**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111282/2021**

**Held in Glasgow on 25, 26, 27 and 28 April 2022**

**Employment Judge L Wiseman**
**Members J Anderson and N Bakshi**

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| **Mr Henry O'Boyle** | **Claimant**<br>**Represented by:**<br>**Ms S Harkins - Lay Representative** |
| **The Board of Directors of St Philip's School Plains** | **Respondent**<br>**Represented by:**<br>**Mr K McGuire - Counsel [Instructed by Mr F P McCormick - Solicitor]** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The tribunal decided to dismiss the claim.

**REASONS**

1. The claimant presented a claim to the Employment Tribunal on the 6 September 2021 in which he complained of unfair dismissal and discrimination because of the protected characteristic of disability. The claimant, in particular, complained of direct discrimination and a failure to make reasonable adjustments following a knee replacement operation.

2. The respondent entered a response in which it accepted the claimant had been dismissed but denied the dismissal was unfair. The respondent also denied the allegations of discrimination.

3. The preliminary issues of timebar and whether the claimant was a disabled person in terms of the Equality Act remained in dispute and were issues to be determined as part of this hearing.

4. We heard evidence from Ms Claire McCallum, Head of HR; Mr Laurence Byrne, Director of the Board who took the decision to dismiss; the claimant; Mr Brian McGuinness, Mr John McMurray and Mr Paul Gallagher all of whom had worked with the claimant and were former employees of the respondent. Witness statements were used in this case.

5. We were also referred to a number of jointly produced documents. We, on the basis of the evidence before us, made the following material findings of fact.

**Findings of fact**

6. St Philip's School is an independent organisation which provides residential and day services to Local Authorities who are seeking appropriate care and/or education placements for children and young people aged 10-17 years.

7. The respondent employs a range of staff including residential workers who work predominantly in the residential houses, instructors for various activities and 12 teaching staff for the 40 pupils.

8. The structure of the respondent changed in 2019 following a school inspection. One of the major changes was that the Central Pupil Support system operated by care staff was disbanded. The staff were retrained as residential workers and are now based in the various Houses where the young people reside.

9. All members of staff with pupil-facing roles (principally residential workers and teachers) must be trained in Therapeutic Crisis Intervention (TCI) (page 150) and able to do the safe/physical holding. The policy is in place to ensure all young people and staff are protected and kept safe from harm and to ensure staff have a specialised level of knowledge, skill and competence in the prevention and management of aggressive behaviour.

10. The focus of the training is very much on de-escalating situations, but the training does also include safe holding. TCI training is given as part of Induction training (although it may take some months in practice for the training to be arranged) and refresher training is given on a rolling 6 month basis.

11. The claimant commenced employment with the respondent on 1 June 1993. He became a permanent teacher on 1 August 2000 and a principal teacher on 1 January 2006.

12. The claimant, towards the end of 2018, started having issues with his left knee, which led to discomfort and difficulty bending it properly. The claimant was referred for physiotherapy but ultimately required knee replacement surgery. The claimant was, prior to the operation, walking with a limp.

13. The claimant met with the Head of Education, Ms Julie Ross, in or about March 2019 to inform her that he would be having the operation in September 2019.

14. The claimant's operation was on 9 September 2019. The claimant, prior to this, had been overly optimistic about a return to work around Christmas time. In fact the claimant was not ready to return to work until March 2020.

15. The claimant and Ms Ross spoke each month during the claimant's absence to keep each other up to date. Ms Ross and Ms McCallum met with the claimant on 5 February 2022 for a welfare meeting, following which an occupational health report was requested to give advice regarding the claimant's medical fitness to return to work following the knee replacement surgery.

16. The occupational health report, dated 24 March 2022 (page 203) noted the claimant was medically fit to return to work *"but would require the modification of restriction of undertaking TCI activities where there is a requirement for physical restraint because of the knee joint replacement … If it is operationally practicable to restrict him from this activity he will be medically fit to return to work. If the physical element of TCI is essential for his role then he will remain medically unfit for work. I will also require a report from his consultant orthopaedic surgeon to give specific advice on his medical fitness to undertake the physical demands of TCI which may involve kneeling or sudden unexpected movement if he is required to carry this out in future…"*

17. The claimant was advised that TCI was essential for his role and that the respondent intended to authorise the occupational health doctor to obtain a specialist report from the orthopaedic surgeon.

18. Ms McCallum received a letter from the occupational health doctor elated 16 April, confirming a specialist report had been received from the Consultant Orthopaedic Surgeon. It was stated *"The Consultant states that it would be very challenging and risky for Henry to participate in physical safe-hold/restraint activity for at least 12-18 months. The report adds that it is important that Henry does not twist his knee with any force. He has also been advised to avoid kneeling, twisting or participating in any contact sports."* The letter continued to advise that the claimant would be medically unfit to undertake the physical aspects of TCI for a minimum of 12 months and very possibly up to 18 months. There was no certainty he would be able to resume physical TCI activity after that time. His fitness for this would need to be reassessed at that stage and updated specialist information was likely to be required.

19. Ms McCallum updated the claimant regarding the reports from the occupational health doctor and another welfare meeting was arranged for 1 June. Ms McCallum met (virtually) with the claimant and his trade union representative, Alan Scott. The claimant was keen to return to work on amended duties. The claimant was of the view there were sufficient staff resources available to facilitate his return to work and that many staff did not do physical holding. Ms McCallum disagreed with the claimant because there had been changes in the respondent's structure and the pupil support system (to which the claimant had referred) was no longer in place, and all staff had to be trained in and able to do TCI.

20. Ms Me Callum spoke with the respondent's insurers at the end of June 2020 to enquire whether the respondent would be in breach of its insurance policy if it allowed the claimant to return to work when he was unable to utilise TCI.

21. The respondent, the claimant and his trade union representative engaged in protected discussions in the period July to October. Ms McCallum was

informed by the claimant's trade union representative, in November 2020, that the discussions had not been successful.

22. The claimant was invited, by letter dated 26 November 2020 (page 102) to attend a capability hearing on the 16 December. The letter from Mr Laurie Byrne, Director of the Board of St Philip's, confirmed he would chair the meeting, and that he would be accompanied by Ms Julie Ross, Head of Education. The purpose of the meeting was to consider the claimant's capability and what, if any, further action needs to be taken. The letter advised that one possible outcome of the meeting could be termination of employment.

23. Mr Byrne was provided with copies of the relevant health reports (occupational health reports dated 24 March (page 203) and 16 April (page 205) prior to the meeting. Ms McCallum provided an outline of how the meeting should be conducted. This was done in the absence of the respondent's policies being available because they were being reviewed.

24. The claimant was accompanied by his trade union representative Mr Stuart Brown. A note of the meeting was produced at page 104. Mr Byrne went through the occupational health reports before concluding that the position appeared to be that the claimant was not fit, at this time, to complete an essential aspect of his role. The claimant accepted he would have difficulty with it but felt in the long run he would be able to do it. There was discussion regarding how often the claimant may be required to undertake physical holds and the claimant read out a statement he had prepared.

25. Mr Byrne concluded he wished to obtain further information following his meeting with the claimant. Mr Byrne obtained a description of the claimant's post and duties; a record of the contact/correspondence with the claimant during his period of absence; the school's policy regarding TCI and an updated occupational health report. Mr Byrne also received information regarding the number of times the claimant had been involved in an Incident and carried out physical holds.

26. An occupational health report dated 14 January 2021 (page 207) was received in which the occupational health doctor confirmed the claimant had had further improvement of his functional recovery since the previous occupational health assessment in March 2020. The claimant did not have any knee pain, did not take any pain killers and had significantly increased his range of day-to-day activities. The occupational health doctor recommended obtaining further information from the Consultant Orthopaedic Surgeon regarding the claimant's fitness for his role, so that advice could be given regarding the claimant's fitness to undertake the physical aspects of TCI safely and reliably. The doctor wished to ascertain the level of potential risk if the knee joint was subjected to an unbalanced/unpredictable force during this activity.

27. A further occupational health report was produced dated 18 February 2021 (page 209). The report included the advice from the Consultant Orthopaedic Surgeon as follows: *"The specialist report confirms Henry has had a good outcome from his left knee replacement surgery. The specialist states that a knee replacement does not result in entirely normal knee function. Although Henry has the functional capability to undertake regular walking, cycling, carrying and lifting without difficulty, the Specialist states that activities comparable with "wrestling" cannot be recommended as overall functionality of a knee joint replacement is not the same as a knee which has not had this operation. In addition, although most activities can be undertaken, the Specialist also advises that contact sports and running are not recommended".*

28. The occupational health physician concluded by confirming his opinion was that the claimant remained medically unfit to carry out physical restraint where the level of physical interaction/contact that could destabilise the knee replacement surgery could reasonably be expected. The doctor also confirmed the restriction was likely to be required on a continuing basis. The doctor confirmed the claimant was fit to undertake the other activities required in his work remit.

29. Mr Byrne considered the reports received from occupational health and was concerned regarding the level of risk the claimant would be subjected to if allowed to return to work. There was a risk of serious injury if the claimant became involved in any situation which may require a physical response. The nature of the environment meant that many of the youngsters were unpredictable. Mr Byrne and the Board of Directors considered it would be irresponsible to allow the claimant to return to work and to a situation where the claimant could possibly damage or injure his knee.

30. Mr Byrne was also concerned that any adjustments made to accommodate the claimant would require to be permanent The suggestion made by the claimant to be accompanied by another staff member in the classroom was considered by Mr Byrne to be not reasonable in circumstances where it would mean employing someone for that task.

31. Mr Byrne, accompanied by Ms Ross, met with the claimant and his representative on the 30 March. The current occupational health reports were read out and there was discussion regarding what adjustments the claimant considered may be reasonable. The claimant confirmed he wished to return to his role, and that he would not contemplate an alternative role. The adjustments suggested by him all focussed on other staff being available either in the classroom or on standby if needed. The claimant also argued he had not been involved in carrying out physical holds for some time.

32. Mr Byrne wrote to the claimant on behalf of the Board on the 29 April 2021 (page 129) to confirm the decision had been taken to dismiss him with immediate effect on the grounds of capability because he was currently unable to perform all the requirements of the job role. The claimant was paid 12 weeks' notice.

33. The claimant exercised the right to appeal against the decision to dismiss him and he did so by letter emailed to Ms McCallum on the 5 May (page 131). The focus of the appeal was that the physical hold was a very small part of TCI and adjustments could be made to allow a return to work.

34. An appeal hearing took place on the 14 June and a note of the hearing was produced at page 137. The appeal hearing was chaired by Ms Barbara Diamond and Ms Mary Castles, both members of the Board.

35. The appeal outcome was confirmed in a letter dated 21 June (page 146). The decision to dismiss the claimant was upheld. The letter made reference to the claimant's argument that physical holding was a small part of TCI, but confirmed that in 2020 there had been 139 physical holds on the campus and in 2019 the figure had been 194. The letter went on to explain that adjustments had been considered but concluded to be not reasonable. The suggestion of additional staff being available to assist the claimant was not reasonable having regard to practicality, cost, resources and sustainability.

36. The claimant did, during the course of the capability procedure, raise a grievance which was heard on the 17 March 2021 (page 114). The subject matter of the grievance was closely related to the issues being discussed at the capability hearing. The claimant, for example, sought to argue that some employees - for example, pregnant women - were allowed to continue to work without doing physical holds, and he felt he was being treated differently. The claimant also raised issues regarding poor communication with him and discrimination.

37. The grievance was dismissed by letter of the 25 March (page 119).

38. The claimant appealed against the decision to dismiss his grievance and a grievance appeal hearing took place on the 21 April (page 124). The outcome of the grievance appeal was confirmed to the claimant by letter of the 26 April (page 128).

39. The Safe Hold Reports (pages 198 - 204) were documents completed following an Incident, which had involved the claimant. The first report, dated May 2017, noted the young person had been restrained in a 3 person prone restraint and that the claimant had been involved in restraining the left arm. The second report, dated June 2017, noted the claimant had had to assist to isolate a colleague in an Incident and had thereafter been in a corridor where the young person was kicking and spitting at him. The third report, dated

January 2018, noted a four person prone restraint had been required. The fourth report, dated March 2018, noted a restraint involving 6 adults had been required. There was no clarity regarding whether the claimant had been involved in the physical holding restraints in the third and fourth incidents.

40. The reports illuminated the fact that on occasion the claimant was required to deal with an Incident and be involved in physical holding.

41. The claimant has, since dismissal, been working in an alternative temporary role with a Mobile Testing Unit for Covid 19, since August 2021. This is an 8 month fixed term contract which pays £1500 a month. The claimant has not applied for any teaching roles.

**Credibility and notes on the evidence**

42. There were no issues of credibility in this case. The main issues in dispute between the parties related to (a) the availability or otherwise of staff to assist in a situation and (b) whether any staff were exempt from doing TCI. The claimant and his witnesses all had very lengthy periods of service with the respondent and it was clear their evidence about the structure of the organisation and the day support unit was given from an historic perspective and did not take account of the changes made by the respondent in 2019. We found as a matter of fact that organisational changes were made by the respondent in 2019 and this led to the day support unit being disbanded and the establishment of residential workers being based in the Houses and not in the central support unit.

43. There was a lack of clarity regarding who may be present in a class with the teacher. Some of the young people had one to one support funded by the local authority which enabled them to have a member of the care staff accompany them to all classes. The respondent also employed a number of classroom assistants who would be allocated to classes where they were required. A member of care staff may also be present in the classroom. We took from these facts that resources were used where most required and it was not a situation where a certain number of staff were guaranteed to be in a classroom, or available, although it would be rare for a teacher to be in a

classroom alone. The respondent accepted a teacher would not ever be required to deal with an Incident alone, and accepted a call for support could be made. The issue was availability. •

44. We found as a matter of fact that all employees holding pupil-facing roles had to be TCI trained. The claimant referred to some people who were not TCI trained, for example the cook and members of the Board, but it was clear those he referred to were not in pupil-facing roles. Mr Gallagher also cited a number of examples of people whom he believed had not been TCI trained, but again it was clear that these were examples from prior to 2017 (when Mr Gallagher left the employment of the respondent).

45. There was no dispute regarding the fact that if an incident occurred it would be dealt with by more than one person.

46. Mr McGuinness was a TCI Instructor from 2005 until 2015. He described TCI as being a process of which approximately 90% is therapeutic intervention and 10% is physical safe holding, which is used as a last resort. Staff were given TCI refresher training every six months and it was not unusual to have some staff sit out the safe holding element of the training because they did not want to aggravate an injury. In those circumstances (and preferring the evidence of Mr McMurray to that of Mr McGuiness) those staff had to return to complete the physical interventions part of the course when fit to do so before they could pass the training.

47. There was no dispute regarding the fact the teaching staff were less involved in physical holding, but all of the witnesses accepted there could be occasions when a member of the teaching staff could be called on to assist in a physical hold. That position was supported by the Safe Holding Reports (pages 198 - 204) where the claimant had been involved in physical holding.

48. We concluded from the evidence that:-

(i) all staff with pupil-facing roles had to be, and were, trained in TCI;

(ii) new members of staff may have to wait up to six months before undertaking TCI training;

(iii) TCI training was refreshed every six months;

(iv) some employees would be unable, because of illness or injury, to complete the physical holding part of the refresher training. In those circumstances they were required to return to complete the training when fit to do so, before they were signed off as passing the refresher training;

(v) pregnant women were not required to carry out physical holding;

(vi) there was some evidence to suggest there were instances of temporary inability to carry out physical holding, for example, because of illness or injury;

(vii) all employees in a pupil-facing role had to be capable of doing physical holding and

(viii) there was no evidence of any employee being permanently excused from carrying out physical holding,

49. The claimant was critical of the respondent for not calling Ms Julie Ross, Head of Education as a witness and he invited the tribunal to draw an adverse inference from this. We were not prepared to draw any inference from the fact Ms Ross was not called to give evidence. It is for each party to decide which witnesses to call.

**Claimant's submissions**

50. Ms Harkins submitted the dismissal of the claimant was discriminatory because he was dismissed because he was disabled and the respondent failed to make reasonable adjustments to his role. If the tribunal did not accept this, then the dismissal was unfair both procedurally and substantively.

51. The claimant was dismissed for reasons of capability. The respondent did not provide any procedures in relation to absence management, capability, grievance or the appeal of the dismissal. Their procedures were being reviewed and so the respondent relied on ACAS procedures. The claimant

accepted this may be appropriate, except ACAS procedures do not exist for absence management or capability in relation to ill health.

52. There is a difference between a capability ill heath dismissal and a capability conduct dismissal. The former is a matter over which the employee has no control. Ms Harkins submitted that at times it appeared the respondent treated this as a conduct or disciplinary issue rather than a genuine ill health capability issue.

53. Ms Harkins referred the tribunal to the case of BS v ***Dundee 2014 IRLR 131*** and the guidance given to tribunals dealing with ill health dismissals. The key themes recognised by the Court of Session were consultation, seeking information regarding the medical condition and the prognosis and asking whether in all the circumstances the employer should have waited longer before dismissing the employee.

54. Ms Harkins also referred to the case of ***Spencer v Paragon Wallpapers Ltd 1976 IRLR 373*** where it was said the employer should consider whether the employee could be offered alternative work more suited to their current state of health.

55. Mr Byrne told the tribunal alternative work had been considered, but it was not clear exactly what had been considered given the respondent's conclusion there were no alternatives. Mr Byrne relied on the fact the claimant had stated he wanted to return to a Principal Teacher role. It was submitted the respondent could have considered making reasonable adjustments at an earlier point thus facilitating the claimant's return to work.

56. The claimant's length of service should be taken into account by the tribunal and the fact he was keen to return to work. The tribunal should also have regard to the fact there was no issue in the claimant continuing to work prior to his operation even though he was visibly limping. Also, it was clear that physical holding is carried out with more than one person present

57. Mr Byrne was not TCI trained and had a rudimentary understanding of TCI. He did not fully investigate how many holds the claimant had done previously.

58. The claimant now accepted his role was not made redundant, but Ms Harkins invited the tribunal to still take into account the fact his role was covered for over a year seemingly without issue.

59. Ms Harkins invited the tribunal to find the dismissal of the claimant unfair.

60. The claimant's primary case of disability discrimination was that he was a disabled person at all relevant times. He had a physical impairment and was impaired in using his knee joint in terms of bending, twisting or kneeling on the joint. The claimant had this impairment from March 2019 and although the claimant told the tribunal he felt he had recovered by March 2020, it was clear from the occupational health reports of March and April that he was still experiencing considerable difficulty with his knee joint.

61. Ms Harkins referred to the duty to make reasonable adjustments and submitted the provision, criterion or practice (PCP) said to have put the claimant at a substantial disadvantage was (i) failing to follow a capability procedure and (ii) allowing members of staff who were not trained to do safe holding or who did not wish to do safe holding to continue in their work and providing support for them to do so. Ms Harkins confirmed she no longer relied on the third PCP which had been the policy that a staff member who could not perform TCI safe holding would not be allowed to return to work.

62. Ms Harkins submitted that in practice members of staff routinely were either not trained in TCI or did not partake in TCI even if they were trained. The claimant told the respondent he wished to return to work but could not undertake the physical holding, but he was not permitted to do so. The reason for this treatment was because of the protected characteristic.

63. The less favourable treatment was that the claimant was not allowed to return from sickness absence and was dismissed because he could not undertake safe holding while disabled. Other non-disabled employees were allowed to continue in their role while not undertaking safe holding. Further, some employees were not TCI trained and the evidence demonstrated that it could take up to six months to get new employees trained in TCI, yet they were permitted to work whilst waiting for their training.

64. Ms Harkins invited the tribunal to uphold the complaints of discrimination and to make an award of compensation as set out in the schedule of loss.

65. Ms Harkins submitted, in relation to timebar, that if the claims were out of time, the tribunal should exercise its discretion to extend the time limit.

**Respondent's submissions**

66. Mr McGuire invited the tribunal to find the claimant had not established he was a disabled person in terms of section 6 of the Equality Act. The claimant relied on a physical impairment related to his left knee, where he had a knee replacement operation. The claimant did not provide a disability impact statement and did not give any evidence about the impact of the impairment on his ability to carry out normal day to day activities. There was reference in the witness statement to having a pronounced limp prior to his surgery. He told the tribunal he had the operation in September 2019 and felt fit enough to return to work in March 2020.

67. Mr McGuire acknowledged the occupational health reports contained a statement to the effect that "the disability provisions of the Equality Act will apply to his left knee joint replacement surgery" but the determination of whether the claimant is disabled for the purposes of the Equality Act is ultimately a matter for the tribunal.

68. Mr McGuire submitted there was no evidence upon which a proper finding could be made that the claimant was a disabled person for the purposes of section 6 of the Equality Act, and, if the claimant was not a disabled person, his claims under the Equality Act must fall to be dismissed.

69. The claimant alleged four acts of direct discrimination: (i) the denial of alternative duties; (ii) refusal to allow him to return to work; (iii) a capability procedure was not followed and (iv) he was dismissed. Mr McGuire submitted the claim of direct discrimination should be dismissed because in a complaint of direct discrimination, the treatment of the claimant must be compared with the treatment of an actual or hypothetical comparator. The hypothetical comparator must have the same abilities as the claimant. On this basis, the

comparator would have been treated in the same way as the claimant. There was no evidence that someone with the same abilities as the claimant would have been treated any differently to him. In fact the evidence was to the contrary standing the respondent's assertion that all staff in pupil-facing roles had to be TCI trained and able to carry out the safe holding aspect of TCI.

70. The claimant was not treated less favourably than a non-disabled person because of his disability. He was ultimately dismissed because the medical evidence was that he could not carry out the physical aspects of TCI and there were no reasonable adjustments that could be arrived at to allow him to continue in his role in a safe manner.

71. Mr McGuire submitted that in any event, the first two alleged acts of less favourable treatment were time barred in terms of section 123 Equality Act. The ET1 claim form stated the initial discriminatory act was the refusal of the respondent to allow the claimant to return to work on or about the 30 March 2020. This was more than three months prior to the claim being commenced.

72. The acts of alleged less favourable treatment relied on by the claimant were single one-off acts and were not acts extending over a period. The claim for direct discrimination was time barred.

73. Mr McGuire submitted the claim of failure to make reasonable adjustments must fail because the two PCPs relied on by the claimant were not PCPs for the purposes of section 20 of the Equality Act. The respondent did not carry out the actions referred to and, in any event, the actions amounted to single instances of behaviour and would not constitute a PCP.

74. Mr McGuire submitted that even if the two points referred to were PCPs, in what way did they put the claimant at a disadvantage? The fact remained there were no reasonable adjustments which could be made. The respondent accepted the claimant would not be expected to carry out a physical hold by himself, but he would need to be able to assist if required, and he could not do that.

75. The claim of failure to make reasonable adjustments was time barred for the reasons set out above.

76. The reason for dismissal was capability in terms of section 98(2) Employment Rights Act. The respondent had followed a capability procedure: they invited the claimant to attend a capability meeting, explained the reasons for the meeting and explained the possible outcomes to the meeting. A follow-up capability meeting took place.- The claimant was accompanied by his trade union representative. They had an opportunity to state his position and to make the points he wished to make. Mr Byrne investigated the points raised by the claimant.

77. The central question in cases involving ill health related dismissals is whether a reasonable employer would have waited any longer to dismiss ***(Lynock v Cereal Packaging Ltd 1988 ICR 670).*** The respondent in this case obtained further medical reports prior to the follow up meeting and understood from that report that the claimant remained medically unfit to carry out physical restraint where the level of physical interaction/contact that could destabilise his knee replacement surgery could reasonably be expected. Further, the restriction was likely to be required on a continuing basis. Mr McGuire submitted the medical position became more definite, and once the respondent obtained this information, they had waited long enough.

78. The claimant asserted there was a failure to follow a fair process because it took ten months to reach a conclusion. The claimant accepted in evidence that some delay was due to changes in his trade union representative and consequent delays in information being communicated to him.

79. Mr McGuire submitted the decision to dismiss the claimant clearly fell within the band of reasonable responses, If however the tribunal found the dismissal unfair, he invited the tribunal to note the claimant had not applied for any teaching positions following his dismissal. He had failed to mitigate his losses and no compensatory award should be made. The payment of 12 weeks' notice should also be taken into account.

**Discussion and Decision**

Was *the claimant a disabled person at the relevant time?*

80. The first issue we considered was whether the claimant was a disabled person in terms of section 6 of the Equality Act, at the relevant time. Section 6 provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities.

81. The claimant told the tribunal that around the end of 2018 he started having difficulties with his left knee and that he had a lot of discomfort in the knee joint and could not bend it properly. He attended his GP, was referred for physiotherapy and then referred to an orthopaedic surgeon, who confirmed the cartilage in his knee was disintegrating and that he would require knee replacement surgery. The claimant informed Ms Ross of this in March 2019. The claimant was limping and in a lot of pain. The operation took place in September 2019, and the claimant felt fit to return to work in March 2020. The only activities the claimant was advised to avoid were twisting his knee with force, kneeling and contact sports.

82. This was the totality of the evidence before the tribunal. The claimant provided no evidence regarding the impact of the physical impairment on his ability to carry out normal day to day activities.

83. The occupational health report dated 24 March 2020 confirmed the claimant had had a good outcome from his operation and that he could walk for around 30 minutes at normal pace and that he attended the gym regularly for leg strengthening exercises and could use the stairs. The claimant had some discomfort with activities which involved bending and kneeling, but was able to drive, do the dishes and carry light shopping.

84. The report in January 2021 confirmed he had had further improvement since March 2020, and had not required any pain relief since May 2020. The claimant did not have any knee pain, could walk 5/6 miles daily without difficulty and had been undertaking physically demanding chores and cycling.

85. We acknowledged the occupational health reports did include a sentence stating *"The disability provisions of the Equality Act 2010 will apply to his left knee joint replacement surgery"* but the issue of whether a person is disabled in terms of the Equality Act is a matter for the tribunal to determine based on the evidence before it.

86. The occupational health reports provided some information regarding the claimant's recovery once he had had the knee replacement surgery. They did not, however, provide sufficient information to assist the claimant in showing the physical impairment had a substantial adverse effect on his ability to carry out normal day to day activities. There was, as stated above, no evidence to inform the tribunal what impact the claimant's knee condition had had on his ability to undertake normal day to day activities. We decided, for this reason (that is, the absence of evidence), that the claimant was not a disabled person in terms of section 6 of the Equality Act. We further decided, accordingly, that the complaints of disability discrimination could not proceed and are dismissed.

87. We should state that even if we had found the claimant was a disabled person at the relevant time, we would still have dismissed the complaints of direct discrimination and failure to make reasonable adjustments for the following reasons.

*Direct discrimination and reasonable adjustments*

88. Section 13 of the Equality Act provides that a person discriminates against another if, because of a protected characteristic, the person treats that other less favourably than they treat or would treat others. Direct discrimination involves the making of a comparison between the treatment of the claimant and an actual or hypothetical comparator. Section 23 Equality Act makes clear that there must be no material difference between the circumstances relating to each case. In other words, like must be compared with like. In a case of disability discrimination not only must the comparator be in the same material circumstances as the claimant but those circumstances must include the disabled person's abilities. So, the correct comparator is a person who is not

a disabled person, but who has the same abilities as the claimant and is in the same or similar circumstances.

89. The acts of alleged less favourable treatment were (i) the denial of alternative duties; (ii) a refusal to allow the claimant to return to work; (iii) not following a capability procedure and (iv) dismissal. We acknowledged the respondent did not allow the claimant to return to work and did dismiss him. We did not find there was a "denial" of alternative duties, but rather there were no suitable alternative duties available. Further, we did not find there was a failure to follow a capability procedure.

90. A hypothetical comparator who was not a disabled person, but who was in the same position as the claimant in being absent from work with a medical report confirming they were fit to return to work but not fit to carry out the physical holding aspect of TCI would have been treated in the same way as the claimant (in terms of the refusal to allow a return to work and dismissal). We say that because the respondent required staff in all pupil-facing roles to be trained in and able to carry out the physical holding aspect of TCI.

91. We acknowledged new staff were permitted to work whilst waiting for TCI training, and we also acknowledged there was evidence to suggest some staff may not have been fit to undertake the physical hold training part of refresher training, however these were temporary situations. New staff would be trained as soon as was possible and those unfit during refresher training had to undertake it at another time. There was no evidence of members of staff unfit to undertake physical holds on a permanent and ongoing basis.

92. We therefore would have concluded the claimant was not treated less favourably; and, even if he was, the reason for the less favourable treatment was not because of his disability, it was because of the medical evidence that he could not carry out the physical holding aspect of TCI and no solutions could be arrived at to allow him to continue in his current role in a safe manner.

93. Section 20 of the Equality Act provides that where a provision, criterion or practice of the respondent puts a disabled person at a substantial disadvantage compared with persons who are not disabled, the respondent

is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

94. The claimant relied on two PCPs: first, the respondent not following a proper capability procedure and secondly the practice of allowing staff to work at the school without doing physical holding. We were not entirely sure what was meant by the term "proper". The respondent did not follow their own written procedure because their policies and procedures were being reviewed. In the circumstances Ms McCallum gave advice to Mr Byrne regarding the procedure to follow. In (summary) general terms the respondent invited the claimant to attend a capability meeting; investigated and obtained up to date medical information regarding the claimant's condition, prognosis and limit on his ability to carry out physical holding, considered alternative employment and consulted with the claimant. We were satisfied (as explained below) that the respondent did follow a "proper" capability procedure.

95. We also had regard to the fact there was no evidence to suggest the respondent had a practice of not following a proper capability procedure. We acknowledged a one-off decision or act can be a practice, but it is not necessarily so ***(Ishola v Transport for London*** above).

96. The second PCP relied upon was the practice of allowing staff to work at the school without doing physical holding. We could not accept, based on the evidence before us, that there was any such practice. We found as a matter of fact that staff in all pupil-facing roles had to be trained in TCI and able to carry out the physical holding aspects of TCI. The only exception to this was pregnant women.

97. There was a dispute in the evidence of the claimant's witnesses and the respondent's witnesses regarding the issue of whether Ms Ross, Head of Education was TCI trained. We preferred the evidence of the respondent's witnesses that she was TCI trained. We accepted the evidence of the respondent's witnesses because Ms Ross is Head of Education and spends time in the classroom observing lessons.

98. Mr McGuinness, who was a TCI Instructor from 2005 to 2015, told the tribunal that staff would not take part in the physical holding part of the refresher training if they did not want to aggravate an injury. His evidence was that those people would still pass the refresher training. This conflicted with the evidence of Mr McMurray who told the tribunal that *"if staff did not carry out the physical holding aspect of refresher training, the procedure would be for the staff member to observe the physical interventions and when fit and able revisit the training programme at a later date in order to complete the physical intervention part of the course. Once the staff member had demonstrated all the physical interventions to a competent degree they would pass the course which would be certificated".*

99. We preferred the evidence of Mr McMurray because Mr McGuinness ceased being a TCI instructor in 2015 and Mr McMurray did not leave the employment of the respondent until June 2021. We also believed that undertaking refresher training on a six monthly rolling basis, highlighted the importance of this to those with pupil-facing roles. TCI was in place to protect young people and staff, and to ensure staff had specialised knowledge, skill and competence to deal with the prevention and management of aggressive behaviour, in what was a challenging and unpredictable environment. We considered this undermined Mr McGuinness' position.

100. We acknowledged the claimant and his witnesses (principally Mr Gallagher) did give examples of people whom they believed had not been required to participate in physical holding. The examples given included a pregnant teacher, a teacher returning to work after prostate surgery, a teacher with arthritis, a teacher returning to work after bouts of depression and supply teachers. The difficulty with this evidence, however, was that we were not provided with any further information. We were not, for example, provided with the dates when these instances were said to have occurred and so we could not understand whether these instances, if they occurred, were historic or current. We also did not know if these examples fell into the category of temporary instances of being unable to carry out physical holding.

101. We concluded that without more information about these alleged instances, they were insufficient to cast doubt on the respondent's position (which we accepted) that all those with pupil facing roles had to be TCI trained and capable of carrying out physical holds.

102. We were satisfied, based on the evidence before us, that there was no practice of allowing staff permanently to work at the school without doing physical holding. It is a matter of risk and safety (a point to which we return below).

103. We should state that even if the respondent had had a practice of allowing staff to work at the school without doing physical holding, we had to question how this practice put the claimant at a substantial disadvantage compared to those who were not disabled. The practice, if it existed, would have benefitted the claimant because that is what he wanted to do.

104. We should also state that even if the claimant had shown there was a PCP which placed him at a substantial disadvantage, we would have concluded there were no reasonable adjustments which the respondent could have put in place. The proposal to have a staff member present to intervene on the claimant's behalf should a physical hold become necessary was not a reasonable adjustment, because it would have necessitated the employment of a person to accompany the claimant during his working hours. This would not have been financially practicable and would not have removed the risk to the claimant of a young person kicking or pushing him in an Incident which he was trying to de-escalate.

105. We concluded, for all of these reasons, that even if the claimant had shown he was a disabled person, the claims of discrimination would have failed.

106. We have not determined the issue of timebar in circumstances where the claim of discrimination was dismissed.

*Unfair dismissal*

107. We had regard to the terms of section 98 Employment Rights Act which provides that:

*"(1) In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair, it shall be for the employer to show -*

*(a) the reason (or, if there was more than one, the principal reason) for the dismissal and*

*(b) that it is … a reason .. within subsection (2).*

*(2) A reason falls within this subsection if it -*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by his employer to do ..*

*(4) Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

*(a) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

*(b) shall be determined in accordance with equity and the substantial merits of the case."*

108. We noted the term "capability" in subsection 2(a) means the employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

109. The respondent accepted the claimant had been dismissed and asserted the reason for dismissal was capability in terms of section 98(2)(a) above.

110. The claimant questioned whether capability was the real reason for his dismissal. This position was based on the fact the letter inviting the claimant to a meeting included the sentence advising the claimant that one possible outcome of the meeting was termination of employment. We noted the inclusion of this sentence is common practice, and indeed good practice. We took nothing from the fact this sentence had been included in the letter.

111. The claimant's suggestion that his role had been made redundant was withdrawn by his representative in her submissions.

112. We were satisfied the reason for the termination of the claimant's employment was capability, in circumstances where the medical advice was that the claimant was not fit to carry out an essential aspect of his role, that is, the physical holding part of TCI.

113. We must now go on to consider whether dismissal for that reason was fair or unfair.

114. We were referred to the cases of ***BS v Dundee*** (above); ***Spencer v Paragon Wallpapers Ltd*** (above) and ***East Lindsay District Council v Daubney*** (above). These cases highlight the key factors an employer should consider when dealing with a capability ill health dismissal. The factors are (i) consultation, (ii) medical information and (iii) alternative employment. The tribunal should also consider whether a reasonable employer would have waited longer before dismissing the employee.

115. We examined each of these factors. We noted the claimant had weekly/monthly contact with Ms Ross during his absence, to update her regarding his recovery. He also had contact with Ms McCallum and attended two welfare meetings with Ms McCallum and Ms Ross. The claimant made a good recovery after his knee replacement operation and considered himself fit to return to work in March 2020. We took from the evidence that at this stage a return to work was also what the respondent expected: this only changed upon receipt of the occupational health report.

116. Mr Byrne met with the claimant on the 16 December 2020 at a capability hearing. The claimant was critical of the consultation carried out at that meeting and at the continued capability hearing because he believed Mr Byrne was not following a capability procedure and that he did not investigate the points raised by the claimant.

117. We (as set out above) accepted the respondent's policies and procedures were being reviewed and were accordingly not used during this process. Ms

McCallum told the tribunal that, in the interim, the respondent used advice from ACAS and Institute of Personnel Directors to formulate a process to be followed. The claimant did not articulate the way in which he believed he had been disadvantaged by the process followed by the respondent. We were satisfied the respondent followed a reasonable procedure which involved consulting with the claimant and his representative, seeking up to date medical information to understand the position and giving consideration to alternative employment and reasonable adjustments.

118. The points raised by the claimant throughout this process and the grievance process focussed primarily on his desire to return to work on amended duties or with adjustments. The claimant simply did not accept the respondent could not accommodate this. The claimant was angry about the length of time it took the respondent to go through the process. (We address these points below).

119. Mr Byrne acknowledged that at the meeting on the 16 December, the occupational health report he had been provided with was from April 2020. Mr Byrne consulted with the claimant regarding the occupational health report and confirmed he would obtain an up-to-date report prior to the continued capability hearing. Mr Byrne duly did this and the reports were dated January 2021 (page 207) and February 2021 (page 209). The second report was obtained because the occupational health doctor wanted a report from the consultant orthopaedic surgeon so that he could reliably give an opinion on medical fitness to undertake the physical aspects of TCI safely and reliably.

120. The medical advice was that the claimant remained unfit to carry out physical restraint where the level of physical interaction/contact that could destabilise the knee replacement surgery could reasonably be expected. The restriction was likely to be required on a continuing basis.

121. The medical reports were discussed with the claimant and his representative at the capability meetings, and they did not disagree with the prognosis. The claimant's position was that he could safely return to work because, as a teacher, he was not called on very often to get involved in physical holding; there were other staff who could undertake the physical holding; others had

been allowed to work without undertaking physical holding and an adjustment could be made to remove that aspect of TCI or have someone else cover it for him.

122. Mr Byrne investigated the issue of when physical holds involving the claimant had taken place. He did not ask to see the actual Safe Hold Reports but relied on the information provided.

123. There was no dispute regarding the fact teaching staff were not called upon regularly to carry out physical holding. However, the fact remained that they were, on occasion, called upon to undertake physical holding. The Safe Hold Reports produced at pages 198 - 202 demonstrate the claimant was involved in carrying out two physical holds in 2017 and he was involved in two incidents (unclear whether he was involved in the physical holding) in 2018. Mr Byrne also understood the claimant had been involved in a physical hold in 2019.

124. The material fact was that although teachers were not regularly involved in carrying out physical holding, they could be, and were, called upon to be involved in Incidents and physical holding.

125. There was no dispute regarding the fact a physical hold would be carried out by more than one person. The Safe Hold reports demonstrate that two people could be involved or, in one of the reports, six people had been involved such was the levef of aggression being displayed.

126. Mr Byrne investigated with Ms Ross the claimant's position that other members of staff would be present in the classroom. There was no dispute regarding the fact other staff would assist in carrying out physical holding and that support could be called. The support available had changed from the time when the claimant and his witnesses had been employed because the central support system had been disbanded and the care workers retrained as residential workers. This change meant the residential workers were based in the Houses.

127. There was no dispute regarding the fact some youngsters may have one-to-one support funded by the local authority which would mean they had a

support person in class with them. Also, there may be a classroom assistant in some classes. The material fact to be taken from this was that resources were used where required to support the young people in class, and there was no guarantee the claimant would be in a classroom with more than one other adult person. We acknowledged support to help deal with an incident would be available, but this did not detract from the fact that if an incident occurred and required to be dealt with, the staff present had to be able to do so as a matter of safety for all concerned.

128. The issue of staff being allowing to work without undertaking physical holding is dealt with above and not repeated here. The respondent acknowledged there were situations where temporary impediments meant a person could not carry out physical holding, but these situations were all temporary and ultimately all staff would be trained in TCI, undertake all aspects of refresher training including physical holding and be able to do physical holds. There was no suggestion in the evidence that the respondent had members of staff who had been permanently exempted from doing physical holding.

129. Mr Byrne consulted with the claimant regarding alternative employment. The claimant made clear he wished to return to his role as a Principal Teacher. Mr Byrne accepted this and proceeded on this basis. We accepted Mr Byrne's evidence that in reality alternative roles were limited insofar as residential workers also had to do TCI and physical holding and the only other roles were for support staff and clerical workers, both of which carried a significantly reduced salary and in which the claimant had not expressed any interest.

130. We were satisfied Mr Byrne did consult with the claimant regarding the issues raised by him and regarding the medical advice and the situation regarding physical holding. We were satisfied Mr Byrne obtained up-to-date medical information and he also explored alternative employment and adjustments. The medical advice confirmed the claimant was not fit to carry out the physical holding part of TCI, and that this was a restriction which would likely be permanently in place. Mr Byrne investigated the points raised by the claimant regarding the number of times teachers are called upon to carry out physical holding and the availability of other staff to cover for him, but concluded it was

not possible to have a situation where a pupil-facing member of staff did not do physical holding and it was not reasonable to have others available to do physical holding for the claimant.

131. Teachers are in pupil-facing roles and may have to deal with Incidents where ultimately physical holding is required. We accepted the respondent's evidence that it was not possible, as a matter of safety (in terms of the safety of the individual staff member and others involved), to have members of staff in such a situation who were not able to do or assist with physical holding. The respondent owed the claimant a duty of care and, given the medical advice, the risk of putting the claimant back into his role where an Incident may occur and there was a risk of injury to his knee replacement was one they could not take.

132. We asked ourselves whether the respondent should have waited any longer before dismissing the claimant. We answered that in the negative. The respondent had up-to-date medical advice and understood the claimant would likely be unfit to carry out physical holding on a permanent basis. The claimant's situation was not going to improve by waiting any longer.

133. We had regard to the case of ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17*** and we asked ourselves whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. We were satisfied the respondent followed a fair procedure, consulted the claimant, obtained up-to-date medical advice and considered alternative employment and/or adjustments. In those circumstances and given there was nothing to be gained from delaying their decision, we concluded the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. We decided to dismiss this claim.

134. We, in conclusion, decided to dismiss the claim in its entirety.

**Employment Judge:** **L Wiseman**
**Date of Judgment:** **31 May 2022**
**Entered in register:** **31 May 2022**
**and copied to parties**