are satisfied that the claimant has established the detrimental action relied upon, i.e. subjecting her to unjustified capability process in order to secure her resignation or dismissal, effectively managing her out of the organisation.

82. We sough to ascertain if there could be any other credible explanation as to why the claimant had been treated in this manner. According to her colleagues, she appeared to be hard-working and well liked by students and staff. There is no evidence of previous difficulties with Mr Keary or suggestion that she slighted Miss Constable when she took up her appointment. Yet Miss Constable very quickly assessed the claimant very negatively and embarked upon a process, outside the designated procedure, to categorise the claimant as a poor performer.

83. We applied the *Barton* and *Igen* guidance. We have made our primary findings of facts above and we have drawn conclusions. The burden of proving that unlawful discrimination was not committed or was not to be treated as committed has transferred to the respondent. The respondent has not discharged this burden. We find that the respondent had a preconceived strategy to dislodge the claimant and that Miss Constable started to implement this strategy when she arrived at the respondent in September 2012.

84. Due to her experience and age, the claimant was an expensive teacher who had declined to undertake managerial roles. We are satisfied that the claimant had suffered disadvantage on account of the age group to which she belonged; the particular disadvantage suffered by the claimant and other members of her age group was the employer subjecting her to a capability procedure and the manner in which it was conducted. The employer was using the capability procedure as a device to manage the claimant out of the business and this was causally connected to the fact that the claimant was senior and expensive i.e. the protected characteristic of the claimant's age.

85. Prior to the EqA, the usual approach for determining indirect discrimination was to construct a pool for comparison comprising all those potentially affected by the requirement or condition (now widened to be the PCP) at issue. The tribunal would then compare how the requirement or condition affected two discrete groups within that pool – one group of persons who shared the relevant protected characteristics with the claimant and another group of persons who did not share that protected characteristic. Looking at the proportion of each group that could and could not comply with the requirement or condition, the tribunal could then come to a decision as to whether a considerably larger proportion of X was disadvantaged more than Y. The European Union Equal Treatment Framework Directive (No. 2000/78) and the EHRC Employment Code signalled a movement away from the statistically driven comparative exercise and generated considerable case law addressing the tricky issue of how to establish disproportionate

impact – i.e. what amounts to a considerably larger or a considerably smaller proportion. However, the EHRC Employment Code makes it clear that statistical analysis is not the only method of establishing disparate impact.

86. Statistics are a useful tool in establishing whether there is indirect discrimination under the EqA. The EHRC Employment Code states that if an employment tribunal is asked to undertake a formal comparative exercise in an indirect discrimination claim, one establish approach involves comparing the proportion of workers with and without a protected characteristic who are disadvantage in order to ascertain whether the group with the protected characteristic experiences a "particular disadvantage" in comparison with others (Paras 4.21 to 4.22).

87. Mr Engel adduced evidence in respect of the respondent's statistical breakdown of starters and leavers over a period of time. This evidence was extracted from the respondent's figures. The evidence was not challenged. Excluding temporary teachers which we are satisfied would distort the analyses, from 31 August 2011 to 31 December 2012 there were in 14 leavers over the age of 36 years replaced by 4 starters aged 37 or over. For a period from 1 September 2010 to 1 November 2012 there were 23 starters under 37 years of age and 4 starters over 36 years of age. On the face of it these statistics look persuasive. However, we have not been given an explanation by either party as to the reasons being such departures. This limits the persuasiveness of the figures but we have reminded ourselves that the figures were initially provided by the respondent and if further explanations or qualifications were required then they should have been raised.

88. Although statistics can provide an insight into the link between the PCP and disadvantage that it causes, it is not the only method. Particularly, in a small pool the percentage differences could be open to fluctuation for a variety of reasons. This demonstrates the importance for the tribunal to look behind the statistical analysis to determine the true story. In doing so, it is permissible for tribunal's to use its experience and common sense in assessing the credibility of the arguments raised. The claimant's struggled to understand why she had been singled out as a poor performing teacher. All the objective information lead to the conclusion that the claimant's performance was satisfactory to good and excellence on occasion. This did not accord with Miss Constable's appraisals and Mr Keary's preordained conclusion.

