Case Number: 1600694/2016

RESERVED DECISION

EMPLOYMENT TRIBUNALS

Claimant: **Mr Simon Wilson**

Respondents: **(1) The Governing Body of Ysgol Friars**
(2) Gwynedd Council

Heard at: **Llandudno Magistrates Courts Hearing Centre**
On: **10 to 12 July 2017 and 13 July 2017 in Chambers**

Before: **Employment Judge G D Tobin**
Mrs C Linney
Mr H C Hamilton

Representatives
Claimant: **Mr C Adkins (trade union official)**
Respondent: **Mr G B Edwards (solicitor)**

JUDGMENT

AS CORRECTED UNDER RULE 69 OF SCHEDULE 1 THE EMPLOYMENT TRIBUNALS RULES OF PROCEDURE OF THE EMPLOYMENT TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS 2013

The Employment Tribunal unanimously finds as follows:

1. **The claimant was subjected to 4 of the 15 detriments claimed as a result of making a public interest disclosure.**

2. **The claimant was not subjected to any detriment, as alleged or at all, for making use of trade union services or on the grounds of any other reason related to his trade union membership or activity, pursuant to the Trade Union & Labour Relations (Consolidation) Act 1992.**

3. **The case will now be listed for a hearing to determine remedy.**

REASONS

The case

1 The claimant commenced proceedings on 21 September 2016. He was a School Teacher. At the time he issued proceedings, the claimant had been working at Ysgol Friars for 5 years. The claimant contended that he made a protected disclosure on 27 November 2015 [sic]. He said he had been subject to the following detriments as a result of making his protected disclosure: removed from teaching high ability groups; denied access to promotion and career development; and subjected to disciplinary action/ sanctions on a relatively trivial matter. The Claim Form set out a number of detriments in detail. The claimant also contended that he had been subject to detrimental treatment for raising his concerns with his trade union, contrary to the Trade Union and Labour Relations (Consolidation) Act 1992.

2 The respondents filed their initial Response on 3 November 2016. The claimant provided further Information and a Scott Schedule on 19 December 2016 and amended his Claim on 21 March 2017, 31 March 2017 and 27 April 2017 to add further alleged detriments.

3 The respondents filed its finalised Response on 30 May 2017. The Response was detailed. This denied that the claimant made a protected disclosure on 27 November 2015 or at all. The respondent denied that any disclosure made by the claimant amounted to a qualifying disclosure or a protected disclosure. In respect of the alleged detriments, the respondent contended these were neither, in fact, detriments or that they were detriments for reasons not related to the protected disclosure. Finally, the respondent denied that any of the alleged detriments scheduled in the claimant's Scott Schedule amounted to detriment arising from the claimant's trade union activities.

The issues to be determined

4 The issues to be determined at this hearing was identified by the parties. These were as follows:

Whistleblower protection

1. Did the claimant, in autumn 2014, make a disclosure of information?

2. Did the information relate to one or more of the 6 types of relevant failure?

3. Did the claimant believe that the information tended to show the relevant failure in question? If so, was that belief reasonable?

4. Did the claimant, believe that disclosure was in the public interest? If so, was the belief reasonable?

5. Was the disclosure a qualifying disclosure?

Detriment

In respect of each of the individual incidents in the claimant's Scott Schedule, as amended:

6. Did the incident amount to a detriment?

7. If so, did detriment occur, either as a result of the claimant's disclosure or his trade union activities?

The Scott Schedule

The Scott Schedule identified the alleged disclosure and detriments, pursuant to section 43B(1)(b) Employment Rights Act 1996. A purported disclosure on 12 December 2012 and 11 alleged detriments were crossed from the Scott Schedule. The disclosure relied upon by the claimant was allegedly made on 14 October 2014 and 15 detriments flowing from this protected disclosure were alleged.

The matters that we (i.e. the tribunal) considered were as follows:

Disclosure:
During w/c 1/8 September 2014, at a science staff meeting, Keith Varty announces 100% passes in the BTEC. On 15 September 2014 the claimant scrutinises the school system and discovered 4 pupils awarded a Pass in the BTEC Applied Science QCF qualification. He then goes to the school system and prints out a copy of the table that had been completed by staff confirming which units pupils had completed. Only 2 of the 4 pupils are on this system. Having checked the information available on the school system, which confirmed that the pupils should not have been awarded the qualification. The claimant approached Ms Sam Berry [i.e. now Ms Williams], Head of Science face-to-face to point out the error, she stated, "she agreed that this was wrong, that they hadn't passed and she would look into it". On 23 September 2014, the claimant emailed Ms [Williams] asking what was happening with these pupils. On 14 October 2014 the claimant approached Mr Gareth Parry, Deputy Head Teacher, about his concerns about the 4 BTEC pupils, and some other unrelated issues. During the meeting Mr Parry tried to find the file of 2 of the pupils. The file was no longer on the school system. In light of the lack of action and the discovery that the file had been deleted from the school system, the claimant verbally requested that Mr Parry arrange for him to be protected under the school's whistleblowing policy.

[*the alleged detriments*]:

I. *Date:* 13 February 2015
Description of act: Claimant emailed David Healey re-: timetabling issues to try to gain an improved timetable for the 2015/16 academic year. Email sent in response to an email to all staff asking for any timetabling preferences, implying that he had some authority over these. Mr Healey ignored email, no response and subsequently given yet

another timetable bias towards low ability groups with no A-level or GCSE.
Perpetrator: David Healey

II. 21/25 September 2015
Messages to David Healey about timetabling. No response.
David Healey

III. 5 October 2015, 13 October 2015, 21 October 2015, 4 November 2015.
Email correspondence between claimant and Keith Varty. Dr Varty deliberately ignores claimant's request to meet to discuss promotional opportunity in light of [Ms Williams] leaving. Then in November 2015, Dr Varty states that the claimant could have applied for the position which was advertised as a BTEC teacher and not Head of BTEC, so internal staff didn't realise this was an opportunity for promotion. Dr Varty subsequently made intimidating comments by email to the claimant.
Neil Foden, Keith Varty

IV. June 2016
Claimant applied for Assistant Head of Year but not selected for interview.
Neil Foden

V. Ongoing
Claimant requests to attend management training during performance management process for 4 years in a row. Never offered or invited to any management training, even when in-house training was arranged by the school.
Neil Foden, Keith Varty, Cherry Shacklady

VI. 17 June 2016
Claimant removes pupils during controlled assessment and puts him in another room. Claimant given a first written warning. First letter from Neil Foden stated would be live on record for 12 months, then second letter sent to stating 6 months.
Neil Foden

VII. 1 July 2016
Letter confirming date of appeal hearing, scheduled for 12 July 2016. Hearing subsequently cancelled due to insufficient number of governors. To date no appeal has been heard.
Neil Foden

VIII. 12 July 2016
Interrogatory style interview of claimant by David Healey and Gareth Parry. No opportunity to have union rep present or any indication as to what the meeting was about. Claimant was not made clear of any possible allegations which may arise.
David Healey/Gareth Parry

IX. 2 September 2016
David Healey reported claimant to the Information Commissioner on 15 July 2016. Correspondence between the first respondent and the ICO follows. Claimant suspended. Claimant returns to work on 6 September 2016.
David Healey/ Neil Foden

X. 21 October 2016
On his return to work claimant was advised that a grievance had been submitted against him. Member then advised this had been "dropped" but Neil Foden was looking at his alleged "vexatious" actions.
Neil Foden

XI. October 2016
Union submits grievance against Neil Foden, David Healey and Gareth Parry.
Governing body
To date, grievance has not been heard in procedure

XII. October 2015
School advertised for new biology teacher. There was no indication on the advert that it was for the Head of BTEC carrying a salary enhancement. New teacher was appointed and given the head of BTEC position without contest.
Governing body and Neil Foden

XIII. 14 March 2017
Neil Foden, Head Teacher of the first respondent, has subjected the claimant to disciplinary proceedings for briefly leaving pupils to obtain his lunch whilst assisting them during his own lunchbreak.

XIV. 29 March 2017
The respondent circulated documentation to hear the claimant's grievance of 21 October 2016 ahead of the hearing scheduled for 6 April 2017. The circulation included a new procedure which was not in place when the grievance was submitted which now expressly allows the respondents to discipline the claimant once they will now likely determine this is vexatious. The new procedure was drafted by Mr Foden, Headteacher of the first respondent on 27 January 2017 in order that it is used to hear a grievance in part against himself. Mr Foden's written response to the grievance circulated at the same time includes reference to the procedure which he drafted and invites the governors to find the grievance is vexatious which will result in disciplinary action being taken against claimant. We [sic] now believe that it is the intention of the first respondent to manufacture grounds to dismiss the claimant and replace him probably with the teacher who was the subject of his disclosure.

XV. 6 April 2017
The respondent heard the claimant's grievance of 21 October 2016 by procedure which was drafted by one of the subjects of this on 27 January 2017 with the express intention of deciding that it was vexatious in order to pursue disciplinary allegations against him. The procedure has not been fully adopted by the first respondent. This demonstrates that 1) that the delay in hearing this grievance was with intention of undertaking this act; and 2) that the governors have fully joined themselves to the victimising acts the claimant has suffered and therefore it is now impossible for this grievance to be fairly heard in procedure.

The relevant law

5 The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The PIDA is convoluted at best, but its aim is to give protection to *workers* (which is wider than *employees*) who disclose specified forms of information using the procedures laid out in the Act. That protection is achieved through the insertion of relevant sections into the Employment Rights Act 1996 ("ERA") which focuses on providing protection to workers in cases of action short of dismissal which has been taken against them (as well as dismissal itself) following their disclosure of information.

6 Section 47B(1) ERA states that :

> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

7 In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

8 Under s43B(1) ERA a "qualifying disclosure" means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:

(a) a criminal offence has been committed or is likely to be so;

(b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;

(c) a miscarriage of justice has occurred or is likely to occur;

(d) the health and safety of any individual has been, is being or is likely to be endangered;

(e) environment has been, is being or is likely to be damaged;

(f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

In this instance, we are dealing with s 43B(1)(b) ERA.

9 There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. An disclosure could convey information as part of an allegation and thereby be covered by the act: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*.

10 The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:

a. disclosures to the worker's employer or other responsible person: s43C;

b. disclosures made in the course for obtaining legal advice: s43D;

c. disclosures to a Minister of the Crown: s43E; and

d. disclosures to a "prescribed person": s43F. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:

e. in "other cases" which fall within the guidelines laid out in s43G. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;

f. in cases of "exceptionally serious" breaches: s43H.

S43C ERA is the relevant provision in this case.

11 In respect of causation, the phrase "on the ground that…" in s47B(1) ERA above, means that, once the detriment has been shown, the employer must establish that it was "in no sense whatsoever," connected to the disclosure in order to avoid liability: see *NHS Manchester v Fecitt [2011] EWCA Civ 1190, [2012] IRLR 64*.

12 S17 Enterprise and Regulatory Reform Act 2013 ("ERRA) introduced the requirement that the disclosure must be in the public interest. The standard is the reasonable belief of the worker, which is not a high obstacle. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA.

13 By s146 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") it is an unlawful for an employer to take action short of dismissal against an individual worker for the purpose of:

a. Preventing or deterring him from being a trade union member, or penalising him from for doing so; or
b. Stopping the worker from taking part in trade union activities; or
c. Stopping the worker from making use of trade union services; or
d. forcing the worker to join some trade union; or to join a particular trade union.

14 The scope of this protection focuses on the employer's intention. The employer's action must be direct and must be for the purpose of deterring or forcing or penalising the worker. Action for some other purpose that happens to affect a trade unionist in a discriminatory or detrimental way is not protected and neither is action taken against the trade union rather than the individual.

The witness evidence

15 We (i.e. the Tribunal) heard evidence from the claimant, Mr Simon Wilson. The claimant was represented by Mr Colin Adkins, a full-time officer of the National Association of Schoolmasters Union of Women Teachers ("NASUWT"). Mr Adkins provided a witness statement but was not presented to give oral evidence. We also read a witness statement of Mr Elandre Snyman, who was another Teacher at Ysgol Friars and a colleague of the claimant.

16 We heard "live" evidence from the following witnesses on behalf of the respondents: Mr Neil Foden, the school's Head Teacher; Mr Gareth Parry, a Deputy Head Teacher; Mr David Healey, a Deputy Head Teacher; and Dr Keith Varty, a Teacher and Head of the Science Faculty.

17 We read a statement from Ms Samantha Williams (formerly Berry) who was a teacher at the school from 1 September 2008 to 31 December 2015.

18 At the outset of the hearing, the Employment Judge raised the importance of hearing the evidence within the time allocated for the hearing and providing sufficient time for the tribunal to adequately deliberate on the rather intricate sequence of events. The importance of the Scott Schedule was emphasised and the parties were advised of the importance of hearing evidence that was confined to the issues to be determined by the tribunal. The parties were asked to limit oral evidence to merely those witnesses necessary for the

determination of these issues. We would like to thank the parties for their constructive approach in this regard.

19 The fact that certain witnesses had not been presented for cross examination meant that limited weight must, of course, be accorded to their evidence. That said, we heard oral evidence from all witnesses that the parties thought necessary. So, the matter of what weight to attach to some of the evidence was balanced by the relevance of the evidence adduced.

Our findings of fact

20 We made the following findings of facts. The Employment Judge stated at the hearing and we reiterate here that we are not going to make a determination as to the accuracy of the alleged protected disclosure, i.e. whether or not one or more school official engaged in examination malpractice. The purpose of the PIDA (and its ensuing amendments to the ERA) is to permit employees to make certain disclosures about their working environment and/or the activities of their employers without suffering a penalty for having done so. The whole focus of a whistleblowing case is then; (1) whether or not the claimant was a whistleblower (as defined by the relevant legislation); and (2) whether or not he suffered detriment(s) as a result of the whistleblowing. As explained to the parties at the hearing, the truth or accuracy of any disclosure is not a matter for our determination.

21 We did not determine all of the facts that were in dispute in this case. We merely determine those facts that we regard as central to determining the claimant's claims of detrimental treatment for disclosing information, which have been identified above. Where we have determined facts that were in dispute, and where this requires further clarification, we have set out the reason for our determination.

22 The claimant commenced work for Ysgol Friars on 1 September 2011. He was employed as a Biology Teacher. He is still employed by the first respondent.

23 The second respondent is vicariously liable for the acts and omissions of the first respondent, by virtue of the Employment (Modification of Enactments Relating to Education) (Wales) Order 2006. We were informed by Mr Edwards, which we accept, that the first respondent is not included in the schedule relating to s47B ERA (as amended), so therefore, to the extent that the claimant succeeds with any of his allegations against the first respondent, his claim must also succeed against the second respondent, if he is to obtain a remedy.

24 At the start of the start of the academic year in early September 2014, Dr Varty announced at a science meeting that the school had achieved a 100% pass mark in the 3 BTEC classes for Applied Science. The claimant knew this to be incorrect because of the non-attendance of 2, possibly 4 pupils. Surprisingly, the claimant did not say anything at the time nor to Dr Varty in the immediate aftermath of his announcement. The claimant said he wanted

to check the system and his records before raising his concerns. So, seemingly, at the outset, the claimant chose not to raise or query this informally. Instead, he opted for a more formal, perhaps confrontational, path.

25 On 15 September 2014 the claimant printed out a copy of the "in-school" BTEC criteria log from the school system which confirmed 2 of the pupils apparently had not passed their coursework and therefore should not have been awarded the BTEC Applied Science pass. The claimant said that he knew, from teaching 2 other pupils, that they should not have passed either based on their absences. The claimant printed out the schools SIMs exam results on 15 and 19 September 2014.

26 The claimant approached Ms Williams, the Head of Applied Science, that day and she confirmed that all 4 pupils should not have passed the course and these passes must have been awarded in error. She said that she would look into it. The claimant chased this 8 days later because he had not heard back from her and Ms Williams responded informing him that Dr Varty and her were looking into it. The claimant then heard nothing further. The claimant was convinced that his concerns were not being addressed and, in fairness to the claimant, we believe that is probably an accurate reflection of the situation. We are not satisfied that either Ms Williams or Dr Varty had taken any material steps to address the inappropriate passes at this time. We were told that Ms Williams was going through an acrimonious relationship breakdown at this time so that might account for her failure to address the undeserved passes awarded. Dr Varty was given Ms Williams some support so whether out of misplaced loyalty to Ms Williams or a desire to cover up examination malpractice nothing was done.

27 On 14 October 2014 the claimant went to see Mr Parry, a Deputy Head Teacher, in Mr Parry's office. They initially discussed the school reward system and at the end of this discussion, the claimant raised (again) his concern that 4 pupils had passed the BTEC examination. The claimant said "4 pupils were awarded BTEC passes when they should not have passed the course" or very similar words that affect. The claimant had raised these concerns previously so he did not dwell on the issue, and Mr Parry was to some extent familiar with this complaint because he did not enquire further. The claimant said that he wanted to be protected under the school's whistleblowing procedure. There was no one else present at this exchange and we accept the claimant's account that this was a protected disclosure, pursuant to the ERA.

Allegation I

28 On 13 February 2015, the claimant emailed Mr Healey regarding the teachers' timetable for the next academic year. He wanted an improvement for his teaching commitments for the 2015/16 year. In the email, the claimant complained that if he did not get what he wanted, he would class this as bullying and intimidation (which was spelt out in block capitals to ensure Mr Healey would get the message) and the claimant threatened possible trade union intervention.

29 In his Scott Schedule, the claimant complained that Mr Healey ignored his email and the claimant was subsequently given yet another timetable biased towards lower ability groups with no A-level or GCSE teaching. First, the claimant's email did not complain of reduced A-level teaching, so that is an unfair criticism of Mr Healy. It was also inaccurate to say that the claimant was given no GCSE teaching because in the timetable analysis contained within his statement, the claimant identified 13 key-stage 4 (i.e. GCSE) lessons for academic year 2015/16 and 12 key-stage 4 lessons for 2016/17.

Allegation II

30 The claimant received his new timetable for the academic year 2015/2016 during July 2015. However, he made no a complaint about this when the timetable was conveyed to him.

31 The claimant wrote to Mr Healey after the start of term, on 21 September 2015, complaining that his timetable was full of low ability sets and BTEC classes. He complained that he had not been given any six-form lessons. The claimant identified speaking to others, including Dr Varty, and said he was told that there were "reasons", without further explanation, for the timetabling. He requested a meeting to discuss his concerns and identified that he was concerned about his career prospects.

32 On 25 September 2015, the claimant wrote to Mr Healey as follows "Thank you for meeting with me afterschool on Wednesday 23rd Sept to put my concerns about timetabling to you…" the claimant proceeded to outline his ongoing concerns and concluded his email. "I will keep you informed of my discussions with Keith. But once again thank you for spending time to listen".

33 The claimant's complaint was that there was no response from Mr Healey to his email of 21 September 2015 and 25 September 2015. From the above, it is clear that this complaint does not fit the reality of the situation because Mr Healey met with the claimant promptly after the claimant's email of 21 September 2015 and, by any reading of the email of 25 September 2015, his communication did not require a further response from Mr Healey. This is borne out by an absence of contemporary complaint from the claimant.

Allegation III

34 On 5 October 2015 the claimant wrote an email to Dr Varty entitled "some questions and comments, something for the next department meeting". He raised various points and towards the end of the email, the claimant asked to meet with Dr Varty to discuss his timetable and career development. He did not get a response from Dr Varty and pursued this on 13 October 2015. The claimant pressed for the meeting, particularly in light of the career opportunities that he thought would be available following Ms Williams departure. Significantly, he also copied Mr Healey into this email.

35 By 21 October 2015, the claimant still did not have a response to his emails and chased this again, although he copied in 3 other senior colleagues (which was hardly conducive to promote a constructive dialogue). The claimant noted

that a replacement for Ms Williams had been found, and he asked whether that would mean any changes to the timetable after the successful candidate took up his or her position in the New Year.

36 The respondent advertised a Teacher of Biology position sometime around late September or early October 2015. This was the vacancy that arose following Ms Williams' resignation. The deadline for applications was 16 October 2015. The decision to advertised post was taken by the respondent's senior management team, in consultation with Dr Varty. The role was advertised with a possible Teaching and Learning Responsibility additional payment ("TLR") in order to attract better candidates. The respondent did not commit to appointing the successful candidate with a TLR and we accept Dr Varty's evidence that had a weaker candidate been selected then the appointing officials would have decoupled the TLR and advertised this internally.

Allegation IV

37 In June 2016, the claimant applied for a role as the Assistant Head of Year. He was not selected for interview.

38 On 27 June 2016 Mr Foden provided the claimant with feedback in respect of his application. We do not find that the claimant's non-selection for interview was because of his protected disclosure of 14 October 2014.

Allegation V

39 In respect of this allegation, the claimant referred us initially to his review meeting of 18 September 2014 with Ms Williams. This predated his public interest disclosure and we could see no reference to management training in the record of this review.

40 At the claimant's review of 4 November 2014, with Lucy-Hannah Owens, the claimant identified a personal objective:

> Attend middle management training – research possible external courses and email JAS regarding in-school training opportunities.

41 This optional objective was recorded as not being met on 17 September 2015 and it was noted (apparently by Ms Owens) "To continue into the next P.M. cycle".

42 The appellant's next review was on 29 September 2016. This recorded Objective 3 (Optional) as follows: "Mr Wilson requested to go on middle management training course – so far this has not been offered. Further on in the review document under Additional Support, Training or Development needed it records "middle management course requested".

43 The claimant identified in evidence that he had not reserved a place on any training course nor had he identified any specific training seminars or sessions that he was keen on pursuing.

Allegation VI

44 During one of the claimant's lessons in March 2016 a pupil, CW, was naughty and the claimant removed him from the class as the other pupils were undertaking a controlled assessment. CW's mother later complained about this, about CW's lack of performance and progression in school and she also alleged that other pupils were getting preferential treatment. Jacqueline Street undertook an investigation of this complaint and wrote to the claimant by email on 22 March 2016. Ms Street recognised that the claimant was busy, nevertheless, she asked a number of detailed questions, which required very expansive responses. Ms Street copied her email to Dr Varty and Ms Shacklady without explanation. There is evidence in the bundle that the claimant wrote his response on a printed copy of Ms Street's email and we are satisfied that he returned his responses to her.

45 On 17 June 2016, Mr Foden gave the claimant a first written warning. Mr Foden wrote as follows:

> This warning will remain "live" on your record until 17th June, 2017 when it will be expunged. If, during this period, you are found to have committed further misconduct, a more serious level of sanction is likely to be imposed.

46 Mr Foden subsequently sent the claimant the exact same letter – dated 17 June 2016 also – substituting the duration of the warning from "17th June, 2017" for "17th December, 2016". So a 12-month warning had been unilaterally varied to a 6-month warning without any explanation, or any apology, for the possible error. Mr Foden did not speak with the claimant about this alteration, nor did he contact the claimant's trade union representative. There was no explanation or other indication in the disciplinary warning itself to say the second letter was a substituted disciplinary warning.

Allegation VII

47 The claimant was informed of his right to appeal Mr Foden's sanction of a first written warning in both disciplinary warning letters. We do not know when this appeal was lodged because we have not seen the appeal letter. Nevertheless, from subsequent correspondence, it is obvious that the claimant appealed against the disciplinary outcome promptly.

48 An appeal hearing was set for 12 July 2016, which was almost a month after the initial warning had been given. This was cancelled, according to the respondent, owing to the unavailability of school governors to hear such an appeal. The appeal hearing eventually took place on 12 May 2017. This was 11 months after the original decision and 5 months after the substituted warning expired. The warning had been valid in the interim (for 6 months), as Mr Foden said that he did not think about suspending this penalty.

49 When the appeal was eventually determined, the appeal panel regarded the sanction imposed as "inappropriate". The appeal outcome letter said:

This decision has been reached on the basis that;

1. Lack of a full investigation into this specific incident has taken place.
2. The teacher followed his professional judgement to the best of his ability in very difficult circumstances.

50 The appeal panel acknowledged that standard operational practice was not followed "to the letter" in this case with regards to the controlled assessments, "but that efforts were then made to ensure that the assessments were still valid".

51 The decision of the appeal panel can, at best, expunge a disciplinary warning after the disciplinary outcome was communicated to the claimant/appellant. So, there is no doubt, that the claimant had been subject to an apparently valid "inappropriate" disciplinary sanction for the whole duration of the warning, and only some considerable time thereafter was this disciplinary warning deleted from the claimant's personal records.

Allegation VIII

52 The claimant had been due to have his appeal against his disciplinary warning heard on 12 July 2016. This hearing had been cancelled by Mrs Williams (the Clerk to the Governors) on 6 July 2016. By strange coincidence, the claimant was invited to a meeting by Mr Healey on this day. We accept the claimant's evidence that Mr Healey gave no indication as to what the meeting was about, although Mr Healey said there was nothing to worry about.

53 The purpose of the meeting was to investigate a purported data security breach. Mr Parry said that he had suspected that there may have been a data breach by the claimant's trade union representative, Mr Adkins, which occurred at a disciplinary hearing for Mr Snyman, another NASUWT member, on 30 June 2016. Apparently, whilst he was at Mr Snyman's hearing, Mr Adkins referred to a possible inconsistency in the treatment of the claimant compared to that of Ms Williams (an National Union of Teachers member).

Allegation IX

54 On 15 July 2016 Mr Healey reported claimant to the Information Commissioner. His detailed written referral said that he had interviewed the claimant who had confirmed passing the relevant information to Mr Adkins, without Ms Williams' permission. This was not true according to our reading of the schools' representative's notes of the investigation. When the referral form asked to provide extracts from policies and procedures relevant to the incident, Mr Healey referred to the school's disciplinary procedures, we determine, to give the impression that he claimant had been dealt with formally in this context. Mr Healey did say he was not sure whether there had been a data breach or whether this amounted to a criminal offence, yet his action in making accusations against the claimant through the ICO were not justified in any way.

55 On 25 July 2016 a Criminal Investigation Officer from the ICO wrote to Mr Healey acknowledging the referral. The letter stated: "From the information you have provided it appears that an offence contrary to section 55 of the

[Data Protection Act 1998 ("DPA")] *may* have been committed". We were puzzled about this response because even of the misinformation applied by Mr Healey, it was obvious to us that a criminal act had not been committed. The Criminal Investigation Officer may have been working to a very low threshold for this initial perusal or she may have placed unnecessary weight upon the allegation as relayed by Mr Healey.

56 Although Mr Atkins was at the heart of the purported data breach, he was not interviewed during the course of the investigation or prior to the ICO referral.

57 On 2 September 2016 the Criminal Investigation Officer wrote again to Mr Healey to say that the allegation did not merit further investigation and the ICO would close the case. The letter stated that:

> … there is no evidence that the information was obtained unlawfully as [Mr Adkins] received the information verbally. There is also no evidence that his source [the claimant] obtain the information unlawfully.

58 Mr Healey received this letter on 2 September 2016. He said that he did not have time to see this email because he was otherwise preoccupied. We do not believe this. Mr Healey confirmed at the hearing that he had access to his emails on his mobile phone. So even if he was otherwise engaged, he could readily have accessed such important communication from a statutory organisation regarding a senior colleague. Mr Healey had originated the complaint, which was a big step. We do not believe in the quirky coincidence that delayed his action upon the ICO outcome communication as portrayed to us.

59 On 2 September 2016, after the ICO outcome had be sent and received by Mr Healey, Mr Foden suspended the claimant. Mr Foden said this was necessary on the first day that the school reopened for the autumn term and he gave reasons for the suspension in his email 3 days later. So, the claimant had not been suspended following his formal interview by Messrs Parry and Healey, nor at the point of Mr Healey's referral to the ICO. Mr Healey was present at the claimant's suspension and said nothing to the claimant that day, or significantly, thereafter about the letter he had received from the ICO.

60 In his email of 5 September 2016, Mr Foden both revoked the claimant's suspension and confirmed the reasons why the claimant had been suspended. In respect of the reasons for suspension, Mr Foden said that the ICO had *made it clear* that a criminal offence *may* have been committed, and that the offence may have been committed by the claimant, the claimant's representative, or both. This was a reference to the ICO's letter of 5 weeks earlier.

61 In respect of the revocation of the suspension, Mr Foden said that he had received another letter from the ICO that morning; "making clear that they are not proposing to take any further action on the breach as a potential criminal offence". The claimant returned to work on 6 September 2016.

Allegation X

62 Mr Foden's email of 5 September 2016 also informed the claimant that a grievance had been lodged against him following his anonymous complaint with Pearson about BTEC science. Mr Foden told the claimant that he would now be subject to a formal investigation. Accordingly, the date of the detriment is not 21 October 2016, as contended by the claimant, but the date of Mr Foden's email.

63 The grievance in question arose from an intemperate complaint from Mrs Jennai Grove in which she repeatedly referred to "a malicious accusation" or "malicious accusations", concerning BTEC examination irregularity. Mrs Grove appeared outraged that the matter had been taken up with the BTEC regulator without raising concerns internally and she pressed for formal action against an unidentified perpetrator because, she felt, it brought school into disrepute.

64 It was not until 21 October 2016 that Mr Foden advised the claimant that Mrs Grove had withdrawn her grievance. Nevertheless, Mr Foden threatened in the same email that he needed to take advice from the local authority as to whether he would pursue action on the basis that "the complaint may have been vexatious".

Allegation XI

65 On 21 October 2016 the claimant's trade union representative submitted a grievance against Mr Foden, Mr Healey and Mr Parry for their "malicious, bullying and intimidating behaviour" towards claimant. The grievance referred to investigation meeting of 12 July 2016 and the claimant's suspension of 2 September 2016. Seemingly, not one prepared to try to take the heat out of situation, Mr Adkins said the two aforementioned incidents were "the most recent examples of the type of malicious, intimidating and bullying behaviour deliberately intended to cause Mr Wilson stress and humiliation since Mr Wilson instigated the school's Whistleblowing policy on 27 November 2014". Employment tribunal proceedings had been issued one month earlier, on 21 September 2016.

66 This grievance has not been fully heard as the claimant withdrew from the process as the school's governors adopted a new procedure after the claimant had raised his grievance. The new procedure had the potential to be detrimental to the claimant and was implemented without consulting the claimant or his trade union. The claimant appealed against the grievance outcome and this appeal has not yet been heard.

Allegation XII

67 This is substantially the same allegation as that contained in allegation III above and has been dealt with previously.

Allegation XIII

68 On 14 March 2017 Mr Foden invited the claimant to a disciplinary hearing. Mr Foden alleged that the claimant had left pupils unsupervised in his laboratory during lunchtime on four occasions. Mr Foden said that this was, in contravention of: the school's standard operational procedure; instructions that he had sent to all teachers in an email; and specific instructions that he had given the claimant following the second incident.

69 The matter finally came to a disciplinary hearing on 19 June 2017. The claimant accepted:

a. that he had received and read Mr Foden's email of February 2016, reminding staff not to leave pupils in their rooms unsupervised;
b. that Mr Foden had found pupils in his lab unsupervised twice in the same week in January 2017;
c. he had given the pupils permission to be in the lab;
d. he had left pupils to get his lunch; and
e. he had warned the pupils not to get caught.

70 The claimant raised a number of points at his disciplinary hearing, of relevance were:

a. as the incident took place at lunchtime, which was not directed time, it was inappropriate to apply disciplinary action;
b. he had found pupils unattended in other classrooms; and
c. the claimant was the only person taken to a formal hearing so therefore he was not being treated equitably.

71 Mr Foden addressed the claimant's points. He said that there was a precedent that staff could be disciplined for misconduct which took place outside directed time. In respect of points (b) and (c) that he had spoken to 4 other members of staff about leaving pupils unsupervised and that none had repeated the offence. He said he believed that disciplinary action for a single offence would be oppressive.

72 Mr Foden then gave the claimant a first written warning, which would remain "live" on his record for six months.

Allegation XIV

73 On 29 March 2017 Mrs Williams circulated documentation in respect of the claimant's grievance of 21 October 2016 ahead of the hearing scheduled for 6 April 2017. The circulation included a new procedure which was not in place when the grievance was submitted and which expressly allowed the respondent(s) to discipline the claimant in respect of a false, vexatious or malicious grievance.

74 This allegation invited us to determine that the respondents would now likely determine that the claimant's grievance was vexatious and that the new procedure was drafted by Mr Foden on 27 January 2017, as a precursor to dismissing the claimant on "manufactured grounds". We are not willing to

speculate as to the purpose of changing the grievance procedure prior to the claimant hearing. However, we note that this was done without trade union consultation or any consultation with the claimant.

75 The claimant did not attend his grievance hearing and this hearing proceeded in his absence. The grievance was found to be "unfounded, without sufficient grounds and therefore vexatious".

76 The claimant subsequently appealed the grievance outcome. His grievance appeal has not yet been heard.

77 To date, so far as we are aware the respondents have not instigated any disciplinary action against claimant in respect of his grievance.

Allegation XV

78 On 6 April 2017 the school governors heard the claimant's grievance of 21 October 2016. Mrs Williams communicated the outcome of the claimant's hearing to the claimant by letter dated 25 April 2017. The claimant appealed against his grievance on 9 May 2017. This appeal had not been heard by 13 July 2017 when the employment tribunal hearing concluded.

Our determination

79 We note that there was some considerable discord between the claimant and his colleagues prior to the events under scrutiny. This is certainly borne out in the early part of the Scott Schedule, which refers to a disclosure of 12 December 2012 and 11 alleged detriments. We did not hear evidence in respect of this earlier purported disclosure and the ensuing detriments but we were struck by the ongoing antagonism between the parties. We commend parties for sticking to the issues at the hearing, particularly Mr Edwards, who portrayed an impressive degree of professional detachment. However, the limitation of our approach was that we felt that we were being given only part of the picture; that said, our job was to judge the case and this was not a conciliation exercise.

Protected disclosure

80 There was much dispute between the parties about whether or not the claimant gave Mr Parry a data key containing information. We have not resolved this issue because we did not need to. The verbal exchange between the claimant and Mr Perry was, of course, an allegation of exam irregularity. However, this was also the disclosure of information as required by s43B ERA.

81 BTEC stands for 'Business and Technology Education Council', which used to run the award when it was first introduced in 1984. At all material times, BTECs were awarded by the Edexcel Examination Board. The qualification was conceived by statute and is a vocational qualification recognized by employers. It also satisfies certain entry requirements through the Universities and Colleges Admissions Service. We accept that if there were examination

irregularities (which obviously we have not determined) then the BTEC examination invigilator (or other such responsible official) was likely to have failed to comply with a legal obligation to which he or she was subjected to, pursuant to s43B(1)(b) ERA.

82 The *qualifying disclosure* was made to Mr Parry, a Deputy Head Teacher, who was the claimant's employer or other responsible person, pursuant to S43C ERA. A disclosure in relation to purported irregularity in the award of a public examination would, of course, be in the public interest as the integrity of a public educational qualification is a matter of legitimate public concern. So not only was the disclosure in the public interest, it was, of course, reasonable for the claimant to believe that it was in the public interest.

83 The claimant's statement was not helpful because his concentration was less on the disclosure and more on the detriments that he said he suffered. This preoccupation with his injury seemed to reflect the claimant's consistent approach to his employer and this case. The Employment Judge pressed the claimant in evidence about the words he used during his conversation with Mr Parry. The claimant could not remember the precise words he used. However, we believe that the claimant gave us a genuine and honest answer when he said that he stated: *4 pupils were awarded BTEC passes marks when they should not have passed the course* (based on their non-attendance). We accept that the claimant said this, despite Mr Parry's evidence to the contrary. We preferred the claimant's account because this was consistent with his whole approach in his pursuit of the examination irregularity and it does not make sense that he would go on to say that he wanted to be protected under the whistleblowing procedures without telling Mr Parry what this was about. The flaw in Mr Parry's account was that he accepted the claimant referred to whistleblowing protection, but that he did not ask what this was about. This does not make sense as Mr Parry was a bright, senior teacher and although we suspect he did not welcome prolonged contact with the claimant he would, at least, enquire what on earth the claimant was going on about, if the claimant had raised the issue of whistleblowing protection.

84 The verbal exchange between the claimant and Mr Parry was, of course, an allegation of exam irregularity. However, it was also the disclosure of information as required by *Cavendish Munro v Geduld*. Accordingly, we find that the claimant made a protected disclosure.

85 In a "normal" workplace, we would expect the claimant to raise concerns with his employer promptly and without the need to obtain proof, surreptitiously or otherwise. Nevertheless, the claimant chose a more formal, perhaps, confrontational route either because of his personality or because he perceived that he was working in a hostile environment. The approach adopted by the claimant is evidence of his less than positive or constructive relationship with his colleagues. The claimant's request to Mr Parry that he be "protected" pursuant to the whistleblowing policy is a further illustration of an uncongenial working environment, although such a request was unlikely to achieve an encouraging approach from his manager.

86 We accept that the claimant's disclosure was in the public interest, although we are not entirely convinced that this was the claimant's primary motive. We suspect that this was a matter that gave the claimant a platform to criticise his employers. However, despite what we may perceive as some personality flaws, we do regard the claimant as a dedicated teacher and we do believe that the claimant saw his disclosure has been in the public interest, even if that was not his primary motive. It stands to reason that a disclosure of examination irregularity must reasonably be in the public interest.

87 The claimant pursued this matter because he was convinced that his concerns were not being addressed. When his concerns were not addressed. It is perhaps unsurprising that he became convinced that colleagues were seeking to cover up this whole episode. Although there is no evidence of a cover-up, the claimant's suspicions were not unreasonable. The claimant's less than straightforward approach in bringing his concerns to his employer was borne out by the rather dismissive attitudes of Ms Williams initially and then Dr Varty. We heard evidence that Ms Williams was going through a messy relationship breakup and may not have been effective in her administration (or her teaching). We noted Dr Varty's efforts in supporting his colleague may have been somewhat misdirected as if he had concentrated on addressing the claimant's apparently legitimate concerns, then this dispute, at least, may have been resolved at an earlier stage.

Allegation I – no public interest disclosure detriment

88 The detriment the claimant initially complained of was that he was not offered sufficient higher-tier GCSE biology groups for the academic year 2015/16. The claimant's email of 13 February 2015 to Mr Healey, accusing him/senior colleagues of bullying and intimidation and threatened trade union involvement or action. This was an angry email and never likely to provoke any response other than to irritate the recipient.

89 The claimant has proffered no evidence, by way of comparator(s) for teachers who fared better than him with their teaching commitments by not making a public interest disclosure.

90 Our factual determination concluded that: first, the claimant's email did not complain of reduced A-level teaching; and second, that the claimant did undertake a significant amount of GCSE teaching.

91 If there were timetabling detriments, we are not convinced that this related to any protected disclosure. There were 14 science teachers at the school and only 4 A-level courses. Teaching A-level courses was in demand and this was shared although we suspect the more long-standing teachers may have fared better with their expectations. The claimant had the rewards of teaching brighter pupils at a more advanced level up to 2015. In the absence of any clear evidence on other teachers' commitments we were unwilling to speculate on this point. So far as GCSE teaching, the claimant's own account was that he taught:

- 8 key-stage 4 lessons for academic year 2011/2012
- 10 key-stage 4 lessons for academic year 2012/2013

- 10 key-stage 4 lessons for academic year 2013/2014
- 12 key-stage 4 lessons for academic year 2014/2015
[*The protected disclosure relied on by the claimant occurred on 14 October 2014.*]
- 13 key-stage 4 lessons for academic year 2015/2016
- 12 key-stage 4 lessons for academic year 2016/2017
This is not a reduction in GCSE teaching as alleged or at all.

92 Mr Healey confirmed in evidence that he set the science timetable in association with the head of faculty, Dr Varty. It was plain to us that Dr Varty disliked the claimant. As Dr Varty's aversion to the claimant predated the protected disclosure relied upon, we have not sought to determine the reason for this ill-disguised antipathy. Nevertheless, we have no doubt that the claimant's threatening emails reinforced Dr Varty's antipathy towards the claimant.

93 In any event, the lack of a response by Mr Healey to such an email may be seen as a wise option in the circumstances, as it did not inflame the situation further.

Allegation II – no pid detriment.

94 The claimant's complaint was that there was no response to his email of 21 September 2015 and 25 September 2015. From our findings of fact, it is clear that this complaint does not fit the reality of the situation because Mr Healey met with the claimant promptly after the email of 21 September 2015 and by any reading of the email of 25 September 2016, this did not warrant a further response from Mr Healey. This is further borne out by an absence of contemporary complaint from the claimant.

Allegation III – no pid detriment

95 Throughout this series of emails, we were struck by the argumentative tone of the emails emanating from the claimant. These emails were often ignored by the respondent, which is hardly conducive to either good management or diffusing a situation that was becoming increasingly inflamed. If the claimant was petulant, the school's senior managers were more worthy of criticism because they could and should have handled this situation better. The claimant should have been responded to in a firm and decisive manner, one which was open in addressing his concerns, yet set measures to correct any ongoing disruptive behaviour.

96 The school's advertisement for the Teacher of Biology position did not commit the respondents to appoint the successful candidate with a TLR. The claimant was keen to progress his career and he was very interested in applying for the TLR. He already held a substantive post as a Teacher of Biology. So he was obviously annoyed that he lost the opportunity to apply for the enhanced element of the advertised role. However, this was not something that was available to him because Dr Varty, in particular, wanted to use the possible TLR uplift as an incentive to attract more senior candidates for the vacancy created by the departure of Ms Williams.

97 We understand why the claimant was irked by this apparently underhand approach. We accept that there was a lack of candour and a lack of transparency in the manner in which the school's senior management went about this recruitment process. However, this reflected a poor attitude towards staff management more than any conspiracy to deny the claimant an opportunity to progress. The approach adopted by the school denied the TLR enhancement opportunity to other members of staff who might be interested in the TLR enhancement so not just the claimant was affected. Therefore, we find that this was a detriment not just to the claimant, or even primarily directed towards the claimant. Accordingly, we determine this detriment had nothing to do with his protected disclosure.

98 Dr Varty was rather disingenuous to say that the claimant made no attempt to speak to him over the post. We have set out previously our assessment that Dr Varty did not like the claimant. From Dr Varty's evidence, it was plain that he did not have a high regard for the appellant's teaching skills. We were not sure whether the low esteem in which Dr Varty held the claimant was merited, but neither Dr Varty or the other school senior management had undertaken any form of performance improvement programme. Indeed, having reviewed all of the evidence in this case, our impression of the claimant was that he was, at least, a competent teacher and he was very likely a good teacher. That said, there was definitely a personality clash between the claimant and his senior colleagues. We previously referred to the tone of the claimant's correspondence. The claimant was convinced there was a conspiracy and, somehow, he felt he was the injured party. He chose a route based on confrontation, although we accept his options were somewhat restricted by the apparent brick wall he felt he met from his senior colleagues.

99 We also note that Ms Williams was responsible for passing the 4 pupils who, according to the claimant, had not deserved their BTEC award. Ms Williams was experiencing some relationship discord which ultimately led to her marriage break-up and her leaving the school and Wales. Dr Varty was sympathetic to Ms Williams' predicament and we accept that he was keen to support a long-standing, beleaguered colleague, whom he understood to be under attack from the claimant. So, Dr Varty's lack of engagement with the claimant was due to a variety of reasons, other than the protected disclosure; although none of these reasons justified the non-engagement or dismissive approach of this experienced and senior teacher.

Allegation IV – no pid detriment

100 The claimant's evidence in respect of his non-selection for the Assistant Head of Year is again cursory and unsatisfactory. His statement said that he was ranked eighth of eight candidates although he was interviewed for the role the previous year. This was the high watermark of his claim.

101 Mr Foden provided feedback from the selection panel, by email dated 27 June 2016. This email is not expansive, but it appears to us to be sufficiently clear in addressing elements of the appellant's application which Mr Foden said

were “poor”. The claimant’s statement referred to Mr Foden’s feedback as” full of inaccuracies and distortions” but he does not address this further. His oral evidence at the hearing gave little further explanation.

102 The appellant’s failure to get selected for interview coincided with Mr Foden disciplinary warning against the claimant, which we find was a public interest disclosure detriment (see later). The appellant’s non-selection for interview certainly appears suspicious against the fact that he was an experienced teacher and he had got through this initial threshold the year before. However, the claimant’s public interest disclosure was made on 14 October 2014 which was approximately 19 months before the detriment alleged and 12 months after the claimant’s comparative incident in which he was selected for interview. It is for this reason that we do not feel the claimant has identified that the detriment was for a reason related to his public interest disclosure. Therefore, the burden has not effectively shifted to the respondent(s), pursuant to *NHS Manchester v Fecitt*.

103 In any event, there was just not the evidence available for us to draw any clear conclusions in respect of the nature of the detriment. We were not advised on how many of the eight candidates were selected for interview nor were we presented with the documentation in respect of the other successful and unsuccessful candidates. We could not undertake the necessary comparative exercise. Therefore, we were simply not equipped to explore the veracity of Mr Foden’s response.

104 It is often the case that senior and established staff may be interviewed for a post as a supposed positive gesture. However, Mr Foden said in evidence that it was pointless interviewing a candidate who would not be appointed because they did not meet the criteria and expectations for the role. Although blunt, this does not waste time or raise expectations unnecessarily but putting a candidate through a selection process in which they would not succeed and, it appears to us, that this may have been the case in the claimant’s circumstances.

<u>Allegation V – no pid detriment</u>

105 Given that the claimant’s complaints of the lack of management training arose solely during his appraisals and emanated from his “personal objectives”, we read the contemporaneous records as placing the obligation upon the claimant to undertake the requisite research and follow-up work. In any event, if an employee claims that they have been treated unfavourably in respect to a lack of training, then it is our expectation that they make the effort to identify appropriate training courses, including the courses’ costs and the joining requirements. A claimant would need to demonstrate positive steps to secure such training, otherwise we are not satisfied that there is any detriment.

106 The claimant’s approach in this regard appeared to be limited to voicing an aspiration and expecting his employers to do the work for him. This was too passive and his expectations of his employer would be unreasonable in most working environments and did not amount to a detriment in this workplace. No

doubt the claimant's complaints in this regard reinforced an attitude from the school's senior management that the claimant was demanding, negative and overly critical. Indeed, the nature of this allegation does not present a favourable impression of the claimant with this tribunal.

107 So far as the in-house training was concerned, we accept Mr Foden's evidence that he was not aware of the claimant's desire to attend such training courses, although we are not sure that such in-house training would have been suitable for the type of middle management training that the claimant sought. Ii may be worth making the point that perhaps with more management training, the claimant might have viewed his senior colleagues approach differently seeing their side of the job. Perhaps, it might have instigated a more conciliatory and less rigid approach from the claimant.

Allegation VI – pid detriment (mostly)

108 During the course of the hearing it transpired that the claimant complained of two detriments in respect of his first written warning of 17 June 2016. The first detriment he complained of was in respect of the decision to give him a first written warning. The claimant alleged that a further detriment flowed from the initial duration of the warning – 12 months – which was then curtailed to a 6-month first written warning and the uncertainty surrounding this.

109 The original incident appears to be quite trivial to us; although we were concerned by Mr Foden's reference to CW been placed "in a storeroom, which was marked "staff only" and has "Hazardous and "Flammable Chemicals" warning signs displayed". The appeal panel gave no heed to the pupil being incarcerated in a potentially dangerous environment. Indeed, it was common ground at the hearing that there were no dangerous chemicals stored in the room. Mr Foden's reference to the signage, then, was pointless, particularly as it was plain that the claimant had separated the child into a safe environment. Accordingly, we regarded this as an attempt by Mr Foden to raise the stakes and make the claimant's supposed misdemeanour sound worse than it actually was.

110 We are convinced that Mr Foden was looking for an excuse to make things difficult for the claimant and that this incident gave him the opportunity to escalate matters to formal disciplinary action in order to teach the claimant a lesson.

111 A disciplinary warning is obviously a detriment. If the warning was undeserved then it was a significant detriment. The fact that the appeal hearing set aside the warning does not necessarily make the original warning inappropriate as new information may have come to light, or the appeal panel may simply have viewed things differently than Mr Foden. However, having read the full documentation surrounding this disciplinary process, we are satisfied that no disciplining officer, properly conducting himself, would have determined that a disciplinary sanction against the claimant was appropriate in these circumstances. It was abundantly clear to us that Mr Foden had become increasingly frustrated with the claimant and that he was looking for any possible infraction so as to send the claimant a message. We believe the

claimant was an irritant and Mr Foden wanted the claimant to move on. This disciplinary warning was a device to "mark his card". It also had the perceived advantage that, if the claimant did not get the message, then the disciplinary warning could be relied upon at a further stage, should Mr Foden want "to turn up the heat".

112 Although it was obvious to us that the formal warning: was a detriment; that it was inappropriate in the circumstances; and that it was used to convey a message to undermine the claimant security at the school, we deliberated as to whether this was because of the claimant's public interest disclosure of 14 October 2015. There was evidence of ongoing difficulties between the claimant and Mr Foden (and other senior colleagues) which predated the protected disclosure. However, these were nowhere near the degree of acrimony that escalated following the fuss made by the claimant about the BTEC examination results. The claimant's protected disclosure was a significant step in this regard. When we apply the *NHS Manchester v Fecitt* guidance, we find the respondent(s) has come nowhere near satisfying us that they have overcome the burden. Indeed, if the protected disclosure was not at the forefront of Mr Foden's mind, then it was a major ingredient in the cocktail of antipathy towards his junior colleague.

113 We regarded it as astonishing that a 12-month written warning was substituted with a 6-months warning without any proper explanation. We regard this as a genuine mistake arising from a misapplication of the disciplinary procedures. Consequently, Mr Foden ought to have apologised for his error. The mistake of an additional 6-months warning was profound, even if it was innocently made. We do not believe that a longer warning was initially made and then subsequently substituted deliberately. That is a conspiracy too far and any purpose achieved in further unsettling the claimant could be lost in the fuss over the inappropriateness of the duration. Therefore, we do not believe that the additional duration of the warning – as opposed to the warning itself – was a public interest disclosure detriment.

<u>Allegation VII – no pid detriment</u>

114 The claimant's appeal hearing had been heard following the preparation of the List of Issues. Indeed, it was heard on 12 May 2017. Nevertheless, we were truly astounded by the length of time that it took to resolve this appeal. It cannot possibly be argued that this appeal was addressed in a timely manner which is the respondent's obligation. Although we are not dealing with a breach of contract claim, the implications to senior managers and school governors of this extraordinary delay should have been apparent from the cancellation of the proposed hearing of 12 July 2016.

115 Mr Foden explained that a (possibly pedantic) school governor frustrated his efforts to progress the claimant's appeal by protesting that there were not enough governors available to hear the appeal and that any appeal panel would be inquorate. We accept that this was probably true, but this does not excuse the indolence. In any event, this governor gave Mr Foden the opportunity to prolong matters to the claimant's discomfort. In effect, Mr

Foden turned his problem into the claimant's problem, which was wholly unacceptable in the circumstances. Inexplicably, Mr Foden did not consider suspending the disciplinary warning. He took no steps to explore co-opting governors from local schools to remedy this problem. We suspect that Mr Foden enjoyed the claimant's discomfort throughout this prolong period, and we accept the claimant's discomfort was considerable. This was the insult that was added to the injury of an unjustified disciplinary warning. The warning had been the first disciplinary sanction taken against the claimant in over 20 years of teaching. It had serious implications to his career prospects, especially if the claimant wanted to apply for jobs elsewhere. We accept that he was genuinely distraught by a disciplinary warning. In the circumstances of this case, we consider such delay by an employer to be disgraceful.

116 Whereas, we regard Mr Foden's original disciplinary warning as a detriment on the grounds of the claimant's original public interest disclosure, we do not regard the delay as arising or being caused by the original disclosure. This arose from matters beyond Mr Foden's direct control. We accept Mr Foden pressed for this matter to be resolved, if anything, so as to address any possible criticism of his role. Nevertheless, his efforts to progress the appellant's appeal were by no means extensive – which it should have been in the circumstances – and amounted to mere lip service. He did not think creatively and he did not consider suspending the warning until this could be considered properly within the disciplinary process.

117 We were struck by a whole lack of professionalism in dealing with such important disciplinary matters. We accept that had Mr Foden – and his fellow governors – been given proper training in staff disciplinary and grievance matters, then they would have understood the seriousness of the situation. However, training is no substitute for common sense and an ability to see the other side of the argument. So, although training may not have altered Mr Foden's disposition towards the claimant, it might have made him aware of his legal responsibilities and the possible consequences of a potential or actual breach of implied contractual terms.

Allegation VIII – no pid detriment

118 We cannot see how events referred to in a factual determination could amount to a breach of the DPA. We have not made a factual determination of this because we have attempted to confine our factual determinations to matters directly or closely relevant to this case. In any event, we do not understand how Mr Adkins assertions could possibly be construed as a breach of the DPA and somehow as a breach of the DPA attributable to the claimant. We accept the legislation is not clear and that all of the respondent's witnesses did not understand the legislation which underpinned the handling and processing of employees' confidential information. That said, if someone asserts that a colleague has done something wrong, or even acted illegally, then they really should have some idea as to what they are talking about.

119 So far as the substantive incident, we could not see that Mr Adkins did anything wrong. He was a trade union official and he wanted to secure the

best possible result for his member. He raised a comparison with another member of staff who he suspected was treated very lightly. How this could be turned in to a disciplinary investigation against the claimant and an ensuing referral to a statutory organisation as criminal wrongdoing is inexplicable to us.

120 Under s10 Employment Relations Act 1999 ("ERelA") where a worker *reasonably requests* to be accompanied at a *disciplinary hearing*, the employer must permit the worker to be accompanied by a "companion", who may be a trade union representative or fellow worker. This right arises where the hearing could result in the administration of a formal warning or the taking of some other action: s13(4) ERelA. The ACAS code of practice provides that to exercise the statutory right to be accompanied, the worker must make a r*easonable* request, which, in the vast bulk of cases will merely amount to a verbal request that a shop steward or other trade union representative accompany the worker.

121 We accept that it is common practice for an employee to be accompanied at an investigative meeting – especially one in unionised workplaces – nevertheless, at the hearing, the Employment Judge queried whether it was the claimant's case that he had a contractual right that exceeded the aforementioned statutory provisions. We were informed that the claimant placed no reliance upon any workplace disciplinary or investigative procedures, merely his statutory rights.

122 Two issues emerge from this. First, this was not a *disciplinary hearing* as provided for under the ERelA; it was an *investigative hearing or meeting*. Second, the claimant did not ask to be accompanied. So irrespective of whether the right arose or not, the claimant did not attempt to exercise such a right.

123 We do not accept that the interview was conducted in a harsh or oppressive manner. Mr Healey explained the purpose of the meeting and Mr Parry proceeded to ask a number of detailed questions. Although we accept that it was unsettling to be called to account for such obviously bogus allegations; the claimant made no contemporaneous complaint about the manner in which the interview was conducted. The first we could detect that this was raised as a formal complaint was in the claimant's grievance of 14 March 2017, which was 8 months later. The respondent's note of the disciplinary interview records that the claimant denied advising Mr Adkins of any disciplinary action against Ms Williams, because, he said he did not know the outcome of disciplinary procedures against her. The fact that Ms Williams had not been suspended for any wrongdoing, alleged or otherwise, would have been obvious to all of her colleagues. The claimant did confirm that he was aware of rumours circulating amongst the staff that Ms Williams had been subject to a warning, but that he was not aware of the level of the warning. It was the claimant's view that Ms Williams had been so lightly treated as to be effectively let off for her examination malpractice. But this view merely amounted to speculation or supposition and was also likely to have been thrown around by other gossips in the school's staff rooms.

124 It was difficult for the claimant to undergo a formal disciplinary investigative hearing when the matter under investigation was trumped up out of nothing, which no doubt accounts for his agitation. However, other than raising our concern as to the questionable judgement of Messrs Healey and Parry by their involvement in such a sham, we do not accept that this interview was conducted in a manner that went beyond how a normal investigative meeting should have been pursued.

125 So far as lack of clarity as to possible allegations which may arise, we do not criticise Messrs Healey and Parry in this regard, because it was an investigatory meeting. We expect clear allegations before any disciplinary hearing but the purpose of an any investigatory meeting is to explore any possible wrongdoing and not necessarily clarify allegations.

Allegation IX – pid detriment

126 It follows from what we say previously that we regard the claimant's suspension as patiently unjustified. There was no suggestion that the claimant would interfere with, or impede, any investigation. Indeed, Mr Healey nor Mr Parry, nor anyone else took any investigatory steps following the referral of the allegations to the ICO. There was no suggestion from anyone involved in this suspension or investigation that the claimant would make further serious data breaches. So far as the seriousness of the allegation, this was not, by any stretch of the imagination, a serious matter.

127 In respect of the purported offence, we could not detect any breach of data handling, significant or otherwise. Anything more than the most cursory look at this issue at the point that the claimant was suspended would ascertain very quickly that these allegations had a veneer so thin as to be transparent. There was no veracity in these allegations. To suspend a long-established teacher on these allegations was outrageous.

128 We then considered the timing of the suspension, we do not believe Mr Healey's or Mr Foden's accounts that they did not know of the ICO's determination prior to the claimant's suspension. There was no reason for Mr Foden to suspend the claimant upon his return to school other than to give some form of credence as to the investigatory meeting of 12 July 2016 and the referral of 15 July 2016. If there was any justification, then the suspension would have occurred earlier. Mr Foden was looking for an opportunity to further discipline the claimant. The ICO's letter undermined this proposed course. We believe that the suspension was also designed to unsettle the claimant and again it was consistent with Mr Foden's disciplinary message of 17 June 2016. He wanted to send the claimant a clear message – one which said the claimant had no place in the school. It was a deliberate further attempt to intimidate the claimant.

129 For the reason set out in relation to allegation VI, this detriment arose as a result of the claimant's protected disclosure.

Allegation X – pid detriment (in part)

130 We have no evidence to suggest that the grievance against the claimant did not arise from anything other than a rather silly expression of frustration from one of the claimant's colleagues, which appears to be the logical inference. Having considered the full circumstances of the case, that is our reading of Mrs Grove's involvement. However, instead of speaking to Mrs Grove and requesting that she did not write such inaccurate and, frankly misconceived, correspondence, it seemed that Mr Foden utilized this as another opportunity to attack the claimant.

131 We regarded the writing of her grievance letter as giving Mrs Grove the opportunity to articulating her frustration and that once this was vented, she calmed down and likely came to an understanding that the claimant had been within his rights to adopt the course he chose.

132 We do not know when Mrs Grove withdrew her grievance; however, it was not until 21 October 2016 that Mr Foden advised the claimant that the grievance against him was no longer proceeding. Nevertheless, Mr Foden threatened in the same email that he needed to take advice from the local authority on how to proceed against the claimant in view of his complaint to Pearson (who oversaw the BTEC examinations). This was a needless threat. It was designed to intimidate the claimant. The claimant had raised the matter of BTEC examination irregularity internally. He had made no progress in addressing his concerns and he took this matter up with the BTEC provider. This was an option available to him and, although there were other options available to him, the claimant was within his rights to pursue this course.

133 It was not appropriate by any means for Mr Foden to respond with threats. We construed that as bullying and unacceptable because, ultimately, the claimant appears to have been correct that 4 pupils were awarded passes when they should not have reached that achievement.

134 This detriment was, of course, related to the public interest disclosure because it flowed directly from the claimant's complaints of examination malpractice.

Allegation XI – no pid detriment

135 A failure to address a grievance is obviously a separate matter to the substance of the grievance, which has already been addressed in this determination.

136 An employee would ordinarily raise a grievance before recourse to employment tribunal proceedings. This could give an employee and employer the opportunity to settled their differences before matters progressed to a legal forum. However, the claimant chose not to raise a grievance before October 2016, which was some two years after his public interest disclosure and one month after he had commenced proceedings.

137 We have some sympathy with the predicament respondents often face with a grievance issued after employment tribunal proceedings have been commenced. If the grievance is determined then the respondent is usually accused of window-dressing for the forthcoming hearing. If the process is not concluded to the claimant satisfaction, then they are readily accused of victimising the claimant, either for the protected disclosure or for issuing proceedings or for raising a grievance. It was abundantly clear to us that the parties would never resolve these matters between themselves – things have progressed too far. This case was always destined for an employment tribunal hearing.

Allegation XII – no pid detriment

138 Please see our comments at the factual stage.

Allegation XIII – no pid detriment

139 We have read the schools standard operational procedure in respect of pupil supervision and accept that leaving pupils unattended in the lab amounted to a breach of this procedure. Of more importance, we accept Mr Foden's evidence, which was reinforced by his contemporaneous account, that he had specifically instructed the claimant to desist from leaving pupils unattended in his lab during his lunch break.

140 The claimant alleged that this was another attempt by Mr Foden to get at him and that the Mr Foden could have dealt with this matter without recourse to formal disciplinary procedures. We reject that argument.

141 The claimant was in the wrong. He was specifically told by the school's Head Teacher to stop leaving pupils unattended in the classroom. Irrespective of whether the claimant questioned Mr Foden's motives, he had been given clear instructions and this was consistent with the school's operational procedures. Furthermore, it was perfectly reasonable for Mr Foden to approach the claimant's non-compliance in the manner that he did. The claimant cannot pick and choose what rules he would follow. He should not have disregarded the Head Teacher's authority and, we determine, Mr Foden was correct in giving the claimant a first written warning.

142 We reject the claimant's allegation in claiming a public interest detriment for an incident in which he was clearly in the wrong and one in which he deserved a 6-month written warning.

Allegation XIV – no pid detriment

143 The claimant's allegation at the time that the List of Issues was prepared was speculative and remained so. That said, we have considerable concern in respect of the actions of both Mr Foden and the school governors who have determined the claimant's grievance.

144 Mr Foden's formal response to the claimant's grievance was circulated at the time that a new grievance procedure was implemented. This provides for

gross misconduct proceedings should the claimant make a false, vexatious or malicious grievance. Such a provision is not commonplace in grievance procedures although they are seen occasionally. It is very rare for an employer to punish an employee for raising a grievance and such a response could only be justified in exceptional circumstances where the employee is quite dysfunctional and is wholly blameworthy in the circumstances. We would be surprised if either Mr Foden or the school governing body embarked upon disciplinary procedures against the claimant in these circumstances and at this stage. However, this may be a matter of further proceedings.

145 The change of the claimant's grievance procedure may or may not amount to a breach of contract and for the reasons previously stated we have not determine this. We do not determine that the claimant has been subject to a detriment because neither any of the school governors, nor Mr Foden, have sought to rely upon this additional disciplinary provision contained within the new grievance procedure.

146 If the schools governing body or Mr Foden do seek to rely upon the newly inserted disciplinary provision, then this will likely amount to a detriment. The provision relied upon was brought in to provide for the claimant's dismissal, and it is nonsense to argue, as Mr Foden has, that this is not a direct response to the breakdown in his professional relationship with the claimant.

147 A substantial part of the fractious management of the claimant has arisen because of the claimant's complaints about the BTEC results and the manner that this was addressed. Consequently, the claimant's protected disclosure is at the heart of the breakdown between the claimant and Mr Foden and other senior professional colleagues. Therefore, any detriment that the claimant may suffer as a result of disciplinary action arising from his grievance may be inextricably bound to his public interest disclosure detriment. That said, no such disciplinary action has been pursued yet so the detriment has not arisen.

<u>Allegation XV – pid detriment, in part</u>

148 The claimant did not attend his grievance hearing so unsurprisingly, this was rejected. It is difficult to see how the school governors could uphold the claimant's case when he did not attend the hearing or present detailed submissions. The governors considering the case considered evidence and arguments presented by Mr Foden and his senior colleagues and, obviously, did not hear the full picture. Accordingly, we were very surprised with their outcome which was relayed by Mrs Williams on 25 April 2017 and determined the claimant's grievance to be vexatious. The reasoning for such a finding was perfunctory and, following our exhausted examination of the full circumstances of this case, such a determination went significantly beyond what we regarded to be a "safe" outcome. That said, the claimant's appeal is still outstanding and he may participate further in the process. Indeed, it would be in his interest to do so. So, we did not regard the rejection of the claimant's grievance as a detriment.

149 However, the outcome went far beyond rejecting the claimant's grievance and determined that this was vexatious. At the hearing, we did not hear from the

school governors who determined the claimant's grievance – Essi Ahari, Keith Horton and Anne Prichard Jones. The governors could have dismissed the claimant's grievance for non-attendance. They chose not to do so and proceeded to determine the appeal. In such circumstances, even though the claimant did not attend, these governors had a responsibility to review the evidence with care and to come to a considered opinion which was fair and proportionate in the circumstances. There can be no doubt that the claimant had a genuine sense of grievance and this arose out of circumstances that warranted a full and detailed explanation. His reasons for not attending the grievance hearing was not because he could not be bothered or because he merely wanted to disrupt or annoy senior colleagues and the school governors. His non-attendance was based on a misguided withdrawal because Mr Foden had changed the procedure just before the hearing to, as the claimant saw it, attempt to fix a particular outcome. Upon reading the evidence presented, the minutes of the hearing, and the outcome letter, we were not satisfied that the governors displayed a balanced engagement with the material presented.

150 Bearing in mind the school governors' previous positive finding for the claimant in respect of his disciplinary appeal, we do not think the school governors were in Mr Foden's pocket. We merely think they were a little lazy and too willing to succumb to the persuasion of the individuals who turned up. The outcome letter was so deficient that we really needed to hear the evidence of a decision-maker to justify what appeared to us to be an extraordinary decision.

151 In the absence of hearing the justification for the finding of "vexatious", we regard this as a detriment. Again, we find the claimant's protected disclosure lies at the heart of all of the disciplinary and grievance processes undertaken. Therefore, the respondents have not convinced us that this finding was "in no sense whatsoever" bound up with the protected disclosure.

Trade union detriment

152 We have spent scant time in this determination dealing with the claimant's allegations made pursuant to the TULR(C)A. This is because the claimant produced very little evidence in this regard and his representative made a half-hearted alternative submission at the conclusion of the case. When this allegation was reviewed by the Employment Judge at the commencement of the hearing, Mr Adkins said that he was effectively covering his bases. There is no evidence at all to support such contentions. We did not believe Mr Adkins understood his case in this regard, and the claimant certainly did not.

153 Very little hearing time had been spent on pursuing this allegation, hence this commensurate determination. This allegation was without merit. Had we spent more time on this half-hearted allegation then we would have relayed a more detailed determination, which may have given rise to a further application from the respondents' solicitor. However, we have taken a proportionate approach and we dismiss these allegations without occupying our time and the parties time to avoid any further possible complaint.

154 The claimant was committed to his whistleblowing case; this additional strand to proceeding did not waste much time and our treatment of this element of proceeding will not surprise the parties.

Summary

155 This case catalogues an unedifying sequence of events, from which no one really emerges with any credit. The claimant adopted an antagonistic approach to senior managers and embarked upon a hostile course. His argumentative and uncompromising approach appears to have predated the event under our scrutiny. The die appeared to have been cast well before the protected disclosure, as indeed, according to the original Scott Schedule, the claimant complained of detriments as far back as 2012. Mr Adkins' involvement did not assist in resolving matters. The nature and tone of the claimant's correspondence and interpersonal relationships should have been curtailed before matters escalated and were never likely to promote a cordial response.

156 Nevertheless, we did expect the claimant's employers to behave better. If the claimant was reactive, then Mr Fodem and his senior colleagues ought to have addressed the claimant's complaints in a swift and firm manner. They were provoked and responded in a petty and vindictive manner. We expected schoolteachers to lead by example. We doubted whether any of the central characters would endure such petulant behaviour from pupils so we were truly astonished, and concerned, that things got so far out of control. We expected far better behaviour from teachers.

Case Management Orders

157 The case will now be listed for a remedy hearing. We will set out a number of preparation steps to assist the parties. As these arise from the exercise of our case management functions, these will be issued in a separate document and should not be published, unlike Judgment/Reasons.

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Employment Judge Tobin

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

.....9 October 2017.....

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FOR THE EMPLOYMENT TRIBUNALS