89. In his evidence to the tribunal Mr Keary claimed that in respect to staff costs he did not know where the claimant was on the teaching scale nor roughly how much her pension contributions would cost. Notwithstanding that the respondent achieved academy status relatively recently and given that a major attraction of academy status is the flexibility that it affords in managing its own resources, Mr Keary denied that he knew anything about the costs of the claimant. We did not expect the Principal to know his financial liabilities with precision as we accept his response that he had financial advisers for that but we were astonished to be told by Mr Keary that he did not accept that a more senior teacher would cost the respondent more money than a more junior teacher, particularly when the more senior teacher did not undertake management functions. This was another example where we found Mr Keary unconvincing and his evidence unreliable.

90. It follows from the above that we assess the PCP put the claimant at a disadvantage. It has never been raised by the respondent that this might be a proportionate means to achieving a legitimate aim. We cannot see how a legitimate aim could be served by

treating the claimant in this manner so, for completeness, we dismiss this apparent defence.

91. Notwithstanding that the claimant has established facts, that in the absence of an adequate explanation, could lead us to the conclusion that the respondent has committed unlawful discrimination; the respondent has not at all proved that unlawful discrimination was not committed or should not be treated as committed. Indeed, we would say the claimant's age and experience and thereby her expense seem to us the only credible explanation as to why she was subject to less favourable treatment throughout this sequence of events.

92. So far as victimisation is concerned, the claimant's solicitors submitted that the reference to "consequences" in their letter to Mr Keary of 7 May 2013 was a protected act within the meaning of section 27(2)(d) EqA. This is rejected. "Consequences" is far too vague to amount a protected act. We accept that the reference to age discrimination and litigation in the claimant's solicitor's letter of 13 May 2013 did constitute a protected act. Nevertheless, we are not satisfied that there is a causal link between this letter and the detriments that followed. The respondent's less favourable treatment of the claimant and breakdown in the working relationship were in train long before this protected act.

Remedy

93. The remaining issues to be determined as follows;

1. Does the claimant want reinstatement or re-engagement? If so, is it practical?
2. To what extent did the claimant suffer injury to her feelings?
3. What are the claimant's financial losses?
4. Has the claimant mitigated her loss?
5. How much should be employment tribunal award in respect of future loss of earnings (if any)?

Case Management Orders

94. We now order that this case is listed for a remedy hearing, with an estimated length of hearing of 1 day. The parties shall write to the employment tribunal within 21 days notifying the tribunal of their dates to avoid (with appropriate explanations for unavailable dates).

95. The claimant shall to serve upon the respondent an updated schedule of loss within 28 days. Such schedule of loss shall be accompanied by the claimant's statement(s) in support of any further remedies sought and losses claimed. The claimant shall quantify her loss of pension rights in accordance with the Employment Tribunal's Guidelines: Compensation for Loss of Pension Rights (Third Edition) providing as appropriate a calculation in accordance with either the *simplified approach* or the *substantial loss formula.* If the claimant intends to rely upon additional documentation then these documents should be disclosed to the respondent at the same time as her updated schedule of loss. It shall be the claimant's responsibility to prepare an additional remedy

bundle containing any additional documents (including the respondent's documents in respect of remedy).

96. If the respondent disputes any aspect of the claimant's schedule of loss then it shall serve a counter-schedule of loss within 21 days after the claimant has disclosed her schedule of loss. If the respondent intends to adduce any documents and/or witness evidence it shall adduce such material when it serves its counter-schedule of loss.

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Employment Judge Tobin

RESERVED JUDGMENT, REASONS & BOOKLET
SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE