Case Number 1600877/2016
1600627/2017
1600279/2018

EMPLOYMENT TRIBUNALS

Claimant: **MR C WILLIAMS**

Respondent: **THE GOVERNING BODY OF ALDERMAN DAVIES CHURCH IN WALES PRIMARY SCHOOL**

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69 I hereby correct the clerical mistake in the Judgment sent to the parties on 22 December 2018 and substituting the attached Judgment.

Employment Judge Beard
Dated: 8 April 2019

SENT TO THE PARTIES ON

16 April 2019

....
FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR C WILLIAMS	**V**	**THE GOVERNING BODY OF ALDERMAN DAVIES CHURCH IN WALES PRIMARY SCHOOL**

HELD AT: **SWANSEA** **ON:** **HEARING**: 3, 4, 5, 6, 7, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25 & 26 SEPTEMBER 2018
CHAMBERS: 3 & 4 OCTOBER AND 12 NOVEMBER 2018

BEFORE:

EMPLOYMENT JUDGE: N W BEARD **MEMBERS: MR FRYER**
MR PEARSON

Representation:

For the claimant: Ms J Watson (Representative)

For the Respondent: Ms Wynn-Morgan (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim of victimisation pursuant to section 27 Equality Act 2010 is well founded and the matter shall be listed for a telephone preliminary hearing to give directions for a hearing on remedy.
2. The claimant's claims of disability discrimination pursuant to section 20 and 21 of the Equality Act 2010 were presented outside the time limit for

presentation of such claims and the tribunal has no jurisdiction to consider them.

3. The claimant's claim of unfair dismissal pursuant to sections 95(1)(c) and 98 is not well founded and is dismissed.
4. The claimant's claims of disability discrimination pursuant to section 15 of the Equality Act 2010 are well founded.
5. The claimant's claims of disability discrimination pursuant to section 26 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

PRELIMINARIES

1. The claimant is represented by Ms J Watson, she is not a trained lawyer, however she represents the claimant in a professional capacity under an insurance policy held by the Claimant. The respondent is represented by Ms Wynn-Morgan (Counsel). The claimant was a teacher and deemed employee of the respondent but contractual employee of the Church in Wales Diocese of Llandaff. The respondent (hereafter "the school") is the Governing Body of Alderman Davies Church in Wales Primary School, a voluntary aided maintained school. Neath and Port Talbot Council plays a part in the narrative, it has three roles. First as the Local Education Authority (hereafter the LEA) with a supervisory role in respect of matters of education and secondly providing HR advice to the respondent and thirdly in respect of Social Services where it plays a role in safeguarding children.

2. The tribunal has been provided with a bundle of documents running to almost 2200 pages. The tribunal made it clear to the parties that the tribunal would not consider or take account of any document which was not specifically referred to in a witness statement, during cross examination or in final submissions.

3. The tribunal heard oral evidence from the claimant; he called, as witnesses on his behalf, Mrs Williams, his wife, Mrs Sydenham a former teacher, Mrs Baynham and Mrs Jenkins who are both former governors of the school. The respondent called Mrs Matchett, the head teacher of the school, Mr J Dummer the deputy head teacher, Mrs L Roch, clerk to the Governing Body of the school, Mrs Coleman current Chair of the Governing body, Mr D Cole Vice Chair of the Governing body, Mr J Rawlinson, a Governor who sat on grievance and disciplinary matters, Mrs S Evans who sat on appeal panels dealing with disciplinary matters.

4. The claimant presented three claim forms which we are to consider. The first of which was presented on 22 November 2016 (the ACAS certificate demonstrating that early conciliation commenced and ended on 8 November

2016), the second was presented on 16 August 2017 and last of which was presented on the 16 February 2018. The claimant claims unfair constructive dismissal pursuant to section 98 of the Employment Rights Act 1996. He also complains that he has been subject to disability discrimination and victimisation from raising his claims. The discrimination claim issues are set out in schedule demonstrating the claimant's contentions and the respondent's responses at pages 61 to 77 of the bundle of documents. The tribunal discussed with the parties the issues it would be required to resolve. It was clear that the respondent contended across all three claims that it had no knowledge of disability until a late stage (essentially knowledge is in issue prior to April 2015). The claimant contends that he has been disabled since a road accident in 1986. Whilst it was not discussed as an issue at the outset, the tribunal drew to the parties' attention within a few days of the hearing commencing that, in order to consider the issue of knowledge, which the claimant contends the school has been aware of since the start of his employment, it would be also be necessary for the tribunal to consider whether the claimant was disabled prior to 2015. The reason for this is twofold: first, the claimant's earliest complaints relate to 2014; secondly knowledge of disability can only exist if disability exists. The issues outlined by the parties at the outset of the hearing were as follows:

4.1. Dealing with the first claim:

4.1.1. The claimant complains of constructive unfair dismissal relying on his treatment in general over a significant period ending on 16 June 2016. The last straw, he argues, arose upon his discovery that Mrs Sydenham had sought permission to speak to him and that permission had been refused.

4.1.2. The disability discrimination complaints in the first claim are set out in the Scott schedule as follows:

4.1.2.1. In September 2014 the claimant alleges he was refused help and support with his class. He contends that this amounts to a failure to make reasonable adjustments, harassment on the grounds of disability and to discrimination arising from disability. The PCP relied upon is that teachers at the claimant's level of experience are not provided with help to manage their classes. It is alleged that this led to a disadvantage to the claimant because he had an increased susceptibility to stress because of his disability. In respect of the section 15 claim it is argued that the claimant has impaired memory and concentration, and a propensity for stress-related illness which are consequences of his disability. No details are set out in the Scott schedule to describe the elements supporting the harassment claim.

4.1.2.2. The respondent denies that it failed to make reasonable adjustments, indicating that it gave the claimant support in the classroom and denies that there was any disadvantage to the claimant. The respondent further denies that it refused to help support the claimant and alternatively, if it is found that there was insufficient support that this lack of support was not a consequence of the claimant’s disability. Finally, the respondent says its approach was justified, and argues that there is no basis to the harassment claim in that the respondent’s treatment of the claimant was not with either the purpose or the effect of creating the prohibited environment.

4.1.2.3. The next complaint raised by the claimant covers the period 13 April 2015 to 21 October 2015. The complaint is that the respondent provided no details of the allegation for which the claimant was suspended only that it related to a child protection issue. It is contended that this was a failure to make reasonable adjustments. The PCP relied upon by the claimant is that application of a policy meant details of child protection allegations would not be disclosed to a person accused of them. It is contended that the disadvantage to the claimant is that he would be less able to construct a defence in those circumstances than someone without his disability.

4.1.2.4. The respondent denies any knowledge of the claimant’s disability and contends, therefore, that the duty to make adjustments does not arise. In the alternative it contends that the adjustments sought, that is, informing the claimant of the details of the allegation, would not have been reasonable in all the circumstances.

4.1.2.5. The same facts are relied upon as discrimination arising from disability. It is contended that the claimant’s impaired memory and cognitive deficits along with a propensity for stress-related illness are a consequence of his disability.

4.1.2.6. The respondent argues justification on the basis that it could not provide information without breaching child protection policies.

4.1.2.7. The claimant also contends harassment based on these facts, but no details are given as to the substance of that claim and the respondent provides the same defence as to the first allegation.

4.1.2.8. The next part of the schedule also refers to 13 April 2015 running to 30 September 2016. The substance of the complaint is that the claimant was not provided with the name of the student alleged to be involved in the allegation of abuse involving the claimant.

4.1.2.9. It is argued that this is a failure to make reasonable adjustments. The PCP relied upon is that names of alleged victims and witnesses to alleged child abuse conduct will not be disclosed to the accused person. It is indicated that the claimant suffered a substantial disadvantage in this regard because of his impaired memory and concentration and susceptibility to stress-related illness. This is argued to mean that the claimant cannot construct a defence as readily as someone without his disability.

4.1.2.10. The respondent’s defence is that it was obligated under child protection procedures not to disclose the names. It relies on lack of knowledge of the claimant’s disability and says that the adjustment sought would not be reasonable in any event.

4.1.2.11. The claimant relies on the same facts as leading to discrimination arising from disability, indicating that the claimant had impaired memory and concentration as a consequence of his disability.

4.1.2.12. The respondent’s defence is that it was justified in acting as did because of requirements of the All Wales Child Protection Policy.

4.1.2.13. The claimant relies on the same facts as amounting to disability -related harassment. No further information is given as to the basis of this claim in the schedule. The respondent denies the claim on the basis that not providing the name had neither the purpose, nor the effect of creating the prohibited environment.

4.1.2.14. The next complaint relates to three dates said to be on around 25 May 2015, 18 June 2015 and 30 June 2015. It’s complained that the confidentiality of the processes was breached. This is said to amount to discrimination arising from disability. Once again, reliance is placed on the claimant’s impaired memory, concentration and propensity for stress-related illness. No further information is given by the claimant.

4.1.2.15. The respondent denies breach of confidentiality as a matter of fact, also denies that this is unfavourable treatment. Finally contends that if there was a breach of confidentiality. The respondent was justified.

4.1.2.16. The same facts are relied upon as disability related harassment, no further information is given in the schedule. The respondent maintains its denial of breach and contends that in any event, any breach did not have either the purpose or effect of creating the prohibited environment.

4.1.2.17. The next complaint relates to the period between July and September 2015 and the school's decision to permit the claimant to return to work but only limited duties following the earlier suspension. The claimant contends that this amounts to discrimination arising from disability. The claimant's impaired memory, concentration and propensity to stress-related illness is set out as consequences of his disability but no further details are given in the schedule. The respondent defends on the basis that it acted in line with standard disciplinary child protection policies, and on that basis that the claimant was not treated unfavourably, however, it indicates that this was a proportionate means of achieving a legitimate aim in any event and therefore was justified.

4.1.2.18. The claimant relies on the same factors amounting to disability related harassment. No further details as to the basis of that claim is set out within the schedule.

4.1.2.19. The respondent's defence is that it was unable to allow the claimant to return to teaching duties in the circumstances, and on that basis that any treatment did not have either the purpose or the effect of creating the prohibited environment.

4.1.2.20. The next item in the schedule refers to 13 April 2015 and is said to be ongoing (we understand that to mean ongoing at the time of presentation of the first claim). The facts relied upon are that there was an unacceptable delay in investigating and concluding charges relating to the alleged child abuse incident and charges related to a breach of ICT policy. The claimant also complains that there was an unacceptable delay in referring the claimant's case to the statutory body. No further details are given in the schedule. The respondent defends with a narrative based response, which essentially contends that any delays in the process arose, essentially, out of the proper application of the process itself and the fact that the claimant raised a grievance. On this basis it denies that it is unfavourable treatment. But if found to be unfavourable treatment contends that the respondent was justified in its approach.

4.1.2.21. The claimant relies on the same facts as disability related harassment but once again provides no further details. The respondent denies that any treatment had the purpose or effect of creating the prohibited environment.

4.1.2.22. The next complaint relates to 24 February 2016. The complaint is that the respondent used information tendered by the claimant and confidence during a grievance process to frame disciplinary charges against him. It said that this is discrimination arising from disability. Reference is made to the claimant's impaired memory and concentration and propensity for stress-related illness as consequences of his disability. No further detail is given. The respondent contends that any confidentiality offered in a grievance process does not extend to wrongdoing by the claimant and that the claimant did or ought to have known this. On that basis it denies that the claimant was treated unfavourably, and in any event the respondent contends that it was justified, even if this was unfavourable treatment.

4.1.2.23. The claimant relies on the same facts as disability related harassment, no further details are given. The respondent contends that it was acting in line with child protection policies and that nothing was done which had the purpose or effect of creating the prohibited environment.

4.1.2.24. The schedule provides the date of 29 September 2016 and complains that the respondent either changed charges relating to the child abuse allegation or brought new charges. It is contended that this is discrimination arising from disability, once again the claimant's impaired memory, concentration propensity for stress-related illness is relied upon as a consequence. No further details are given by the claimant. The respondent contends that there was no change to the charges, denies that the claimant was treated unfavourably, or that any unfavourable treatment that is found arises in consequence of the claimant's disability. If it is wrong about those elements it contends that the treatment of the claimant was justified.

4.1.2.25. The claimant relies on the same facts as supporting a claim of disability related harassment. No further details are given. The respondent denies that the treatment complained of had the purpose or effect of creating the prohibited environment.

4.1.2.26. The next aspect of the schedule dates matters between 13 April 2015 and 8 November 2016. The complaint is that there was an unacceptable delay in providing the claimant with investigatory report in relation to investigations into allegations under the disciplinary processes. This is said to amount to discrimination arising from disability and the claimant's impaired memory, concentration and propensity to stress-related illness is relied upon as the consequences of the disability. The respondent denies any unreasonable delay indicating that it had acted in accordance with policies and, as a result, denies that there was any unfavourable treatment. The respondent contends that, if there was unfavourable treatment, such treatment did not arise in consequence of the claimant's disability. Finally, the respondent relies on the defence of justification.

4.1.2.27. The same facts are relied upon as amounting to disability related harassment, no further details are given. The respondent denies any unreasonable delay and, in any event, contends that any treatment did not have the purpose or effect of creating the prohibited environment.

4.1.2.28. The next item in the schedule is related to a period between 13 April 2015 up to 2017 (again we consider this to mean at the presentation of the first claim as no amendment has been sought). The complaint is that the respondent failed to carry out a reasonable investigation into either of the disciplinary matters which were brought against the claimant. This is said to amount to discrimination arising from disability, once again relying on the claimant's impaired memory, concentration and propensity for stress-related illness as a consequence of the disability. No further details are given by the claimant.

4.1.2.29. The respondent denies this claim contending that it carried out reasonable investigations in line with policies. It is denied that the alleged treatment arising in consequence of the claims disability. And in any event, contends that the treatment was justified.

4.1.2.30. The claimant contends that these matters also amount to disability related harassment, no further details given. The respondent denies any unreasonable delay and that any treatment did not have either the purpose or effect of creating the prohibited environment.

4.1.2.31. The claimant's next complaint starts with the date of 13 April 2015 and refers to September 2015 but, from that date, sets out that events were still current in 2017 (which we again take to be to the point where the claim was presented as no amendment has been sought). The factual complaint is that the respondent, without good reason, failed to permit or to respond to the claimant's request for access to witnesses, colleagues and documents to prepare a defence.

4.1.2.32. This is relied on as a failure to make reasonable adjustments, and the PCP relied upon is that suspended employees are not be permitted to contact colleagues or attend the school. The substantial disadvantage relied upon by the claimant's again the impaired memory, concentration propensity to stress-related illness as a consequence. It is contended that this makes it harder for the claimant to construct a defence than it would be for someone without his disability, so that refusal of access put him at that disadvantage.

4.1.2.33. The respondent denies that it refused to permit the claimant do this or to respond to the claimant's requests. The respondent contends that it required the claimant to do this within the correct timeframe of the procedures being used. The respondent denies that there was any substantial disadvantage and submits that it had no knowledge of the claimant's disability so that the duty to make adjustments had not arisen. In any event the respondent contends that the adjustments sought were not reasonable in the circumstances.

4.1.2.34. The claimant also relies on these facts as discrimination arising from disability and disability related harassment. No further details are given in respect of either of these contentions. In respect of the discrimination arising from disability claim the respondent denies unfavourable treatment, arguing that any such treatment did not arise as a consequence of the claimant's disability, but that, in any event, its approach was justified. In respect of the harassment claim the respondent denies that the treatment relied upon the purpose or effect of creating the prohibited environment.

4.1.2.35. The last item in the schedule is dated 31 August 2016. The complaint is one of constructive dismissal which it is contended, amounts to discrimination arising from disability. Once again reference is made to the claimant's impaired concentration and memory and a propensity to become ill when stressed. No further details are given. The respondent denies the claimant was dismissed and also denies that there was any unfavourable treatment which arose in consequence of the claimant's disability. The respondent also relies on justification.

4.1.2.36. The claimant relies on the same fact of constructive dismissal as amounting to disability related harassment. The respondent denies that any conduct found to have occurred had either the purpose or effect of creating the prohibited environment.

4.1.3. At the outset of the hearing we discussed with the parties. The issues in claims two and three as there was no schedule for these matters. In dealing with claim two the claimant relied on the following:

4.1.3.1. The claimant's claims of disability related discrimination relate to his difficulties with processing information and his memory arising from a cognitive impairment. The claimant admittedly transferred materials which were subject to data protection rules and said that this was a consequence of his disability in that his judgement was impaired at the time. The claimant contended that the respondent's actions in failing to modify the process which is applied in the circumstances amounted to discrimination. The respondent's defence to this claim was one of justification. It argued that it had a legitimate aim in protecting children's data and conducting a disciplinary procedure was a proportionate response to achieving this legitimate aim.

4.1.3.2. The claimant also claimed that the respondent had breached its duty to make reasonable adjustments. The PCP relied upon was the adoption of the respondent of the disciplinary procedure and sanctions to that procedure. It was argued that the respondent should have recognised the claimant's disability and its likely effects created disadvantage for the claimant in that he was less likely to be able to deal with the procedure. The respondent argued that this was not a PCP that what was being asked for was not an adjustment to the procedure an adjustment to the outcome. The respondent repeated its defence of justification.

4.1.3.3. The claimant also claims victimisation, this cause of action is brought in claim two, and in claim three. In respect of claims two and three the claimant relies on two protected acts: first, the grievance which he presented; the second is his first tribunal claim. The claimant then sets out that these are acts of victimisation.

4.1.3.3.1. That the attendance of Mr Walsh, the respondent's solicitor, during internal processes was improper and was intended to ensure protection of the respondent's employment tribunal defence and not the proper application of the internal process to the allegations against the claimant.

4.1.3.3.2. That a group of governors, not properly mandated under the statutory procedures for governors sought to take control of the disciplinary process and appeal.

4.1.3.3.3. That the claimant was promised that Mr Walsh and Miss Roch would take no further part in the process following correspondence between the parties; the promise was breached.

4.1.3.3.4. That, in the child abuse allegation decisions were made which were contrary to evidence and part of the issues involved were unaddressed. It was contending that the following findings of fact were unsupported by evidence: that an incident had occurred on 24 March 2015; that the investigator had told the claimant in September 2015 the details of the case against him; and in fact, that been a failure to inform the claimant of the details of the allegation; and in fact, the claimant had not been able to participate in the investigation. The respondent failed to accept and take account of written submissions in dealing with the child-abuse allegations at the disciplinary hearing. At the decision in the ICT disciplinary case that the claimant’s impairment had no effect on his actions was perverse. The respondent denied it had made an error in the appointment of Mrs Winstone to the disciplinary appeal panels. The respondent had manipulated the appeal panels. Perverse decisions were made on the evidence available. That Mr Walsh had decided the merits of the claimant’s complaint about the ICT panel composition in circumstances with that was the sole province of the governors. Members of panels should have recused themselves both because of their involvement in the early stages of the claimant’s disciplinary processes and because of involvement in the case of Mrs Sydenham. On appeal, there was a perverse decision in accepting the original decisions. And the ICT outcome letter records facts incorrectly.

4.1.3.3.5. The claimant contended the following detriments arose out of those actions: that there was a significant impact on the claimant’s future potential as a teacher because of the risk of referral to an external disciplinary body for teachers; that the decision that there was an incident child twenty-four March was that the claimant had committed some wrongful act which had an impact on his mental well-being and his position in the community.

4.1.3.3.6. The respondent’s defences were that factually the position adopted by the claimant is wrong. That there were potentially community and privileged defences relating to Mr Walsh’s activities. Respondent argued that it had dealt with its processes properly and appropriately.

Amendment Application

5. The claimant made an application to amend. Ms Watson advanced an updated Scott schedule to set out the parameters of that application. The items the claimant sought to amend were numbered 2,3,4,5,7,9 in the new Scott schedule. The claimant contended that numbers 23 through to 38 in the new Scott schedule were not attempts to amend but simply drawing

information from claims 2 and 3 into the Scott schedule. Dealing with items numbered 24 to 38 the tribunal agree with the claimant's submission that these are simply referring back to the pleaded claims. However, we will rely on the pleaded claims and the issues discussed at the outset of the hearing in dealing with those case as they set out the matter sufficiently. In respect of item number 23 the tribunal do not agree that this was already included in the first claim. In our judgement the first claim simply sets out a narrative of events and makes a broad claim of disability discrimination. The claimant was asked to clarify the complaints of disability discrimination by preparing Scott schedule and further and better particulars. That order was complied with by May 2017. That schedule and the further and better particulars provided do not identify item 23 as a claim of disability discrimination and, therefore, in the narrative of the ET1 claim form could properly be seen by the respondent as background. In those circumstances we treat this as an application to amend which is dealt with below.

6. All the applications for amendment relate to the first claim form. That claim was presented to the tribunal in late 2016. The response was presented in January 2017. There were preliminary hearings in February and April 2017. Following orders made at those hearings additional particulars were prepared and responses provided. In addition to this the claimant brought further claims; the second claim presented in August 2017 and the third presented in February 2018. Neither on presentation of those claims nor at the preliminary hearings that joined these claims to be heard together was any application to amend made. The tribunal must consider all the circumstances, in terms of those matters which are sought to be added while they do not alter the factual evidence that the tribunal hear they do alter the causes of action to which those facts apply. They are therefore in our judgement, major amendments. In respect of these amendments, all of them relate to 2015 and on a prima facie basis, therefore, would be out of time. We are also aware that, in the internal processes, the claimant was represented initially by his trade union then by a firm of employment solicitors, and latterly by Ms Watson appears on his behalf in these proceedings. Further, the factual matters complained of were facts complained of at the time. There is therefore significant prejudice to the respondent both in terms of the passage of time and in potential costs of additional preparation. There is also the potential for an impact on these proceedings being heard. In those circumstances it appears to us that an explanation for the late amendment would be of significance in the balancing exercise. We were not provided with any explanation of substance. Whilst reference was made to late disclosure and exchange of witness statements that does not, in our judgement, explain the failure to plead these matters which were well known before that time. This means that an application to amend, even made at the outset of the hearing, was very late in the day and would cause great disadvantage to the respondent. In a case that has been listed for seventeen days with numerous witnesses to be called the respondent's preparation for dealing with the case. The prejudice to the

claimant is that he is unable to bring those claims. However, there was nothing preventing him from bringing those claims at a much earlier stage. The balance of prejudice. In our judgement clearly falls on the side of the respondent and the application to amend is refused.

THE FACTS

Disability

7. The respondent has admitted that the claimant was disabled from April 2015 but does not admit knowledge of that disability. The tribunal has, therefore, to decide if the claimant was disabled within the meaning of the Act from a time before April 2015. This is because the claimant contends that he was disabled from the time of his accident and that the respondent, corporately, was aware of this disability from soon after his appointment. We also must decide whether the respondent knew or ought to have known of any disability we find to have existed and when, if appropriate, imputed knowledge arose.

8. The claimant was involved in a road traffic accident in 1986 suffering severe injuries; the claimant was in a coma for eight days. The injuries to the claimant's other than those to his head were resolved within 6 months of the accident. However, the claimant had suffered a significant head injury with resultant damage to the brain. We have been taken to the following documents relating to the claimant's medical history: GP records, in-patient and out-patient records of hospital treatment, records of physiotherapy treatment and records of mental health support services.

9. From that documentary evidence we are able to find the following as fact.
    9.1. The claimant was injured in a road accident on the 23 December 1986, suffering injuries to the lung and ribs and, in addition, a traumatic head injury. Initial indications were that the claimant would require speech therapy along with physiotherapy.
    9.2. In June 1987 the claimant was being treated by a consultant psychiatrist, apparently there was a diagnosis of schizophrenia and psychotic illness. This was treated with medication and a short period as an in-patient in a psychiatric hospital.
    9.3. The psychiatric medical notes indicate that even prior to the road traffic accident the claimant had psychiatric illness and treatment.
    9.4. In December 1987 it appears that the medical view was that the claimant would never regain his pre-accident capabilities although this was not a depressive illness at that time.
    9.5. In July 1996 the claimant's GP wrote to an insurance company indicating that the claimant's treatment in 1987 had achieved "good results".
    9.6. The claimant does not appear to have had any incident of psychiatric illness, apart from a brief absence from work for stress related illness in 2001, until his illness in 2015.
    9.7. The records show that in 2006 the claimant was removed from the severe mental illness register.

9.8. The claimant was clearly developing difficulties related to the admitted disability from January 2015 as set out below.

10. The claimant prepared a witness statement for a preliminary hearing on the issue of disability.
    10.1. This statement refers to his car accident in 1986 and indicates that he was "left with depression and certain residual cognitive difficulties which are exacerbated by stress."
    10.2. However, in terms of impact on day to day activities the claimant references events in 2015.
    10.3. The claimant's references to impact of his condition prior to 2015 is that he was able to develop strategies to deal with his difficulties. The claimant outlined these as: poor concentration, short-term memory loss, slight slurred and jumbled speech and "the need to ask questions to get hold of an idea".

11. The claimant also prepared a witness statement for this hearing and, to some extent, deals with disability within that. The following emerges from that statement:
    11.1. The claimant misses the point regularly and loses his train of thought easily.
    11.2. The claimant gets mixed up and doesn't immediately take in what is said to him.
    11.3. The claimant also argues that stress seriously affects him such that all his symptoms worsen.
    11.4. The claimant sets out that he became unable to function rationally and was subject to psychosis with an intensification of anxiety and depression.
    11.5. It is important to note that he refers to having years of freedom from this state until the stress of events in 2015 from which point he says he has suffered several seriously bad episodes of the illness involving delusions and paranoia.
    11.6. There is medical evidence which supports the claimant's description of his condition since 2015.

12. The claimant, at the outset of his employment in 1991, completed forms for West Glamorgan County Council, the then Local Education Authority. In those forms the claimant indicated that he was not registered disabled and considered himself fully recovered from his accident. The tribunal recognise that this was four years before the implementation of the Disability Discrimination Act 1995 and registration as disabled at that time had a specific legal connotation. In our judgement this evidence has no impact on the question of either whether the claimant was disabled or whether the respondent had knowledge of his disability. There were later undated additions to this document, which referred to the claimant's condition. Again,

the tribunal is unable to draw any conclusions from this material as the evidence does not help as to when the information was added or who it was added by.

13. Evidence from Josephine Jenkins and Suzanne Baynham was provided in exchanged witness statements, the respondent indicated that it had no challenges to that evidence and the witnesses were not required by the respondent to face cross examination. We draw the following facts from those statements.
    13.1. Mrs Jenkins had known the claimant for many years having lived on the same street and having been a governor at the school for fourteen years, leaving that role soon after the appointment of Mrs Matchett.
    13.2. She observed that the claimant had obvious difficulties with speech and sometimes with processing information, although, the latter was less obvious.
    13.3. She indicated that the previous headteacher at the school had been aware of the claimant's difficulties and had made adjustments for him to accommodate them; in particular she refers to the claimant having been made the PE teacher for five years.
    13.4. She comments that in 2001 when the claimant's wife became seriously ill the claimant's symptoms became much worse. She notes that the claimant was anxious and withdrawn but goes on to say that he was "very muddled" and tripped over his words constantly.
    13.5. Mrs Baynham had known the claimant as a young man before his accident and had not seen him for many years until her appointment as a school governor in 2007.
    13.6. Her evidence pointed out an obvious contrast between her recollections of the claimant's abilities when young and what she observed in 2007.
    13.7. She describes how the claimant struggled, initially, to grasp concepts, jumbling ideas up and going off the point.
    13.8. She also describes speech difficulties such that the claimant had to be asked to repeat what he said on occasion.
    13.9. She describes how the previous headteacher had made adjustments because of these difficulties moving him to teach younger classes and to teach PE. She indicates that it was known that this was done to support the claimant although that was not made overt.
    13.10. She too stopped being a governor when Mrs Matchett took over.

14. Based on all the evidence which relates to the claimant's disability we find as follows.
    14.1. The claimant has experienced psychiatric events periodically. Those events occurred before and after the traumatic head injury in 1986.
    14.2. There is lay evidence that the claimant suffers from poor cognition and that the symptoms that demonstrate this were exacerbated in 2001 during a difficult period for the claimant.

14.3. The medical records demonstrate that in 2001 there was a stress related illness, but there is no further information.

14.4. There is an absence of any medical indication of an ongoing condition between 1987 and 2015.

14.5. There is an absence of medical evidence relating to any relationship between the psychiatric condition in 2015 and that experienced in 1987.

14.6. On that basis the tribunal is not able to say that the illnesses are connected nor that the admitted disability in 2015 was the same disability as in 1987 or that they arise from a recurring condition. This is because we have no expertise to do so and lay evidence is insufficient to allow us to say that both events arise out of a physical injury to the claimant's brain or an underlying predilection to psychiatric breakdown of that particular sort.

14.7. The claimant's contention that he has a condition, the symptoms of which are exacerbated by stress, is not proven prior to April 2015 in the absence of expert medical evidence of that causation. Although the tribunal accept that this interpretation may well be true.

14.8. The tribunal are unable to say based on the evidence given by the claimant that his difficulties with cognition and memory and speech difficulties are such that they have a substantial impact on his day to day activities prior to April 2015 save on specific occasions; the last prior event being in 2001. Whilst adjustments are referred by Mrs Jenkins and Mrs Baynham to have been put in place, they also refer to the same being done for teachers generally in the sense that the former headteacher would, according to Mrs Baynham, take account of the characteristics of all members of staff.

Narrative of Events

15. We shall begin by dealing with some general matters before moving to the specific facts relating to the claimant's complaints.

16. The respondent is the governing body of a voluntary aided primary school. The claimant was employed as a teacher at the school. The claimant's employment commenced on 1 September 1991 and he gave written notice of his resignation on 16 June 2016 the notice taking effect on 31 August 2016. The claimant was subject of two separate disciplinary proceedings one involving allegations of physically removing a child from the classroom, the other in relation to alleged breaches of data protection. During the course of the first disciplinary process the claimant raised a grievance, the second disciplinary process was commenced because some documents the claimant used in pursuing his grievance were drawn to the attention of Mrs Matchett the headteacher.

17. The validity of the ICT policies at the school, that is whether they are properly adopted by the school following statutory procedures, is unclear. The claimant

signed that he had seen a document headed acceptable use policy for ICT in November 2010 and it was this policy that the respondent relied on during the ICT disciplinary process. The heading indicates that staff were being asked to sign the document as a code of conduct, the document refers to the school's e-safety policy. The claimant's uncontradicted evidence was at the time he signed this document his use of computer equipment was very limited. The claimant did not pay particular attention to this document when signing because the document was not particularly relevant to his work at that time.

18. Mrs Matchett was appointed head teacher in 2012. Mrs Sydenham gave evidence about her view of the headteacher's approach to Mr Williams and to the running of the school generally. She indicated that the atmosphere at the school changed and that the headteacher would single out those who "crossed her". This was denied by the respondent's witnesses as was the assertion by both Mrs Sydenham and the claimant that Mrs Matchett's approach to the claimant moved progressively from being dismissive to being bullying. Specific examples were used of Mrs Matchett where she spoke to the claimant so that he was humiliated sometimes in front of children and others in front of staff. The tribunal gained the impression that Mrs Matchett was not fully au fait with the school policies in relation to grievances and disciplinary matters. We also gained the impression that Mrs Matchett attempted to exercise a strict control over the school. We are aware that it is not in dispute that Mrs Matchett returned a child to the claimant's classroom on 24 March 2016 although the manner in which she did this is in dispute. The claimant in giving evidence on these matters appeared to the tribunal to be reliving events as he described them. His evidence was compelling because of this. We also found Mrs Matchett evasive in giving answers on occasion which led us to approach her evidence carefully. We have viewed the claimant in giving evidence as providing considered answers; he took time in doing so. In busy environment such as in this school, we can understand that this might lead to frustration. In our judgment, the evidence of the claimant and the claimant's witnesses is to be preferred on this point. Mrs Matchett had clear expectations of a teacher of the claimant's seniority and experience (which can be seen in her discussions with him on behaviour management). In our view of the evidence she would allow frustration with the claimant to be expressed inappropriately in front of others.

19. The tribunal has, throughout the evidence of the school's witnesses, particularly those who form part of the governing body, reached the conclusion that they are either totally unaware of the statutory requirements governing them or ignore them. We are of the view that nothing else would explain the lack of minutes dealing with governors' meetings, lack of records in relation to the adoption of policies, the lack of records as to the appointment of governors and a general approach which led to, for instance, the creation of an ad hoc committee dealing with legal matters arising from the claimant's and Mrs Sydenham's claims without the appropriate governors'

vote to empower that committee. This has led us to the conclusion that the tribunal cannot be certain that any action of the governors was conducted *intra vires*.

20. In 2013 the claimant was a teacher accompanying children on the school overnight trip to Pendine. Mrs Matchett was on this trip with the claimant. The claimant contends that on this trip. He informed Mrs Matchett of his accident and of the impact on him, referring to his difficulties with speech and cognition. Mrs Matchett denies that this conversation took place. The respondent's case is that Mrs Matchett was, however, on this trip to Pendine. It is likely therefore that conversations between the headteacher and teachers took place during this residential trip. The claimant clearly recollects having had this discussion with the headteacher. The headteacher told us of no conversations that she had with the claimant on this trip. It appears to the tribunal that some conversations must have taken place between the claimant and the headteacher. It would be an opportune moment for the claimant to inform the headteacher of specific problems in a more relaxed atmosphere. In our judgement we prefer the evidence of the claimant that this conversation took place. We consider that on the balance of probabilities his clear recollection supersedes the headteacher's absence of recollection. We are not able to say that the headteacher is deliberately denying this conversation it may have been forgotten. However, from that stage the headteacher should have been aware that there were ongoing problems that the claimant asserted arose from his accident.

21. The claimant complained that his class in 2014 was of an inappropriate mix of pupils. We are aware that in 2012 members of this class were seen to be difficult in behavioural terms because of the way in which those individuals interacted. We are also aware that in 2013 those individuals were separated and placed in other classes. Those individuals were then placed in the claimant's class in 2014. There is no evidence that this was done deliberately to cause the claimant difficulties. On the evidence we heard class arrangements were generally created during discussions between the previous year's class teachers which were then moderated by the senior management team in the school. It is of note that it was not just the claimant that was aware of these difficulties, on 29 September 2014 Gemma Evans, a learning support assistant reported appalling behaviour of the class.

22. The claimant was unable to moderate the behaviour of the individuals during the autumn term of 2014. The claimant, the claimant's witnesses and the respondent's witnesses have given evidence that by January 2015 this was having some impact on the claimant. This is both in terms of the claimant's temperament and the claimant's control of his class. We were told that the claimant had been a successful teacher over a number of years, that he had good relationships in school with staff and pupils, that there had been no reported problems of him being able to control behaviour within his class until

this time. Additionally, the claimant is reported, in 2015, to be acting out of character by those who knew him.

23. In January 2015 the respondent accepts that the claimant began raising matters of class behaviour with the head teacher directly. Prior to this the claimant had been recording specific incidents on the school's method of recording pupil issues known as SIMS. The claimant was under the impression that SIMS recording would have been picked up by the Senior Management Team. However, we were told by the respondent's witnesses that information is only picked up if a specific referral is made by the teacher recording the incident. As a result of the claimant speaking to the headteacher the respondent set up what were meant to be observations of the claimant's lessons. The claimant saw the way in which the observations were operated as co-coaching and felt bullied. Instead of simply observing the claimant Mr Dummer, who carried out the observations, took over a lesson. Afterwards, he effectively, told the claimant that's how it should be done. The school expressed this is being done as a form of support. Whatever the intention, the impact was that the claimant felt undermined. Whatever the intentions it is clear to the tribunal that the method chosen to support the claimant was ineffective.

24. On 11 February 2015 the claimant became ill and he was absent for the half term. The claimant informed the school during his absence that it was due to the flu. However, the school held a return to work meeting with the claimant after the half term holiday. During that meeting with Mrs Matchett the claimant indicated that the "flu" had been brought on by exhaustion. He mentioned that he was suffering from stress and he related these matters to the problems in running his classroom. It appears to the tribunal from reading the meeting notes prepared by Mrs Matchett (pages 590 to 592) that her approach to the claimant's absence was one of performance management and not concern for the claimant's health and well-being. This is indicated by those notes being recorded as simply meeting notes, whereas the official return to work interview is barely completed (pages 593 and 594). Mrs Matchett told us that she had offered occupational health support to the claimant. However, the return to work document asks whether occupational health support has been recommended and "yes" is crossed out and "no" left unmarked. Mrs Matchett was cross examined about this inconsistency. Her response did not make sense. She said because the claimant had refused occupational health support she was therefore not recommending it. In the tribunal's judgement this is the opposite of the situation, which she describes where she was recommending occupational health support by offering it and was rebuffed by the claimant. The tribunal would expect, given its experience of Mrs Matchett's method of recording, that such a matter would have been noted as the claimant's refusal. In our judgement, as seen from the meeting notes, Mrs Matchett's concentration was on methods of improving the claimant's ability to

manage class behaviour rather than a concentration on the impact the class behaviour was having on the claimant's health.

25. On 23 March 2015 there was an altercation in the schoolyard between the claimant and Mr Dummer. Whatever the causes and whoever was aggressive is of less importance than the fact that all agree the claimant was acting entirely out of character during this altercation. The tribunal is of the view that by this stage the respondent was aware of the following: the claimant had been absent when the claimant did not normally take sickness absence; the claimant had reported stress related to the behaviour of his class; there was some indication that the class was problematic from other individuals; there was significant SIMS reporting by the claimant in 2014 about the behaviour of the class; the claimant was acting in a way which was seen to be out of character. In those circumstances the respondent should have been alerted to the potential that the claimant was suffering the effects of some sort of illness. In the light of the information that was presented by the claimant to Mrs Matchett in 2013 during the visit to Pendine. We are of the view that by this stage some thought should have been given to considering an occupational health appointment for the claimant.

26. On 24 March 2015 an incident occurred but no one event is agreed upon by the witnesses.

26.1. The claimant tells that he caused child B to be removed from his class and taken to Mrs Sydenham's class. He describes Mrs Matchett returning child B to his class by launching the child into his classroom and having a verbal altercation with the claimant. The claimant continues by saying that child began fighting again with child C which was the original cause of the removal. He then says, that a later stage, he took those children to Mrs Matchett's room so that she could deal with them as appropriate under the school's behavioural policies. The claimant's account has been relatively consistent throughout internal processes and at this hearing.

26.2. Mrs Matchett's account, in her witness statement, is that the claimant brought the children to her and was sent away because she was in a budget meeting. She says that the children were bought back to her later that morning. Her account to Mr Cole during the investigation into the claimant's grievance, given on 9 February 2016, and where she refers to child being in the corridor in early morning indicates that Mr Williams had brought the two boys later in the morning. However, Mrs Matchett is recorded as having told an investigator Mrs Cobert on 24 November 2016 that she had taken child B to the claimant's room because the child was crying outside Mrs Sydenham's class. Her account was that later that morning. Mrs Kyte, a volunteer in the claimant's class, had come to office asking her to go to Mr Williams class because of problems with two children fighting. Mrs Matchett accepts in that account that she told Mr

Williams to deal with the children's behaviour in class. She also indicates that about ten minutes later the claimant brought the two children to her room.

26.3. Given the inconsistencies that we have seen in the account given by Mrs Matchett to the internal interviewers and her evidence before us. The claimant's account of events involving the children is to be preferred.

27. On the morning of 27 March 2015, a learning support assistant was escorted to Mrs Matchett office by a teacher to whom she had reported some concerns. The learning support assistant, Mrs McNamee, indicated that she had seen the claimant remove a child from his class in a way that distressed her and that she felt she needed to report. As part of the reporting system the learning support assistant was required to complete a document setting out her account of events. In this case there are two such documents. One, it appears, was created immediately by the learning support assistant when she spoke to the teacher that she first approached. The second report was completed when the learning assistant was with Mrs Matchett. The tribunal have received no credible explanation for the necessity of producing a second report document. We were told that Mrs McNamee was distressed and wanted time to think. However, it was also made clear during the course of evidence that the headteacher was required to provide the report to the social services once it was made without further investigation beyond initial enquiries. The first document was not timed and dated the second document was dated 27 March and timed at 9:30 AM. The distinction between the first report made and the second is that the former indicates that the child was led from the class, the latter that the child was pushed from the class. What remained the same in both documents was that the incident was recorded as having occurred on the 26 March 2015. Mrs Matchett did not prepare any contemporaneous notes of this interaction beyond the reports. Beyond speaking to Mrs McNamee, Mr Parker, the chair of governors and Mr Dummer the deputy head and deputy child protection officer school and Mrs Matchett made no further enquiries; other than to check that Mr Williams and the child were in school on 26 March. Again, there are no notes of the discussion between Mrs Matchett, Mr Parker and Mr Dummer. It would have been known both to Mrs McNamee and to Mrs Matchett that another member of staff was with Mrs McNamee at the time these events were said to have happened. The referral records sent on 27 March 2015 indicate that there is no health and safety risk involved in the referral and that Mrs Matchett had completed a document described as AASRF1. It also indicates that she had completed a risk assessment, ensuring control measures were in place. Also within the document it is indicated that a health and safety risk assessment was completed. The tribunal have been taken to none of these documents in the course of evidence, and none of those documents appear in the index to our bundle.

28. As a result of her conversations with Mr Parker and Mr Dummer, Mrs Matchett made a report to social services sending Mrs McNamee's second written account. She did not suspend the claimant from his employment on 27 March 2015. That day was the last day of the school term. The explanation given to us was that by the time she had spoken to Mrs McNamee, Mr Parker and Mr Dummer that there was little prospect of the claimant coming into contact with children that day. We are aware that the claimant was heavily involved in sport with children and might have been involved with children during the school holidays. When Mrs Matchett was questioned about this she denied any knowledge of the claimant's extracurricular involvement in sport. The tribunal consider on the balance of probabilities that, it is highly improbable that none of the three senior school figures involved in the discussion would have be aware of the claimant's likely involvement with children in the holidays. The evidence we have heard is about how close knit a community this school serves and how it was an integral part of that community, as was the claimant who is described as both well-known and closely connected with the local community. We find therefore that it would have been known that the claimant was likely to engage with children at the time when those individuals were in a position to consider suspension. Nothing further was done until the return to school after the Easter break.

29. Mr Parker was at the time, the chair of governors of the school. The tribunal heard no evidence from Mr Parker nor any explanation as to why he is not giving evidence in this case. Mrs Matchett gives evidence that Mr Parker made the decision to suspend the claimant on 13 April 2015, when school reassembled. Her account is that this was on the advice of the local authority human resources team supporting the school. However, it appears that as part of Mr Parker's decision, Mrs Matchett completed a risk assessment. There is no other documentation which indicates anything about the content of either the advice from the local authority or the reasoning underpinning Mr Parker's decision. The tribunal drew the conclusion from Mrs Matchett's answers in cross examination in respect of this risk (and a later risk assessment which she undertook dealt with below) that she had no real understanding of how a risk assessment should be prepared. Her answers amounted to this, that every time an adult was accused of touching a child to any extent, there would be the highest risk of the highest injury because one was an adult and the other a child (we have considerable doubt about the veracity of this answer given the second risk assessment dealt with below). This negates the purpose of a risk assessment as part of Mrs Matchett's decision making process was to consider if control measures could be put in place which would ameliorate the risks. In our judgement we concluded that no proper thought was given as to whether this was an appropriate occasion to suspend the claimant. We are bolstered in this conclusion by the fact that it was not considered serious enough on 27 March to suspend at that point in time.

30. At the time of his suspension, the claimant was told nothing more than that this was a suspension because of a child protection matter. The tribunal were told that this was because the local authority had advised that this is what should be done and that the school was considering the all Wales child protection policy. The policy requires that an alleged perpetrator be given as much information as possible without causing risk to the child involved or other young people or which might inhibit or interfere with an investigation. There is no documentary material that we have been shown which shows local authority advice to this effect. The risk assessment that we have seen does not deal with these risks directly and we have seen no analysis which would mean that the claimant could not know that he was accused of physically removing the child from the class. The tribunal accept that it may have been appropriate that that stage to keep the identities of the informant and the child confidential. The letter of suspension sent to the claimant identified a local authority HR officer as a point of contact for the claimant to seek any occupational health support or clarification of any aspects of the suspension.

31. Within the first week of his suspension the claimant began the process of gathering evidence which he could pass to his union in order to defend himself. The claimant told us, and we accept that he was very distressed at this point and confused to what at the allegation could be about. He was concerned that the union should know about his view of his treatment in the run-up to suspension. As a result of this the claimant used his access to the school's internal systems to download what we are told by him were over 200 documents. The claimant has accepted the school's position that the downloading of documents was likely to be in breach of data protection provisions. However, at that time the claimant was in some difficulty with the impacts of stress on his mental health. He told the tribunal and we accept, that at that point in time. It did not "cross his mind" that he might be doing wrong. He particularly makes the point that teachers regularly used memory sticks to transfer data back and forth between school and home and so he thought nothing of this.

32. The claimant complains about a breach of confidentiality during this period. He refers to matters being reported back to him through a series of reported conversations. In other words, one person telling another and that person telling a third and onwards. The tribunal were unable in the circumstances, without further evidence, to say that this was a breach of confidentiality on the part of the school. We are aware for instance, that the mother of child A was informed of the incident and might well have put two and two together in respect of the claimant's suspension soon afterwards. We cannot say one way or another, whether the school breached confidentiality of the process.

33. The all Wales Child Protection Procedures require, when the matter is reported to social services, that a decision is then to be made by what we have come to know as PASM. Our understanding is this. At the stage where

PASM is involved there is a multi-agency meeting where decisions are made as to the appropriate next steps to be taken given the particular report made. The first stage of this is whether there is sufficient concern to set up the multi-agency meeting. Based on the report provided by Mrs Matchett and that prepared by Mrs McNamee, it would appear that social services concluded at that stage that there was insufficient information to cause a meeting to be called. A referral was sent back recording as follows "*to refer for additional information in relation to context around the incident and whether there are concerns around unreasonable force used – limited information provided in referral in order to make a decision.*" Mrs Matchett clearly understood this to mean that if no further information was provided there would be no further action taken (see page 612). Her response on 15 April 2015 was to provide further information which recorded her own concerns about the claimant's performance and events in relation to his class offering her opinion that what was described was the use of unreasonable force.

34. As a result of this revised information it was decided that the multi-agency PASM meeting should be called. It was held on 6 May 2015 and at that meeting it was decided that some investigations would be undertaken. As we understand it that was done with child A being spoken to by a social worker. Following this, there was a further PASM meeting on 14 July 2015. That meeting decided that the allegation was "substantiated" and that there was no further action to be taken by social services or the police, but that the school should conduct matters through its internal disciplinary processes. The tribunal understand, and raised with the parties, its' understanding of the meaning of the word "substantiated" in PASM meetings. The purpose of PASM is to make decisions as to what further steps need to be taken and whether a substantiated complaint required, for instance, a child protection conference and/or a police investigation to follow. Nothing was said by the parties to contradict the tribunal's understanding, either in evidence or submissions. In this case that means that there was sufficient "substantiated" for a school disciplinary process to be undertaken. Throughout PASM process the claimant was provided with no further information as to the accusations against him or the names of the accusers.

35. Following the PASM decision Mrs Matchett carried out a risk assessment. She invited the claimant to attend the school to agree control measures under which he would work. The letter inviting the claimant to return to work is undated but follows a conversation on 16 July 2015 between Maureen Williams, a HR officer, and the claimant. That letter indicates that the claimant would be no longer suspended and would return to the school on Monday, 20 July 2015. The letter also informed him that there would be an independent investigation into allegations that the claimant had not adhered to school policies in respect of safe and effective intervention policy and procedures, positive behaviour policy, and safeguarding guidance document. The letter refers to this behaviour as misconduct.

36. Although the above letter referred to agreeing control measures with the claimant at the meeting with Mrs Matchett on 20 July, the reality is that the claimant was told to accept the control measures that she had identified.

36.1. The risk assessment document prepared by Mrs Matchett regarding this, sets out six control measures (although numbered 1 to 5 with two numbered as 4).

36.2. During questioning, it became clear that Mrs Matchett did not understand what the purpose of a control measure was. She accepted that all the control measures, bar one, were not actually there to control risk.

36.3. The tribunal consider that, again, Mrs Matchett's concentration was on performance issues and not on the claimant's health or the health and safety of children.

36.4. What is striking is, that the only actual control measure, was that the claimant was not to carry out direct teaching of pupils. However, as we shall see the respondent required him to organise a sports day as part of his return to work following the summer break.

36.5. Therefore, logically, the absence of direct teaching alone apparently lowered the risk analysis in comparison to that performed when the claimant was suspended.

36.6. The risk being analysed in both April and July 2015 was the use of unreasonable force with a pupil. The process is to measure the likelihood of an occurrence, the severity of harm if it happens and risk level form part of the analysis. There is a key which informs this process of analysis, where a matrix sets out likelihood in column (certainty to unlikely) and severity in steps (fatal to minor) and the risk level is found where the two co-ordinates meet. The control measures are then matters put in place to reduce either likelihood or severity or both.

36.7. Without control measures in the April analysis the likelihood of an event is set at very likely and the severity of an event is set at major and the risk level is high risk (it is to be noted that the key indicates that major falls just below fatal in the severity key and very likely falls just below certainty in the likelihood key). On that analysis without control measures in place, there was a high risk that the claimant would cause a severe bodily injury and it was very likely that he would do so.

36.8. In the July risk assessment likely was reduced to very likely and severity was reduced to medical treatment in the key. There is nothing to explain this reduction. In terms of the complaint against the claimant in April and the situation in July there was no difference of fact that arose from the social services investigation. The actual control measure does not reduce risks to zero risk but reduces the likelihood to unlikely in the key and severity to minor in the key.

36.9. It is to be noted that in the assessment of activity hazards in April only suspension leads to zero risk. Whereas having one additional member of staff in the classroom with the claimant or 2 additional members of staff deployed in the classroom with the claimant risk levels remain the same, the likelihood reduces from likely to unlikely between 1 and 2 additional members of staff however the severity of risk remains major. Mrs Matchett was unable to explain any form of reasoning that supported the way in which these risk assessments had been analysed.

37. The claimant returning to work on 20 July 2015 was arriving back just prior to the school summer holiday long vacation. He had been told that the diocese would appoint an investigator. At the end of August, the claimant wrote to the head teacher asking what was happening in regard of the investigation. The tribunal note that despite the seriousness which the respondent says that this allegation represented, nonetheless, the school summer holidays seem to bring a complete hiatus in any activity in dealing with them. What that does not mean, of course, is that the claimant was no longer concerned about them. The claimant was extremely worried about these allegations, both in terms of the way they threatened his reputation and his career. The appointment of an investigator seemed of less importance to the diocese, which of course is the responsible body at this school. It is to be remembered that the claimant during this stage of the process was still entirely unaware of any details of the allegation against him other than it was of a "child protection" nature. Mrs Matchett told us that she felt that she was under a restriction whereby she was not able to provide the claimant with any information because of a social services edict emanating from PASM. This edict was that the minute should not be disclosed to anyone without the permission of the PASM chair person. Mrs Matchett told us that she considered this to mean that she was not able to provide any information that had been discussed at the PASM meeting at all to anyone. The tribunal find this a strange conclusion to draw, particularly as that would mean that the investigator could not be told anything about the matters to be investigated. This clearly was not what Mrs Matchett meant when she said to anyone. Therefore, the tribunal consider it difficult to understand why she felt that she was under a particular duty not to disclose to the claimant. Of particular concern in this regard is that she appeared to be telling us that she did not consider that the school's disciplinary policy, as guided by the Welsh government guidance, held sway in the circumstances. Her position was that the all Wales child protection policy was still in application, despite the fact the PASM had passed the matter back to the school. The tribunal take the view that the all Wales child protection procedures had been dealt with by the PASM meeting and its decision. Therefore, the matter had been passed into the school's area of responsibility and for it to apply its internal policies. Whether Mrs Matchett actually believed PASM held sway or not, in our judgement she ought to have known that the disciplinary process held sway. If she did not know that for certain she should have sought specific advice on

the matters in order to consider the fairness of the process the claimant faced. This is of particular importance given that she had been made aware of the claimant's stress illness in February and accepted before us that the situation faced by the claimant in the absence of that information would have been particularly stressful.

38. The claimant was asked to come back to school to work in the September subject to the controls being in place and at that time was still unaware of who had been appointed investigator. Neither was he aware of what arrangements would be put in place for the investigation process. On his return to school. The claimant was asked to organise a sports day. The claimant became very stressed by this process and after he had carried out a risk assessment became concerned that he was being "set up". The claimant's explanation to us was that this belief was because he was going to be in a position where he would be with children in circumstances where they might face dangers such as crossing roads, and given that he did not know what he had been accused of nor who his accuser was nor who the child was that the uncertainty brought on an illness. The illness the claimant told us had the appearance of a heart attack when he was sent home and had to undergo medical tests. The tribunal, whilst recognising that the process of these claims may have impacted on the attitudes of some of the respondent's witnesses, were nonetheless surprised at the apparent lack of sympathy and empathy expressed by Mrs Matchett and Mr Dummer in particular towards the claimant's absence arising from this event. This was the last time that the claimant worked at the school. It was clearly the precursor of a long illness and the answers given about their awareness of the claimant's illness on that day demonstrated a degree of dismissiveness. We concluded that the claimant was, whatever symptoms were being displayed on that day, demonstrating the effects on his disability of a stress situation. We consider that this situation so soon after his return to school, when he was raising concerns with Mrs Matchett about the sports day, and with the history we have already outlined that the school were not taking the claimant's condition seriously.

39. At some point Mrs Cobert was appointed as the independent investigator by the diocese. The tribunal are not clear exactly when this was. The tribunal know that by 16 July that Mrs Cobert had been identified as an investigator and had signified her willingness to carry out that role. By 31 August, an email indicates that the decision to appoint her as an investigator was to be taken. The following day, i.e. 1 September 2015. However, we have seen no document which sets out her appointment, nor importantly, what her terms of reference were for carrying out the investigation. From our understanding any terms of reference must have been gained from her discussion with Mrs Matchett on 9 September 2015 which took place prior to Mrs Cobert meeting the claimant. Mrs Matchett at this meeting delayed the start of the investigation by informing Mrs Cobert that she could not allow the

investigation to take place until there was occupational health involvement as the claimant was off sick at that stage. The claimant had been absent for just 2 days at that point. Mrs Matchett received an occupational health report dated 1 October 2015, she does not know when she received a report. That report only showed the occupational health advisers recommendations because the claimant had placed restrictions on the contents. She understood from the report that the claimant would be able to meet with Mrs Cobert. Mrs Cobert met with Mrs McNamee first before speaking to the claimant on 9 October 2015. She finally met with the claimant on 21 October 2015. It was at this meeting that the claimant discovered that the allegation involved him manhandling a child. He was still, even at this stage, given no further information about the name of the child or of his accuser. It is important to note that Mrs Cobert was, at this stage, investigating events which were said to have occurred on 26 March 2015.

40. On 18 November 2015 the claimant raised a grievance with the school via solicitors representing him at that stage. The investigation report was not completed on this date, but an advanced draft copy was sent to Mr Parker as chairman of governors on 23 November 2015. The grievance letter had asked for the disciplinary process to be put on hold pending the outcome of the grievance. The school complied with this suspending any further steps in the disciplinary process at this point in time. The grievance letter set out several points. The 1st headed A was suspension from school and failure to follow proper procedures, the 2nd bullying the 3rd breach of confidentiality and the 4th failure to follow proper procedures for dealing with stress in the workplace or to manage sickness absence. Mr Parker wrote back in a letter dated 10 December 2015 indicating that whilst the respondents would deal with the latter three matters as part of the grievance process, it did not intend to deal with the first matter, which would, instead, be reserved to the disciplinary process. We have heard no evidence as to the reasoning for the division of the grievance in this way and no explanation why it was necessary to retain those particular aspects to the disciplinary process itself. We are not aware that this was a decision that was approved by anyone other than Mr Parker and are unaware of any advice that was provided by human resources in respect of it. On the face of it this appears to be a strange conclusion. The claimant was, in effect, complaining that the disciplinary process had been manipulated and related this to his other grievances about the senior management team. Therefore, it would seem reasonable to draw conclusions about all these matters in one process be that the grievance process or the disciplinary process so that the decisions were made with a complete picture of the fact finding. The other issue relating to this is that Mr Parker would have been aware that stage that there was a concluded investigation with a report and therefore the matters of the claimant’s complaint had not been dealt with as part of that investigation.

41. During the course of the claimant's absence, which of course covered the entirety of the grievance processes and that part of the disciplinary process dealt with up until the claimant's letter indicating his wish to resign. The respondent carried out its normal processes with regard to this and sickness absence management. This meant that there were meetings with the claimant and occupational health reports obtained about the state of his health.

42. A lot of correspondence was exchanged between the school, in the person of Mr Cole who had been appointed to conduct the grievance investigation and the claimant solicitors about the detail of the claimant's grievance. This resulted in the creation of a document which set out 49 examples which were said to encapsulate the substance of the claimant's four named grievances. The grievances were generally directed towards the conduct of Mrs Matchett but also referred to other senior members of staff. The grievance also referred to breaches of confidentiality which the claimant had said occurred and complained about the way in which processes had been dealt with in terms of the claimant's suspension and the disciplinary process itself. Mr Cole interviewed the claimant on several occasions over a total period of some 7 hours. Mrs Matchett was interviewed by Mr Cole on 9 February 2016. During the interview, Mr Cole referred Mrs Matchett to some documents, which had been provided to her by the claimant. As a result of seeing these documents. Mrs Cole began the process which culminated in disciplinary action against the claimant on ICT matters. We deal with that below. On 12 February 2016 some of the witnesses who were identified by the claimant were interviewed as part of the process.

43. The tribunal consider that the approach of Mr Cole in identifying examples of the main headings set out in the claimant grievance was both sensible and proportionate. In order to establish, to take one example, bullying, it would be necessary to have evidence about occasions when bullying was said to have occurred. Therefore, specific incidents would need to be explored. We have no criticism of this stage of the grievance process nor of the interviews that Mr Cole conducted with the various people involved and those named by the claimant. Miss Watson tried to suggest that one stage Mr Cole, ought to have interviewed more people. We do not think it is reasonable for him to have interviewed anyone not identified by the claimant unless during the course of his investigation it became clear that that individual would be relevant to the investigation.

44. At some point after her interview with Mr Cole Mrs Matchett obtained the documents which the claimant had given Mr Cole from a locked cabinet. She had received no permission from Mr Cole to obtain these documents. Mrs Matchett told us that she received permission from Mr Parker, the chairman of governors. She told us that the purpose was in order to investigate the claimant in respect of what she thought might be data breaches. Mrs Matchett was cross examined at length by the claimant's representative. During the cross-examination it was pointed out to Mrs Matchett that none of the

documents, which were shown to her during the course of the interview with Mr Cole indicated that they were emails or that they've been obtained from the school system. Mrs Matchett appeared to accept the propositions put to her by miss Watson on these points. On that basis it appears to us difficult to understand how suspicions about data breach could have been evoked by viewing those documents. Therefore, it is very difficult to understand why Mrs Matchett would seek permission from Mr Parker to view those documents. There is no evidence other than Mrs Matchett's testimony that she had such permission and the tribunal are concerned that the motive for exploring Mr Cole's paperwork was other than that put forward in testimony by Mrs Matchett.

45. A panel was appointed to hear the claimant's grievance complaints. The claimant contends that they did not use an appropriate process. The tribunal were not shown a written process which set out any form of hearing the 1st stage of the grievance. However, the claimant seems to have expected that he would make a presentation of his grievances and then be allowed to cross examine witnesses during the course of the hearing. The claimant complains that he was not afforded this opportunity of an opening statement that such he was confined in question to asking questions solely on one or more of the 49 issues, on the basis that Mr Cole had covered that issue with an individual. Therefore, the claimant complains that he was not allowed to ask a question of a witness who might have been able to give evidence about an issue that but had not been questioned on that issue by Mr Cole.

46. The panel's outcome letter indicates that they found against the claimant on each and every one of the 49 complaints. It can be seen from the way in which the complaints were dealt with that the panel confined themselves to looking at the evidence on complaint 1, for example, and did not apply that evidence to any other complaint. Given that these were examples for the broader complaints being brought by the claimant we would have expected any panel to be looking at the evidence in the round. That would be necessary to consider whether evidence in respect of one complaint tended to support or undermine the evidence in respect of another complaint. We conclude that the manner in which they made their findings meant that certain of the claimant's general complaints were not found to be proven because none of the examples had been found to be proven. However, what appears to us to be problematic is the compartmentalisation of these specific examples rather than an examination of the claimant's complaints in the round.

47. The claimant appealed the grievance outcome we have heard no evidence from any of the panel deciding the grievance appeal. The hearing took place on 18 May 2016. The claimant was represented by a barrister. The appeal panel indicated to the claimant that the appeal was not a rehearing. They refused to engage in the claimant's complaints about the method by which he was confined in the questioning of witnesses because "Mr Williams appeared

to be attempting to raise a new grievance” (p.1166). However, the claimant’s barrister appears from the notes to have accepted these strictures. However, the minutes are not agreed minutes. No witnesses were called to this hearing, despite the request of the claimant. The reasons given were that the claimant had sought witnesses because he had not been sent the notes of the grievance hearing and because he had now been given those notes witnesses were not necessary. In our judgment this hearing gave no opportunity to correct the problems we identify from the grievance hearing.

48. Mrs Emma Dummer, a governor of the school, is the sister in law of Mr Dummer the deputy headteacher. Mrs Matchett had raised an issue about the documents the claimant gave to Mr Cole. That began a process which led to a disciplinary investigation in respect of data protection issues. Mrs Emma Dummer was appointed to investigate these issues. Strictly speaking, there was at the time of her appointment no specific conflict of interest involving her relationship to Mr Dummer (whatever the wisdom of appointing a relation of a member of the senior management team to investigate disciplinary matters). However, when the investigation received from the claimant an indication that part of his defence related to his treatment by the senior management team alarm bells should have rang. Her investigation concluded by recommending that disciplinary action for potential gross misconduct should be undertaken. This appears to go beyond what the disciplinary policy requires from an investigator who, by the policy, should not draw conclusions or make recommendation but merely gather the evidence for the decision on disciplinary action and the level of that action to be taken by the headteacher in consultation with the chair of governors. This is perhaps even more concerning as the original version of Mrs Dummer’s report, effectively, said that the claimant was guilty of gross misconduct on the facts as she had found them to be. Her finalised report was presented on 20 June 2016, prior to that however, as we set out below, the claimant had tendered his resignation.

49. On 16 June 2016 the claimant wrote to the respondent indicating that he was resigning giving notice to the next resignation date of 31 August 2016. The letter explains that the claimant’s reason for resigning is that he had received a communication from his solicitor indicating that Mrs Sydenham was no allowed to contact him. The reason he understood for that decision was that the respondent wished the investigation to be concluded before allowing any contact as both he and Mrs Sydenham were accused of data breaches which were connected. The claimant had in mind much of the previous treatment which we have set out above as part of an accumulation of events which together he considered were sufficient to amount to a severe breakdown in the employment relationship. His letter offering his resignation contains the following words “*just when I thought things could not get any worse I have been told by my solicitor that Mrs Matchett has recently refused to give permission to my colleague, Mrs Sydenham, to contact me to discuss the*

overlap of our two cases. This is gratuitous cruelty and further abuse of power". The claimant understood that the respondent's reason for this refusal was to ensure a structured investigation a reason which he saw as an excuse and unjustified. We conclude that the trigger for the claimant's resignation was the discovery of the information about Mrs Sydenham from his solicitor.

50. There was a completed investigation report into the child protection allegation provided to the respondent in draft as set above. However, once the grievance process was at an end in May 2016, Mrs Matchett received advice from the HR support at the LEA about that investigation and report. On the 23 June 2016 in an e-mail the following "concerns", amongst others, were raised by a Ms Porter-Thomas about the investigation and its impact on a forthcoming disciplinary hearing: the qualifications of the investigator, that the investigator expresses an opinion without reference to any evidence to support the opinion (nor is the evidence apparent from the material available: the distinction between misconduct and gross misconduct and the way in which matters had been communicated to the claimant about this. As a result of this a decision was made, the tribunal have no evidence as to when, by whom and in what circumstances, that the investigation should recommence. Interestingly, given the view as to the investigators qualification to carry out this investigation and the faults identified, the same investigator was appointed to carry out the new investigation. The claimant was informed on 21 July, inaccurately, that the reason for the further investigation was some additional evidence. The respondent contended that this was because it was now known that social worker had spoken to child A. The tribunal reject this explanation and conclude that this was used as an excuse to justify the re-investigation of matters because the initial report was seen as substantially flawed.

51. Astonishingly, that was not the end of the revision process in respect of the second investigation. Throughout the initial investigation the claimant was asked questions about an unnamed child with an unnamed witness referring to events occurring on the 26 March 2015. On 9 September 2016 Ms Porter-Thomas wrote to Mrs Matchett indicating that the PASM minutes referred to an incident on 24 March 2015 and asking her to confirm the date of the incident. Mrs Matchett responded that the incident was on 24 March 2015 and that the mix-up in dates was because the Learning Assistant reported the matter to her line manager on 26 March 2015. None of that information tallies with the evidence we have heard. The contemporaneous evidence in matters reported to social services initially indicate an event which occurred the day before the report was made on 27 March 2015. The tribunal are in no position on the evidence before to conclude that the incident allegedly witnessed by Mrs McNamee occurred, on her account, given at the on 24 or 26 March 2015. We cannot say that the incident she witnessed was related to the 24 March 2015 incidents we have outlined above. All in all, we are left to say that on the evidence we have heard we cannot say that any incident took place at

all. However, the respondent then wrote to the claimant indicating that the second investigation was now into an incident on 24 March 2015.

52. In between July and 9 September 2016, a hearing was arranged for 23 September 2016 which was postponed so that the second investigation could be undertaken. The claimant had been seeking information about the identity of the child. Mrs Matchett was most reluctant to divulge this information, she told us this was because of her understanding of policy and the position of PASM. However, in an email where she was discussing this issue she made it clear that she was concerned that if the claimant found out the name he would bring pressure bear on the family in some way and seek to show that child A had “lied”. In our judgment Mrs Matchett did not believe that she was following a particular policy but was simply trying to keep control of the process, and using social services, who no longer were involved, to justify her decision making. In our judgment Mrs Matchett began to concede this point only at the stage where it became apparent that the employment advice, given in September 2016, was against the approach she was taking.

53. The claimant was invited to attend an investigation meeting with Mrs Cobert on 7 October 2016. He had been told by this stage that the “new” evidence was a summary of the PASM minutes. The claimant wrote to indicate that he would not attend that meeting and provided information which he argued should be used to support his position. In particular, he indicated that Child A was not in his class on 26 March 2015 and when in his class on 24 March 2015 he was accompanied throughout by Mrs Kyte a classroom volunteer. On the 2 November the respondent wrote to the claimant indicating that the date of 26 March that had previously been investigated was wrong and that the 24 March 2015 was the correct date. The letter also informed that the matter was being treated as potential gross misconduct. This mirrored the 9 September letter which was sent for the disciplinary hearing whereas prior to that letter matters had been referred to as misconduct.

54. The claimant attended an investigation interview with Mrs Cobert on 21 October 2016. She also interviewed Mrs Kyte and Mrs Matchett and Mrs McNamee for a second time. There were significant differences in the account given by both Mrs McNamee and Mrs Matchett compared to the first account given. Most particularly both were now indicating that the incident in question took place on 24 March 2015. However, additionally, Mrs Matchett changed her account about who brought children to her room, naming for the first time Mrs Kyte. In our judgment this change should have led the investigator to undertake a much more careful examination of events. This should have meant that the investigator broadened the number of people to be interviewed, at least to the teacher who was accompanying Mrs McNamee on the day the events occurred and because of the problem with dates should also probably have extended to Mrs McNamee’s line manager to whom she first reported the matter. Additionally, there should have been an examination

of contemporaneous diaries etc in order to attempt to deal with these anomalies.

55. Mrs Dummer's report was ready in June 2016, Mrs Cobert's second report was made available in late 2016. However, the disciplinary processes were then delayed; the hearings did not in fact take place until 15 and 16 May and 19 June 2017. The delay was in part caused by the availability of the claimant's representation and the claimant's state of health. Other reasons were the availability of witnesses to attend a disciplinary hearing, further to this there were various concerns about the make-up of the disciplinary panels and the availability of governors to sit on those panels. No one event or person was responsible for this considerable delay at this stage. However, in our judgment the responsibility of the delay by postponing the hearing meant for 23 September 2016 (child protection) falls entirely on the respondent and we have seen no explanation why it was necessary to delay the ICT hearing given the report was available in June of 2016 once the claimant was well enough to attend a hearing.

56. We note that the claimant was making requests for documentation prior to the hearings. The responses, for reasonable disclosure, were in our judgment obstructive. An example of this is that the claimant asked for the original report provided to social services by Mrs McNamee only to be told that this was part of the child's record and therefore not disclosable. The tribunal is at a loss to understand why a document which commenced the whole child protection allegation against the claimant and is amongst the first written account of events should not be disclosable in the circumstances, we heard nothing in the evidence which led us to conclude that this approach by the respondent was bona fides.

57. There are no agreed notes of either disciplinary hearing. The tribunal have seen two sets of notes. The respondent has minutes in the usual format. The claimant presents typewritten documents with handwritten annotations which we were told are the pre-prepared questions of Mrs Watson (typed) and the note of responses to those questions recorded by the claimant. Mr Rawlinson gave evidence to the tribunal about the decision making of the panel in both disciplinary hearings. Mr Rawlinson told us that Mr Walsh the respondent's solicitor retired for a time with the panel in disciplinary hearing and gave them legal advice. The school used the disciplinary policy prepared by Neath Port Talbot Council (September 2013). As we have indicated we have no specific evidence that this policy was properly adopted by the respondent. At paragraph 77 of this policy the following is set out "*once this part of the hearing is completed there will be an opportunity for the staff disciplinary and dismissal committee to receive advice. Once this is received members of the committee will be left alone with the clerk to discuss the evidence and make their decision*". The policy indicates in appendix A that the persons present for the hearing will be the decision makers and their advisers, the employee and representative, the management representative and the clerk. Later in the

same appendix it is indicated that the decision makers and advisers will deliberate in private, the advisers withdrawing when the actual decision is to be made. The Welsh Government guidance on disciplinary policies makes the following points on the same parts of the process at point 76 is exactly the same as the council policy wording.

58. There were two disciplinary hearings, one dealing with the child protection matter the other dealing with the data protection complaint. The first matter was dealt with over two days 15 May and 19 June 2017 (because it had not been concluded in one day as expected) and the second matter was dealt with on 16 May 2017.

59. The minutes of both disciplinary hearings note the attendance of Mr Walsh, recorded as legal representative to “the school” on 15 May 2017 and as legal adviser to the panel on 16 May 2017. In respect of the child protection disciplinary he was not present on the 19 June 2017 and therefore did not take part or view any deliberations for that matter. The tribunal take the view that Mr Walsh’s role in the disciplinary processes is somewhat ambiguous. He is clearly providing advice to the respondent school on the claimant’s claims. He is also, we are told, advising the panel on legal matters and the respondent relies on legal professional privilege in respect of that advice.

60. Usually it is a simple matter to see who advises a panel; the adviser will generally be a HR officer and occasionally a legal professional and rarely both. We note the provisions for attendance of advisers set out in the Welsh Government Guidance and which is, to a great extent, mirrored in the document which the school relies on as its policy, both set out that although legal or other advice can be given there is a restriction. That restriction requires that only the panel retire to make a decision with the clerk to the governors to take notes (it should be noted that the clerk is a specific individual that must be appointed by the governors under the statutory provisions). In this case we are told that Miss Roch is clerk to the governors and although we have not seen minutes establishing her in that role it is clear that she has acted in that role for some considerable time. On the balance of probabilities, the tribunal accept that she is the properly appointed clerk. However, the claimant made allegations against Miss Roch as part of his defence and therefore a notetaker was appointed, we are not aware of a temporary clerk appointment being made (which we understand is a possibility under the statutory provisions).

61. Miss Roch was not present as clerk in either hearing but does appear as a witness. However, she does not at any stage appear to relinquish the role of clerk and is still involved on the administrative matters involving the claimant’s disciplinary case and as seen below was, at least to some extent, acting in advising the panel on its duties as governors.

62. This leaves the position of Mr Walsh unclear if he is an adviser to the panel he should not be present when they deliberate, he clearly was not on 19 June

2017. On 16 May 2017 Mr Walsh is again present but there is no clear evidence that he retired with the panel when they deliberated. As to what role he undertook the tribunal have some concerns. The panel is required to make an independent decision on the evidence. An adviser who has a dual role which also involves advising the school on legal claims connected with the disciplinary matters, must in our judgment throw some doubt on that independence. However, Miss Watson's submission went further and was that any advice should be given in front of all parties. In our judgment the policy provides for advice to be given but does not specifically exclude the parties from being present at that point nor does specifically include them so that they ought to be present t when such advice is given. The guidance is, in our judgment, ambiguous to that extent. On the evidence we conclude that it would be reasonable for the respondent to take advice without the claimant present, but that it would not be reasonable for that adviser to have the dual role we have described.

63. Following the 16 May 2017 disciplinary meeting the panel considered that it required medical evidence in order to make its decision. It requested that the claimant provide access to his records. At this stage the tribunal is aware that the claimant had, for the purposes of his tribunal claim that was commenced in November 2016, had prepared a witness statement as to the impact of his disability and disclosed medical records to the respondent's then legal advisers. In letter dated 31 March 2017 the respondent had conceded that the claimant was a disabled person from April 2015, and we are aware that the claimant, had downloaded the matters subject of the disciplinary soon after his suspension on 13 April 2015. Mr Rawlinson, in cross examination, accepted that the claimant had drawn to the panel's attention that the respondent had accepted he was disabled with a mental impairment at the time when the material was downloaded. Mr Rawlinson could not explain why, in those circumstances, the panel required further medical evidence. Further the tribunal was particularly concerned that some of Mr Rawlinson's answers around these matters indicated that he had involved his wife in discussions about confidential medical records. The tribunal are concerned that external input may have impacted on the final decision. Leaving aside any issues of the claimant's entitlement to confidentiality in respect of medical records it is of concern that it was done in circumstances where the claimant was being accused of breaches of protected data. What concerns the tribunal is this: by March of 2017 the respondent had conceded not only that the claimant was disabled but that it was due to a mental impairment which impacted upon him at the time of the alleged data protection breach. That was new and important evidence which the claimant obviously raised as a defence. However, we are surprised that given this new evidence no attempt was made to reconsider whether to continue or modify the disciplinary approach. In specific terms the decision to pursue this as a gross misconduct matter before a panel was taken in the absence of, what on any measure, is significant new information.

64. Mr Rawlinson told the tribunal that although the panel was taken to a written statement by the claimant (p 1625) which pointed out that the school accepted that he was disabled with a mental impairment that the panel “must have missed it”. The tribunal reject that account. The panel looked at the impact statement prepared by the claimant. They were directed to the impact statement by the document at p. 1625. Not only does that document tell the panel directly about the school’s position on disability it does so in the passage that directs them to read the impact statement. In our judgment that could not possibly have been missed in those circumstances. We conclude that the panel was deliberately ignoring that evidence brought forward by the claimant. Further Mr Rawlinson’s dismissive answers in respect of stress on the claimant before us and his reference, seen in the minutes, that the impact statement was “amateurish” are both an indication that the panel was determined to avoid finding that the claimant’s decision was impaired at the time when he downloaded material. Before us Mr Rawlinson, despite an obvious logic, was unable to concede that stress as it impacted on the claimant would be any different to the impact of stress he felt as a witness in these proceedings. We drew the conclusion that the panel’s decision was not based on the evidence before it but other factors. Their decision was that the claimant was not suffering a mental impairment at the time when he downloaded material which would have prevented him from appreciating the nature of his actions, that he should have been aware of the importance of ICT policies, that this amounted to gross misconduct and he was to be dismissed. This is shown in a letter dated 26 May 2017 which was not sent. The outcome letter eventually sent to the claimant on 22 June 2017 differed to the extent that “mental impairment” was changed to “condition” and the letter referred to the claimant using logic or a rationale in choosing between emails. Mr Rawlinson’s explanation for the first change was a sensitivity to the phrase mental impairment there was no explanation for the second change. However, the evidence was that Mr Rawlinson prepared a letter which Mr Walsh vetted. The letter was not shown to the panel after this. There are no notes of the panel’s deliberations that we have seen. Mr Rawlinson contended that he had his own notes on computer, however we have never been shown those notes. We are concerned that the guidance indicates that standard letters should be used, prepared by the clerk from minutes of the deliberation and conclusions and approved by the chair of the panel. Whilst we understand the difficulty here because of Miss Roch’s position, we have the same concerns about duality of role in respect of Mr Walsh as set out above. In writing the letter Mr Walsh was clearly fulfilling the role of the clerk but had not been present at the meeting and therefore was recording what had been communicated to him by Mr Rawlinson and not the deliberations of the panel with their conclusions. The tribunal find it difficult to comprehend circumstances which would allow Mr Walsh to draft the letter without having in mind the defence of the respondent which he was charged to pursue. We are

concerned that the existence of the claimant's first Tribunal claim has had an impact on the respondent's approach to this disciplinary matter

65. The claimant did not attend the adjourned hearing on the 19 June 2017. The claimant sent a document hearing which was not opened by the panel. The tribunal do not consider that this action was a deliberate means of avoiding the claimant's submissions being considered. On the balance of probabilities this was a miscommunication, on the morning of the hearing, where Miss Roch was writing about submissions but the HR officer advising was advising on the issue of evidence.

66. The tribunal must express puzzlement at the decision made at this hearing. The panel decided that the evidence did not support a finding of guilt on the child protection matter. However, despite this they were, initially intent on giving the claimant a warning. This betrays either, total ignorance of the disciplinary processes they were conducting or a deliberate attempt to continue to approach the matter with the litigation in mind. We cannot believe that the level of ignorance necessary to support the first conclusion would be found in a panel of three governors trained in disciplinary matters. Therefore, we are drawn to the conclusion that the litigation was the motivating factor as no other explanation has been provided. It is obvious that once the decision was made that a professional, either HR or legal, was aware of the discrepancy between a not guilty finding and a punishment being imposed, so that the imposition of training replaced the proposed sanction. That adds to our view that the panel were determined that some fault should be placed with the claimant. We are drawn to these conclusions further because we cannot find in in the disciplinary policy or the guidance that where a matter was not proven the panel would have the ability to impose training (which would be a management issue).

67. In the decisions in both disciplinaries it must be recognised that the claimant was, at that stage, no longer an employee. Therefore, in respect of the data breach matter a dismissal could only be appropriate if it was considered that the claimant, in some way, had acted so that his professional conduct body ought to have been made aware; it was not made aware on the evidence before us. The headteacher, as data protection officer for the school, should have reported the matter to the information commissioner's office; she did not on the evidence before us. Therefore, whilst the school was taking steps against the claimant, it was not taking those steps which we consider would be concomitant with those findings. In respect of the child protection decision training was, patently, a nonsensical suggestion when the claimant was no longer employed by the school. In our judgment both disciplinary decisions require explanations for those elements which were not put before us.

68. There were three matters left over to be dealt with as grievances at the disciplinary hearing. They were not. Mr Rawlinson was reminded of this by Miss Roch after the hearing. Mr Rawlinson told us that he did not reconvene

but held separate telephone conversations with the other two panel members. He said that he made notes, but again the tribunal have not had sight of these notes. What is clear is that Mr Rawlinson and the panel members, even on his account, did not revisit the disciplinary matters. Given that the justification for hiving off these matters was never made clear, it would appear obvious that the disciplinary evidence and grievance evidence was meant to be considered together, otherwise there would be no purpose for not hearing them at the original grievance. Similarly, it would seem obvious that conclusions on the evidence related to both should be considered at the same time. That was not the case here. This was an afterthought. As the tribunal has set out above we do not consider that the grievance was without merit as the claimant was not informed about matters which he should have been when he should have been. We consider that the decision on grievance issues were treated without thought and dismissed without consideration.

69. The claimant appealed both disciplinary decisions. The claimant complains about the way in which the constitution of panels was undertaken. The tribunal have indicated above that the procedure for setting up panels by the governors is such that we cannot say that these appointments were made properly within the statutory rules. However, the failure of the respondent in this regard is so wholesale that we are drawn to the conclusion that it is incompetence rather than malice which has led to these failings. We are aware that Mrs Matchett was in some way the motivating force for changes to the composition of panels. We see this as an aspect of her attempting to control matters in a similar way to the approach she took in school management. There is no explicit evidence of Mrs Matchett engineering who would sit on the panels as opposed to clear evidence of her involvement in who should not sit on the panels. Whilst we understand, particularly in the light of earlier events, the claimant's view that this was done in order to undermine his claims, we do not consider that there is sufficient evidence to show any interference with panel members who did sit on the appeal. Nor is it possible to say that those individuals were the sway of Mrs Matchett.

70. The appeal meetings were held in September 2017. In respect of the decision with regard to data protection dismissal was reversed and the sanction was of a final written warning reducing dismissal because of the claimant's health mitigation. The appeal in respect of the child protection matter was raised on the following grounds: the finding that an incident took place on 24 March 2015 was contrary to evidence, the introduction of new evidence related to 24 March 2015, the finding on grievance matters was inadequate. The conclusion of the panel on appeal was: the factual appeal was dismissed on the grounds that the event could have occurred on any day and considered that the training recommendation was not a sanction. On the Second ground of appeal there was no new evidence in the appeal: the final ground of appeal was dismissed on the basis that procedures were followed.

71. The tribunal were drawn to the conclusion given our findings generally above in respect of the matters which the appeal panel was to consider, that the appeals were treated as a “tick box” exercise. We do not consider any proper thought was given to the matters we have outlined as failings. Mr Walsh was not present at any of these meetings, nor was he involved in drafting the letter. The outcome letters were composed by a Mrs Powis who was acting as clerk. The tribunal consider that the decision making was flawed on the basis of the evidence we have heard, save in respect of the data breach issue. The claimant and his wife gave evidence that Mrs Winstone, a member of the appeal panel had spoken to him after the appeal hearing in a chance encounter. He told us that she gave an account of the appeal meeting which indicated that the other two members of the appeal panel were taking undue notice of the existence of tribunal proceedings in respect of the claimant’s claims and Mrs Sydenham’s claims. This was challenged in cross examination as being untrue. At that stage Mrs Winstone was expected to be called as a witness and her statement (unsigned and not dated) was included in the bundle of witness statements which the respondent indicated it would be calling as witnesses. The respondent did not call evidence from Mrs Winstone and did not provide any explanation for that decision. On the basis of the cross examination we had no reason to doubt the evidence of the claimant and Mrs Williams. No evidence was called which we could prefer. The only question left to us is whether the information given to the claimant by Mrs Winstone was accurate. In our judgment part of Mrs Winstone’s account to the claimant matches our own view of the chaotic approach of the governing body of this school in terms of procedural matters. In addition to this we cannot see why an individual who was part of a panel would say these things to the claimant, she did not need to speak to him, if they were not accurate. In our judgment, on the balance of probabilities, the decision of the appeal panel was affected, at least in part, by concerns over the claimant’s litigation.

THE LAW

72. Section 95 of the Employment Rights Act 1996 provides so far as is relevant:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—*
>
> *-------------*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

73. The approach to constructive dismissal is set out by Lord Denning in ***Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA*** in which he defined constructive dismissal as followins:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

74. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in ***Malik v. Bank of Credit; Mahmud v. Bank of Credit[1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606*** where Lord Steyn said that an employer shall not:

> *". . . without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

75. In this case, we must also pay mind to the fact that the claimant needs to establish his decision to resign on the last straw principle, in that he argues that the whole of the respondent's approach caused him to resign. In ***Lewis v Motorworld Garages Ltd [1986] ICR 157***, Glidewell LJ pointed out that at p 169 F-G that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. In ***Omilaju v Waltham Forest London BC [2005] 1 All ER 75*** Dyson LJ said at paragraph 21:

> *"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a*

> *constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

76. The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to *seriously* damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct, and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct, taken together, sufficiently serious so as to damage the relationship of confidence and trust between employer and employee.

77. In a constructive dismissal claim the respondent is still required to establish the reason for dismissal. In ***Berriman -v- Delabole Slate Ltd. [1985] ICR 546*** Browne-Wilkinson LJ held that the reason for dismissal is the reason for which the employer breached the contract of employment.

78. Disability being a protected characteristic under the Equality Act 2010 the relevant aspects of the legislation begins with Section 6 which provides the definition of disability

> *(1)A person (P) has a disability if—*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
> *(2) A reference to a disabled person is a reference to a person who has a disability.*
> *(3) In relation to the protected characteristic of disability—*
> *(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
> *(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6) Schedule 1 (disability: supplementary provision) has effect.

78.1. Section 15 provides:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

78.2. Section 20 deals with the Duty to make adjustments and provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

78.3. Section 21 deals with the Failure to comply with the duty and provides

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by

virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

78.4. Section 26 provides:

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
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(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

78.5. Section 27 provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.
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(4)This section applies only where the person subjected to a detriment is an individual.

78.6. Section 123 deals with Time limits

(1)--------------- on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.
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(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

79. Section 136 deals with the Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
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(6)A reference to the court includes a reference to—
(a)an employment tribunal;

80. In addition, with regard to the Burden of Proof, the provision in section 136 above is the UK implementation of the EU Directive 2000/78/EC general framework for equal treatment in employment and occupation at Article 10 which provides

> *Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

81. The definition of disability is set out in s 6(1) of the Equality Act 2010. This provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities'. Langstaff P in ***Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT*** set out: *"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse*

effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial."

82. The approach required by the Equality Act 2010 in determining whether a person has a disability is to consider the following. Does the person have a physical or mental impairment? Does the impairment affect the person's ability to carry out normal day-to-day activities? Are those effects on such activities more than merely trivial? Finally, are the effects long term? To assist the tribunal in coming to conclusions on those tests Schedule 1 of the Equality Act 2010 sets out factors to be considered in determining whether a person has a disability. Further, there is guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability.

83. In ***Gallop v Newport City Council [2013] EWCA Civ 1583*** it was held that the following conditions as to the employer's state of knowledge apply to claims of disability discrimination. Firstly, the employer must have actual or constructive knowledge that the employee was a disabled person. Secondly, to have the required knowledge, whether actual or constructive, three elements of the relevant facts need to be known to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities. Thirdly provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person'. That knowledge cannot be avoided by ignoring the obvious. Nor can an employer simply pass that information to someone else and rely on their opinion as to whether this amounted to a disability.

84. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in

discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***

85. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. The test for justification is whether the unfavourable treatment is "a proportionate means of achieving a legitimate aim” this test is squarely one of objective justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was 'reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim

86. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment Appeal Tribunal in the ***Environment Agency v Rowan UK EAT/0060/07/DM***, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in Rowan, to identify the actual provision criterion or practice on the facts of the case.

87. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec***

Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

88. We are required to consider time limits, in respect of the discrimination claims. It is clear that some of the omissions complained of occurred more than 3 months before the presentation of the claim. We are required to consider first whether the incidents constitute an act or omission extending over time. We have to judge whether there is a continuing act as set out in ***Hendricks v Metropolitan Police Comr. [2002] EWCA Civ 1686, [2003] 1 All ER 654*****.** The claimant needs to establish a nexus between the various events. That nexus does not necessarily mean that the same individuals are involved in each event or that the events follow on from a specific policy. The nexus must, however, be established by demonstrating that there is a state of affairs in existence throughout that period, a connection whereby for instance a particular workplace culture is shown. If there is no continuing act or omission we have to consider whether it is just and equitable to extend time for the presentation of the claim. In deciding whether it is just and equitable we are required to apply the decision in ***Robertson v Bexley Community Centre [2003] IRLR***. That case makes it clear that there is no presumption that the tribunal should exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal to do so. Auld LJ indicates that the exercise of the discretion is the exception rather than the rule.

89. In addition, when deciding whether it is just and equitable to extend time, we must consider the explanation given by the claimant or any inferences that can properly be drawn from the facts which show an explanation as to why the claim was not made at an earlier stage see ***Abertawe Bro Morgannwg University Local Health Board -v- Morgan [2014] UKEAT 0305/13.***

90. In dealing with issues of harassment, the Tribunal has to have in mind the guidance given by Mr Justice Underhill, the President of the Employment Appeal Tribunal in ***Richmond Pharmacology V Miss A Dhalliwell*** where it is said that prior case law in respect of harassment is unlikely to be helpful in interpretation of the statutory tort of harassment that we are dealing with, and that even less assistance is likely to be gained from the provisions of the Protection from Harassment Act 1997.

90.1. We must note that there is a formal breakdown of element 2 within the harassment provisions into two alternative bases of liability, that of purpose and effect, which means that the Respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the proscribed consequences but did not, in fact, do so.

90.2. Then there is the proviso in Sub Section 2 such that the Respondent should not be held liable merely because his conduct has had the effect of producing the proscribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

90.3. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the alleged subject of the discrimination felt, about the alleged subject of the discrimination, and must subjectively feel that their dignity has been violated, etc.

90.4. Finally, we must consider an enquiry into why the perpetrator acted as they did. This is distinct from the purpose question and relates the reasons why the person has done something not the results they intended to produce.

91. We have to consider the provisions dealing with victimisation. It would appear to the tribunal from the wording of that section that we are no longer concerned with establishing a comparator. However, the causation issue is important. Is the tribunal to consider that a simple but for test is to be applied, or is a more sophisticated approach required asking, perhaps, was the protected act the reason why the respondent acted as it did? The formulation of the section links any detriment, using the word “because”, to the claimant carrying out a protected act or the respondent’s belief that the claimant has carried out or may carry out a protected act. Previous authorities under the old law required employment tribunals to be alert to the actual reason for the detriment see ***Chief Constable of West Yorkshire Police –v- Khan [2001] IRLR 830***. The word “because” is generally defined, in a conjunctive sense, as “for the reason that”, that definition fits well with the “real reason” approach. On that basis the test must relate to “the reason why” the employer acted as it did rather than a purely objective “but for” test. That is because in order for a factor to be material some action must be contingent upon that factor. The mere existence of the factor as an event which, in a causative sense, leads to detrimental treatment is not sufficient for that factor to be considered material. It might be said that a plain reading of the section leads to a conclusion that what is being examined is the employer’s subjective reaction to a protected act or an anticipated protected act.

92. When passing statutes or secondary legislation, the legislature intends to use ordinary English words in their ordinary senses unless the contrary is shown. In addition to this “literal” form of construction the rules of construction indicate that where there is ambiguity or doubt arising from the wording of the statute then there are aids to construction which the courts can apply. Under the so called golden rule, where the literal rule gives an absurd result and one which Parliament could not have intended, the judge can substitute a reasonable meaning in the light of the statute as a whole. The mischief rule for interpreting statutes requires a judge to consider three factors: firstly, what the law was before the statute was passed; secondly, what the statute was trying to remedy; and, finally, what remedy Parliament was trying to provide. There is also the purposive approach which requires the Judge to consider the purpose of the statute and whether the intention is met by the interpretation placed upon those words. In ***R v S of S for Health ex parte Quintavalle (on behalf of Pro-Life Alliance) [2003] 2 WLR 692*** Lord Steyn gave an indication as to the circumstances in which such an approach can be taken setting out “*nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently.*”

93. It is also necessary, when case law emerges from an EU Directive to consider the purposive meaning of a provision taking account of the directive from which it emerges. In ***The United States of America v Nolan [2015] UKSC 63*** Lord Mance set out this summation of this approach to construction.

*“(I)t is a cardinal principle of European and domestic law that domestic courts should construe domestic legislation intended to give effect to a European Directive so far as possible (or so far as they can do so without going against the “grain” of the domestic legislation) consistently with that Directive**: Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR I-4135, Vodafone 2 v Revenue and Customs Comrs [2009] EWCA Civ 446, [2010] Ch 77,** paras 37-38 and **Swift v Robertson [2014] UKSC 50, [2014] 1 WLR 3438**, paras 20-21. But that means avoiding so far as possible a construction which would have the effect that domestic implementing legislation did not fully satisfy the United Kingdom’s European obligations. Where a Directive offers a member state a choice, there can be no imperative to construe domestic legislation as having any particular effect, so long as it lies within the scope of the permitted. Where a Directive allows a member state to go further than the Directive requires, there is again no imperative to achieve a “conforming” interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or*

reformulation, intend to go further in substance than the European requirement or minimum. ***R (Risk Management Partners Ltd) v Brent London Borough Council [2011] UKSC 7, [2011] 2 AC 34****, considered below, is a case where the Supreme Court implied into apparently unqualified wording of domestic Regulations a limitation paralleling in scope that which had been implied by the Court of Justice into general wording of the Directive to which the Regulations were giving effect: see* ***Teckal Srl v Comune di Viano (Case C-107/98) [1999] ECR I–8121 ("Teckal")****. It concluded that the two had been intended to be effectively back-to-back. A reformulation may also have been aimed at using concepts or tools familiar in a domestic legal context, rather than altering the substantive scope or effect of the domestic measure from that at the European level. But that is as far as it goes."*

ANALYSIS

94. We consider the issue of disability first. The respondent contends that the claimant meets the Equality Act definition of disabled from April 2015 on, the claimant argues that his disability began in 1986.

94.1. Does the claimant have a physical or mental impairment?

94.1.1. From before his accident in 1986 the claimant has experienced psychiatric events periodically. Therefore, there is evidence of a mental impairment.

94.1.2. There is also evidence of a physical injury to the brain in 1986.

94.1.3. However, there is insufficient expert medical evidence before us for us to be able to conclude that each of the psychiatric episodes is causally related. We are aware that within the records different potential causes are suggested for episodes prior to the claimant's accident, which raises the question as to whether episodes pre and post-accident arise from the same source. This is particularly so when there are significant gaps between episodes.

94.1.4. There is no indication of an ongoing condition between 1987 and 2015 there is only evidence of specific events.

94.1.5. There is also evidence that, in 2001 during a difficult period for the claimant, some severe symptoms occurred. The medical records demonstrate that in 2001 there was a stress related illness, but there is no further information.

94.1.6. It is accepted that from April 2015 the impairment had a substantial impact on day to day activities. This condition arose at a time of great stress for the claimant. However, we are not in position to say that the lay evidence of the claimant's symptoms in 2001, even if they match the symptoms in 2015 arise out of the same impairment. Although they are sufficient to establish disability on the last occasion and may be sufficient to demonstrate it in 2001.

94.1.7. We cannot say in those circumstances that the impairment on each of these occasions is the same impairment.

94.2. Does the impairment affect the person's ability to carry out normal day-to-day activities?

94.2.1. The evidence shows that the claimant suffers from poor cognition, has some difficulties with speech and has memory issues. However, the evidence seems to indicate that this is not always obviously present. The claimant’s own evidence appears to limit itself to effects of this in 2015.

94.2.2. There is also evidence that the claimant has, had such difficulties in the past sufficient, perhaps, to meet the definition of substantial.

94.2.3. The claimant has, for many years, taught and been considered more than proficient as a teacher. Some adjustments were made for him in terms of his role. The headteacher at the time also made adjustments for other teachers it is not clear that such adjustments were related to any particular symptoms shown by the claimant.

94.2.4. What the claimant has not established is what, if anything, these difficulties prevent him from doing. For much of the time there is no significant impact on the claimant’s day to day activities. We accept that there were in 2001 and in 2015, there is no clear evidence that there was such an impact between those dates.

94.3. Are the effects long term?

94.3.1. We considered here the question of recurring but intermittent difficulties arising from an impairment. There have been long term episodes, both in the past and since 2015, which could be considered to meet the definition of disability.

94.3.2. Therefore, if the episodes arose out of the same impairment we could consider that there was an ongoing disability. However, in the absence of specific evidence of causation we do not have the expertise (although we suspect it to be the case) that it is the same impairment that caused each of these episodes.

94.3.3. In those circumstances we are not able to say that the claimant was a disabled person until 2015.

94.3.4. However, there were indications of the claimant’s condition becoming apparent from January of 2015. We do not consider that respondent’s admission that the claimant was disabled from April 2015 necessarily accurately reflects the date from which the claimant was disabled within the meaning of the Act.

94.3.5. There is a definite change in the claimant’s demeanour from early 2015. This is evidenced by the claimant acting significantly out of character.

94.3.6. In addition to this the claimant's control of his class, which had never been a problem, became a significant difficulty for him as was observed by the respondent's witnesses.

94.3.7. The claimant was absent from work due to illness in February 2015, in our judgment this was connected to the impairment.

94.3.8. In our judgment, at the latest, the claimant was disabled within the meaning of the Act by the events in the schoolyard on 23 March 2015 when the claimant's conduct was significantly out of character and his ability to cope with an ordinary everyday event of being asked to speak to a colleague was not possible without an adverse reaction.

94.3.9. We are of a view that, from this date the claimant was, on the balance of probabilities, likely to suffer an exacerbation of the impact of his impairment on day to day activities as a result of stressful situations. The general evidence points to occasions when his symptoms worsened at moments of high stress e.g. the description of the claimant when he was made aware that his suspension was known outside the school.

95. We now consider the issue of the respondent's knowledge of the claimant's disability from 2015.

95.1. Did the school have sufficient knowledge of a physical or mental impairment.

95.1.1. The school, corporately, was aware that the claimant had suffered a serious accident involving a head injury, from almost the outset of the claimant's employment.

95.1.2. The school, corporately, was aware that the claimant contended that this injury caused him some continuing difficulties and Mrs Matchett was aware of this from 2013.

95.1.3. In our judgment this was sufficient to put the school on enquiry about the claimant's impairment once it was aware of the potential of substantial disadvantage that could be long term.

95.2. Did the impairment potentially have a substantial and long-term adverse effect?

95.2.1. The claimant's difficulties have remained to this day, they are accepted to be substantial by the respondent and have lasted long term.

95.2.2. The school did not seek advice from medical experts as to the claimant's condition and prognosis in 2015. In our judgment the school is not able to argue that the condition was not likely to be long term at that time.

95.3. Did this potentially impact on his ability to carry out normal day-to-day activities?

95.3.1. The school was aware that there was a relatively sudden change in the claimant's ability to control behaviour in his class when this had not previously been a problem.

95.3.2. The school was aware that the claimant had been acting out of character.

95.3.3. The claimant took time off work before the half term holiday and made it clear to Mrs Matchett on return that there was a stress element to his illness and, in particular, that the was suffering from exhaustion.

95.3.4. In our judgment such changes were sufficient to put a reasonable employer on enquiry as to the reasons for changes. The claimant was attributing his absence to his health, the respondent approached the matter purely as performance issue. In our judgment the respondent was not in position to attribute the reasons without seeking medical advice.

95.4. Given those conditions the respondent cannot rely on a failure to seek medical evidence to indicate lack of knowledge. The respondent had sufficient information for constructive knowledge of the claimant's disability.

96. The first claim:

96.1. The claimant complains of constructive unfair dismissal relying on a last straw, being his discovery that Mrs Sydenham had sought permission to speak to him and that permission had been refused.

96.1.1. Mrs Sydenham had sought permission to speak to the claimant before the results of the investigations, both in respect of her and the claimant, into data protection matters had been concluded.

96.1.2. Given that there were issues potentially connecting the claimant and Mrs Sydenham in those investigations, it was not unreasonable for the school to ask that they did not communicate before the conclusion of the investigations.

96.1.3. In our judgment the claimant in his letter of resignation indicates that he understood the reason for the refusal to be connected to the data protection investigation.

96.1.4. The respondent's actions in preventing contact were, therefore, innocuous.

96.1.5. On that basis the decision in ***Omilaju*** indicates that the action cannot contribute to the previous actions of the respondent. There is much in the actions of the respondent prior to this that the claimant could have relied upon, individually or cumulatively, to found a breach of the implied term, however he relied upon this action. For that reason, we cannot say that his resignation was tendered because of a breach of the implied term.

96.1.6. The claimant was not dismissed within the meaning of section 95(1)(c) and therefore his claim of unfair dismissal is not well founded and is dismissed.

96.2. The claimant complains of a failure to make reasonable adjustments, harassment on the grounds of disability and discrimination arising from disability in September 2014. The claimant has not proven that he was disabled within the meaning of the Act until 23 March 2015. Therefore, these claims are not well founded and are dismissed.

96.3. In the period 13 April 2015 to 21 October 2015 the respondent had knowledge of the claimant's disability. The respondent suspended the claimant, began investigations with social services, concluded those investigations, returned the claimant to work and began internal investigations. The claimant contends that the failure to give him more detailed information of the complaint and to provide him the name of the child was a failure to make a reasonable adjustment.

96.3.1. Guidance indicates that as much information as is possible should be given unless there are specific reasons for not doing so.

96.3.2. In the first part of that period, when social services investigations were underway, the tribunal are of the view it was, possibly, reasonable to keep the identity of the child and the witness confidential. However, we consider that the respondent provided insufficient details of the child protection allegation when the claimant was suspended, it would have been sufficient if the claimant had been told he was accused of manhandling a child out of his classroom. We consider the provision of such information to the claimant would not have impeded the investigation. Given the range of accusations that are encompassed by the phrase "child protection" the provision of that limited information would have placed a level of perspective on the accusation the claimant faced.

96.3.3. After the conclusion of the external investigation we can see it is reasonable that the child is not identified. However, we have been given no reason specific reason for the claimant not to be told more details of the actions with which he was accused and who had accused him. Certainly, before the investigation meeting the claimant should have been given this much information in order to provide his evidence to the investigation.

96.3.4. It is clear to us, that despite our view of the guidance, the school did not approach the guidance in this way. In our judgment the school would have taken the same approach to any teacher accused of a similar action. On that basis the failure to provide more detailed information was a provision, criterion or practice.

96.3.5. We accept that this would be of particular disadvantage to the claimant because of his disability. The exacerbation of symptoms brought about by the stress of not knowing whether he was accused of something minor or more serious would impede the claimant in the preparation of a defence. We are aware of psychotic and paranoid episodes during this period in those circumstances someone without the claimant's disability would have had a greater clarity of thought when dealing with allegations than the claimant.

96.3.6. Given what we have set out above it would have been reasonable for the respondent to have to adjust its process by providing the claimant with information about the actions he was accused of and his accuser after the conclusion of the PASM investigation at the latest.

96.3.7. However, these events in 2015 conclude in October, the claimant did not present this claim until 22 November 2016. Therefore, the claim, even with a maximum ACAS conciliation period taken into account, is presented more than 8 months out of time.

96.3.8. It is apparent that there was a level of concentration on internal procedures by the claimant during 2015 and 2016. We are also aware of complaints of delay involving the respondent in dealing with various steps. To this we must, of course add into our deliberations the claimant’s ill health. However, we are also aware that the claimant was represented in 2015 by solicitors and has had the assistance of Miss Watson during the 2016 period. Added to this, although the technical end of the claimant’s employment was at the end of August 2016, he had decided to end his employment at a much earlier date.

96.3.9. There is obvious prejudice to the claimant in not being able to pursue a well-founded claim, but it is a claim he was in a position to present well in time. The prejudice to the respondent of the passage of time cannot be ignored. Given the material that this case has generated and the scope of evidence we consider that the prejudice to the respondent is significant.

96.3.10. No specific explanation has been provided for the late presentation of this claim by the claimant and given the balance of prejudice we do not consider it is just and equitable to extend time.

96.4. The same facts are relied upon as discrimination arising from disability. The requirements of section 15 are that the respondent must act as it does because of something arising in consequence of the claimant’s disability. The respondent’s failure to provide the information to the claimant was because of its understanding of Welsh Government guidance not as a consequence of anything arising out of the claimant's disability. This complaint is not well founded.

96.5. The claimant also contends that this amounts to harassment. There is no indication that the failure to provide this information was decided upon because the claimant was disabled, therefore it was not the purpose of the respondent. Whilst it is possible to describe the failure to provide information as unwanted conduct (albeit by omission), it is difficult to consider that it is conduct which is relevant to the protected characteristic of disability. While the effect on the claimant is to cause him distress, it is the same distress as would be caused to a non-disabled person in those circumstances, albeit that the resultant stress would impact more on the claimant because of his disability. The conduct having such an effect does not mean it is related to disability in our judgment. This complaint is not well founded.

96.6. The complaint from 13 April 2015 to 30 September 2016 is that the claimant was not provided with the name of the child in the child protection allegation.

96.6.1. The Welsh Government's disciplinary policy guidance indicates that a person accused should be given as much information as it safe to do.

96.6.2. We accept that not providing the name of the child was reasonable whilst the social services investigation was underway. The All Wales Child Protection Procedure would lead to such a conclusion; the protection of the child is paramount until certain investigations are undertaken. Similarly, while the school's internal investigation is underway to would be reasonable to keep the child's name confidential until evidence is gathered from witnesses.

96.6.3. After the conclusion of the internal investigation there was no specific reason shown for keeping the name of the child confidential. This is particularly the case as the claimant would need to know the name of the child in order to, for instance, provide a defence of reasonable restraint to protect another child or the child in question or to say that the child identified was not present in the classroom. The identity of the child would be crucial to the presentation of any defence that might exist.

96.6.4. Given the fact that the claimant was not prevented from returning to the school and that risk assessments, if properly dealt with, could produce adequate control measures it would not be reasonable to withhold that information.

96.6.5. Until the conclusion of the investigation we consider that the respondent was acting proportionately in refusing to disclose the name of the child and with the legitimate aims of protecting the child and securing evidence the respondent took this as a reasonably necessary step.

96.6.6. Thereafter the school should have disclosed the name of the child. On our findings Mrs Matchett was the cause of the school failing to make this disclosure. Her reason, we found, was to maintain control over the process. We cannot say that this is the approach she would take with all processes of this nature. Therefore, we are concerned that this decision does not amount to a provision criterion or practice that names of alleged victims of and witnesses to alleged child abuse conduct will not be disclosed to the accused person. Therefore, the claimant cannot show that there was a failure to make reasonable adjustments and this complaint is not well founded.

96.6.7. If we are wrong about that we would find that this was a substantial disadvantage to the claimant for similar reasons to those set out above about the provision of information. Further in our judgment providing the information would alleviate this disadvantage. As we have also indicated the defence of justification is not available after the close of the investigation.

96.7. The claimant relies on the same facts as discrimination arising from disability. The claimant contends that he had impaired memory and concentration as a consequence of his disability, however that was not the reason why the respondent failed to provide the child's name. The reason was Mrs Matchett's concern to control the process; that did not arise because of the consequences of the claimant's disability. This complaint is not well founded.

96.8. The claimant relies on the same facts as amounting to disability -related harassment. We repeat our reasoning set out above for the provision of information we see no relationship between the conduct and the claimant's disability.

96.9. The next complaint relates to 25 May 2015, 18 June 2015 and 30 June 2015 where it is alleged the confidentiality of the suspension and disciplinary processes were breached. It is argued that this is both section 15 and section 26 EA 2010 discrimination. The claimant has not proven that school breached confidence and these complaints are not well founded.

96.10. The next complaint relates to the period between July and September 2015. The claimant contends that the decision to return the claimant to school but only to work limited duties is discrimination arising from disability. The claimant states that in consequence of his disability he suffers impaired memory, concentration and a propensity to stress-related illness. However, the respondent's decision, albeit based on a grossly flawed risk assessment was not connected with those consequences of the claimant's disability but with it view of child protection in the light of the allegations against the claimant. On that basis the complaint is not well founded.

96.11. The claimant relies on the same factors as disability related harassment. Once again, the decisions made by the respondent are not related to the claimant's disability. The same considerations as we have outlined above in respect of harassment apply to this complaint; it is not well founded.

96.12. The claimant complains that from13 April 2015 to the presentation of his there was an unacceptable delay in investigating and concluding charges relating to the alleged child protection matter and those related to a breach of ICT policy. The claimant also complains that there was an unacceptable delay in referring the claimant's case to the statutory body. That there were delays in the process is undeniable. The fact that the claimant raised a grievance is a relevant element in that but there are a plethora of unexplained delays and an inexcusable delay caused by the respondent deciding upon a re-investigation of matters.

96.13. We consider that the delays involved in this case would certainly amount to unfavourable treatment of the claimant. However, none of those delays arose as a consequence of the claimant's the claimant's impaired cognitive powers or his propensity to stress illness. The delays were caused by decisions unrelated to the claimant's condition for reasons such as a recognition that the initial investigation was inadequate, that the grievance should be dealt with in the first instance before a disciplinary and that both disciplinary matters should be heard close together. These were not good explanations for the delay but were, factually, explanations unconnected with the consequences of the claimant's disability.

96.14. The claimant relies on the same factors as disability related harassment. We repeat the reasoning in respect of harassment set out above. This treatment was not related to the claimant's disability except in the impact upon him.

96.15. The claimant complains that on 24 February 2016 the respondent confidential information given in a grievance process to found disciplinary charges against him. It is argued that this amounts to discrimination arising from disability. The claimant has admitted for the purposes of this case that he was in breach of data protection. We consider that the respondent is correct that confidentiality in a grievance process does not extend to wrongdoing. However, using that information to pursue a disciplinary process does mean the claimant is treated unfavourably, it cannot be described as anything other than a disadvantage to be put in that position. This did arise as a consequence of the claimant's disability as the data breach was, at least in part, connected to the claimant's poor decision-making abilities at that point in time, which were aspects of his lack of cognition and the paranoia he was experiencing. However, we accept, that the respondent's use of the information was justified. It was a legitimate aim that the respondent wished to ensure that it complied with data protection law and it was proportionate to do so by pursuing disciplinary processes where it considered a member of staff had potentially breached data protection. On that basis this complaint is not well founded.

96.16. The claimant relies on the same factors disability related harassment. We do not consider that the respondent's decision can be said to be related to the claimant's disability. The decision to pursue a disciplinary process was made on the grounds of data protection issues and was not connected to the claimant's disability other than in the sense that the information was downloaded by the claimant because of his disability.

96.17. The claimant complains that on 29 September, 2016 the respondent either changed charges relating to the child abuse allegation or brought new charges and that this amounts to discrimination arising from disability. These changes were made by the respondent because of recognition by HR supporting the school of deficiencies in the disciplinary process as it had been dealt with up to that point. That decision did not arise out of the claimant's impaired memory, concentration and propensity to stress-related illness. The decision was not made because of something arising in consequence of disability. This complaint is not well founded.

96.18. The claimant relies on the same facts as supporting a claim of disability related harassment. Once again, the decision was not based on anything related to the claimant's disability, the change in charges was because of the quality of the original process. Relying on the same reasoning as we have set out above in respect of harassment claims, we consider that this complaint is not well founded.

96.19. The claimant complains that between 13 April 2015 and 8 November 2016 there was an unacceptable delay in providing him with an investigatory report which he argues amounts to discrimination arising from disability. We accept that the delay was unconscionable and certainly amounts to unfavourable treatment. However, the claimant's impaired memory, concentration and propensity to stress-related illness had no relationship to the reason for this delay. The delay was caused by concerns about the quality of the investigation and the instigation of a second investigation and not a consequence of disability. This complaint is not well founded.

96.20. The same facts are relied upon as amounting to disability related harassment. The decision was not based on anything related to the claimant's disability, the change in charges was because of the quality of the original process. Once more we do not consider that this claim is well founded based on the same reasoning process we have applied to harassment claims above.

96.21. The claimant complains that between 13 April and the presentation of the first claim the respondent failed to carry out a reasonable investigation in either of the disciplinary matters which were brought against the claimant. This is said to amount to discrimination arising from disability, once again on the claimant's impaired memory, concentration and propensity for stress-related illness are said to arise in consequence of the claimant's disability. The investigation in both matters were certainly flawed and amounted to unfavourable treatment. However, the manner of the investigation did not arise out of any of the identified consequences of the claimant's disability. The failings were all aspects of incompetence or of adopting an unreasonable method. The choice of an unreasonable method in having Mrs Dummer investigate was not made because the claimant had, for example, a poor memory, but was simply because she was a school governor. Her continuation in that rule was unwise but had nothing to do with the claimant's disability.

96.22. The claimant contends that these matters also amount to disability related harassment. There is nothing which would lead the tribunal to conclude that the approach towards investigating these matters was related to the claimant's disability. The methods adopted demonstrated a lack of competence and or poor choices of methods or the appointment of inappropriate individuals to investigate. Whilst this might have had an effect on the claimant and his ability to cope because of his disability, the conduct itself did not arise because of the claimants impaired cognitive powers or his propensity to stress.

96.23. The next complaint is about preventing the claimant's access to witnesses and documents which it is said begins at 13 April 2015 reference is made to September 2015, but the complaint indicates that events were still current at the date when the claim was presented. This is relied on as a failure to make reasonable adjustments.

96.23.1. The PCP relied upon is that suspended employees would not be permitted to contact colleagues or attend the school. The respondent did have this embargo in place for a period and the respondent relies upon the school procedures as the reason for these decisions being made that access would only be allowed at the appropriate time. Therefore, it must follow that this amounts to a PCP.

96.23.2. The substantial disadvantage relied upon by the claimant is impaired memory, concentration and propensity to stress-related illness. The claimant has problems with memory and, as he told us in evidence, also has symptoms of paranoia as part of the effects of his disability. Clearly the claimant's reliance on memory alone for the preparation of a defence is limited. That would make it harder for the claimant to construct a defence compared to someone without those cognitive problems. Therefore, refusal of access would put him at that disadvantage.

96.23.3. Next it is clear that this type of disadvantage would affect others with the claimant's disability but would not disadvantage those without the disability.

96.23.4. The claimant has suggested providing him access to documents and the ability speak to witnesses would have overcome the disadvantage.

96.23.5. Preventing the claimant from approaching individuals and having access to documents was extended over a significant period because of the respondent's failure to deal with matters appropriately and its decision to set up a second investigation into the child protection allegation and to delay the ICT investigation to coincide.

96.23.6. Whilst preventing access at an investigation stage might be justified doing so after the conclusion of an investigation would not be. In those circumstances setting up a second investigation does not mean that it would not be a reasonable adjustment for the respondent to have to make.

96.23.7. We are required then to consider time limits. The claimant contends that this was ongoing. However, the law indicates that time limits for a reasonable adjustment runs from a point where it would be reasonable for the respondent to have to make the adjustment. On our findings the investigations were concluded (for the first time in the case of the child protection allegation), by late 2015 and 20 June 2016 in respect of the ICT investigation. In our judgment it would have been reasonable for the respondent to make the necessary adjustments within a very short time after this latter date and certainly before the end of the school term, so that the claimant could make approaches as necessary with colleagues still in work. That would mean the middle of July at the latest.

96.23.8. On that basis we consider that on any claim related to either investigation, time would begin to run the latest by Friday 15 July 2016. On that basis the time for approaching ACAS would expire on 14 October 2016. The claimant did not approach ACAS until 8 November 2016 and therefore the claim, without an extension, would be out of time in any event. The claimant did not however use the

ACAS period for conciliation the certificate showing as much. Therefore, by the 8 November the claimant was aware he would be pursuing the claim. We have heard no evidence to explain why, if the claimant could approach ACAS on that date he could not have done so less than three weeks before. We add into this that the claimant was relying on this sort of issue, in the case of the position of Mrs Sydenham, as the reason for his resignation in June and so it is a matter that he had in mind. In our judgment there is no specific explanation why the claimant should not have pursued this matter by 22 October 2016. We are of the view that there is prejudice to the claimant of not being able to pursue a claim that is well founded but we consider this is outweighed by the prejudice to the respondent in having to deal with this matter presented late with the natural reduction in recollections. We do not consider it is just and equitable to extend time.

96.24. The claimant also relies on this failure to provide access to witnesses and documents as discrimination arising from disability and disability related harassment. We do not consider that the respondent's approach as a consequence of the claimant's poor cognition or propensity to stress. The reasons for the approach was that the respondent felt itself to be following procedures. In those circumstances this treatment of the claimant did not arise out of something in consequence of his disability. With regard to harassment again we consider whatever the effect of the respondent's conduct, in terms of any exacerbation of the claimant's symptoms, the conduct of the respondent was not related to the claimant's disability. The same analysis as we have applied above pertains.

96.25. The last item in the schedule is dated 31 August 2016. The complaint is one of constructive dismissal which it is contended, amounts to discrimination arising from disability. On our finding there was no dismissal and, therefore, there can be no discrimination on that basis either as discrimination arising from disability or disability harassment.

97. At the outset of the hearing we discussed with the parties. The issues in claims two and three as there was no schedule for these matters. In dealing with claim two the claimant relied on the following:

97.1. The claimant's claims of discrimination arising from a consequence of disability relate to his difficulties with processing information and his memory arising from a cognitive impairment. The claimant admittedly transferred materials which were subject to data protection rules and said that this was a consequence of his disability. In our judgment this is correct in that the claimant's abilities to make decisions was impaired at the time and, on the balance of probabilities, the claimant in downloading more than 200 items was affected by this.

97.2. The claimant contended that the respondent's actions in failing to modify the process and outcome which is applied in the circumstances amounted to unfavourable treatment. In our judgment applying unmodified process and decision, particularly when the respondent had new evidence of the claimant's disability was unfavourable treatment of the claimant. The respondent's decision that dismissal was the appropriate outcome was clearly in consequence of the conduct of the claimant in downloading the material which in turn arose from a consequence of the claimant's disability.

97.3. The respondent's defence to this claim was one of justification. We accept that the respondent had a legitimate aim in protecting children's data and conducting a disciplinary process of some sort was a proportionate response to achieving this legitimate aim. However, we do not consider that it was reasonably necessary in pursuit of that legitimate aim to dismiss the claimant in the circumstances. The respondent in such circumstances has a range of sanctions available to it demonstrate its disapproval of the claimant's actions. The sanction of dismissal, after the claimant had already left the respondent's employment, was not reasonably necessary to establish its disapproval. A sanction short of that, taking account of the claimant's condition in mitigation would have been sufficient to achieve its legitimate aim. This claim of section 15 discrimination is well founded.

97.4. The claimant also relied on this as a breach of the duty to make reasonable adjustments. The claimant was not it appears to us seeking an adjustment to the process but to the outcome. The outcome is not a PCP, it is a decision individual to the claimant. On that basis we do not consider the reasonable adjustments claim well founded.

97.5. The claimant also claims victimisation and the claimant relies on two protected acts: first, the grievance which he presented; the second is his first tribunal claim.

97.6. If there is any doubt that the claimant engages in a protected act with regard to his grievance, there can be no doubt that presentation of his first claim form amounts to a protected act. The claimant then sets out that these are acts of victimisation.

97.6.1. The attendance of Mr Walsh, the respondent's solicitor, during internal processes is the subject of complaint. It raises a difficult issue. The respondent has called no evidence from Mr Walsh. It is to be supposed that reliance is being placed on legal professional privilege and, of course, the respondent can also rely on litigation privilege if Mr Walsh advised on matters which relate specifically to the claimant's claim. Therefore, the tribunal has heard no evidence from the respondent or its witnesses about the advice given by Mr Walsh in these internal procedures. However, for the reasons set out below we consider that the claimant has established a *prima facie* case of victimisation so that the burden of proof provision applies. Therefore, the respondent is, by reason of the statute, to provide evidence of an explanation of its conduct which demonstrates did not to victimise the claimant. This raises the following question (on which we gave permission to both parties to provide written submissions after the close of oral submissions; neither party did within the time limits we set) what effect does the doctrine of privilege have on the statutory requirements for an explanation.

97.6.2. Legal Professional Privilege and Litigation Privilege are long standing exceptions to the rules of disclosure in litigation, which in general requires transparency. Both forms of privilege are based on public policy. It is in the interests of the public and the administration of justice for a client to be open and frank with their legal advisors so that soundly based legal advice can be given without the concern that it could be made public. It is clear there is a high bar for a court or tribunal to remove the protection of this privilege, there has to be evidence of iniquity in order to do so. However, the question here is not one of forcing a respondent to reveal privileged material because of specific issues of iniquity. Instead the tribunal has reached a stage where it has evidence before it which reverses the burden of proof, the statute indicates that in those circumstances the respondent must provide an explanation to prove that the treatment was, in no way whatsoever, because of the protected act. The respondent has a choice, albeit a type of Hobson's choice, as to what to do. It can lose the protection of privilege in order to advance an explanation or it can retain privilege and potentially lose the case. The tribunal cannot, obviously, ignore the statute which gives it jurisdiction. However, also it cannot lightly ignore a long standing public policy approach. The question must therefore be, can the statute be properly construed to encompass the right to privilege in these circumstances.

97.6.3. The approach to construction that we have set out above leads us to the following conclusions. The statute and the Directive both clearly point to a burden on a claimant to prove facts which could lead to a conclusion of discrimination on the part of the tribunal. Thereafter the burden of disproving victimisation, in both the statute and the Directive are clearly set out. In our judgment there is no ambiguity in the wording. It might be argued that the phrase in the Directive "*such measures as are necessary, in accordance with their* *national judicial systems"* might permit an interpretation which takes account of the approach to privilege. However, it is the statute which is our first source and there is nothing to prevent Parliament extending rights. In our judgement if Parliament wished to preserve the right to privilege some sort of saving could have formed part of the provisions. In any event it would undermine the purpose of the directive and the statute if, simply by employing lawyers in their domestic procedures employers could avoid the requirement to provide an explanation in the relevant circumstances.

97.6.4. The claimant argued that Mr Walsh's role was intended to ensure protection of the respondent's employment tribunal defence and not the proper application of the internal process to the allegations against the claimant. We cannot say what Mr Walsh's role was, we have not heard evidence. However, we are able to say as follows:

97.6.4.1. A committee of governors was formed without following the compulsory procedures necessary where the powers of the governors was to be exercised by a committee. That committee instructed a solicitor to act on behalf of the governing body. It also instructed the solicitor to take part in the disciplinary process his involvement was not sought by the governors who had been appointed to act on disciplinary matters nor was he instructed by them as to the parameters of advice he could provide. We agree that this group was acting ultra vires. We cannot say that he attempted to control the disciplinary process.

97.6.4.2. The ICT decision at first instance took no account of the evidence of claimant's disability and an obvious potential impact. The explanation as to why mitigation evidence about his condition was discounted demonstrated, in our judgment, a determination to find against the claimant.

97.6.4.3. Mr Walsh acted in part in the role of the clerk to governors and in part as an adviser. Mr Walsh had been instructed, also, to deal with the claimant's claims and he had reviewed the outcome letter which was altered removing a recognised phrase from the Equality Act 2010 on disability.

97.6.4.4. There are other aspect of the process which we have outlined in the facts that are also of concern, however the above is sufficient for our findings.

97.6.4.5. We do not consider that another employee, facing these sort of disciplinary proceedings, but who had not brought a claim would have faced (1) the creation of an ad hoc committee which involved itself in the disciplinary process (2) the involvement of a solicitor in the role of the clerk (3) the ignoring of obvious evidence of disability contained within the evidence before the committee. The ignoring of the evidence and the failure to follow specific procedural requirements are, in our judgment to the claimant's detriment as is the imposition of a gross misconduct finding and dismissal. We consider therefore that there is evidence of less favourable treatment. We further consider that there is evidence that the less favourable treatment, in involving the solicitor charged with defending the claimant's claim and in ignoring evidence about disability and in changing phrases connected with the legal definition of disability shows that this less favourable treatment which has a connection with the claimant's first claim. In our judgment that material is sufficient to conclude that there is evidence which could, indeed in our judgment would, lead to a conclusion of victimisation in the absence of a non-discriminatory explanation, we have had no such explanation. On that basis we consider that the burden of proof having shifted to the respondent the claimant's claim of victimisation is well founded.

97.6.4.6. The child protection decision at the disciplinary did not appear to follow the evidence. The decision, in our judgment, appeared to be about ensuring that the claimant was found responsible for something no matter what it was. The following aspects appear to us to be important:

97.6.4.6.1. The findings of fact were, effectively, that something had happened on an occasion involving the claimant and a child. On that basis it was held that the claimant required training. Initially we note the panel wanted to give a warning as a sanction despite no finding of guilt.

97.6.4.6.2. The policy did not provide for the panel to impose training as a sanction.

97.6.4.6.3. The hearing was meant to deal with aspects of the claimant's grievance and did not. We conclude that this indicates that the panel were intent on dealing with disciplinary issues and had no concern to look at matters which the claimant was complaining about.

97.6.4.6.4. When this failing was pointed out the panel did not engage with them in reconsidering the disciplinary in the round with the grievance complaints.

97.6.4.6.5. Training was not something the respondent could enforce as the claimant was no longer employed by the respondent. We did not receive any adequate explanation for why this step was felt to be necessary.

97.6.4.6.6. We have indicated that on the available evidence it was not possible to say that an event had occurred on the 24 March 2015. We also consider that the claimant was disadvantaged in dealing with matters without a specific indication of the date and time when events were alleged to have occurred.

97.6.4.6.7. All of this is to the claimant's detriment. We do not consider that an employee who had not brought a claim would have been treated in this manner. It is on the face of it less favourable treatment. This is because we do not accept that taking these steps to impose a sanction where there was no finding of guilt would be probable unless there was specific motivation.

97.6.4.6.8. Again there are other significant aspect of the facts relating to the procedure which we consider inadequate, however these matters are sufficient to deal with this aspect of the claim.

97.6.4.6.9. We take the view that, on the balance of probabilities that motivation was the litigation. We cannot imagine that a panel with a sophisticated procedure to apply and with significant professional advice could get matters so wrong.

97.6.4.6.10. We would conclude, in the absence of a contrary explanation, that the treatment of the claimant in this process was because he had brought an employment tribunal claim.

97.6.4.6.11. That means that the respondent is required to provide a non-discriminatory explanation for its treatment of the claimant. In our judgment the explanation that the respondent was just following policy is insufficient to explain all of the failings we have outlined, and we do not accept it to be true. Again, the complaint of victimisation is well founded.

97.6.5. We have found that the appeal panel was influenced in its decision making by the fact that the claimant was engaged in bring tribunal proceedings. On that basis even, without considering the burden of proof provisions, we find that the claimant's claim of victimisation is well founded.

97.6.6. This additional detriment is connected to those disciplinary findings the claimant's future ability to be a teacher was bound to be affected by those findings.

97.6.7. Whilst there was a risk of referral to an external disciplinary body for teachers that did not happen, we do not consider that to be a detriment.

97.6.8. We do accept that there was some impact on the claimant's mental well-being and his position in the community.

97.7. The claimant complains he was promised that Mr Walsh and Miss Roch would take no further part in the process following correspondence between the parties. In our judgment if the promise was breached, to an extent by Mr Walsh being involved in the checking of correspondence and Miss Roch carrying out the function of clerk, it was because they were carrying out normal activities related to their roles*.* However, we do not conclude that this breach of promise occurred because the claimant brought a claim. Mr Walsh engaged in process of vetting material and Miss Roch was just carrying out her normal role as clerk to the Governors. In our judgment there was no specific relationship between that conduct and the fact that the claimant had brought a claim.

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Employment Judge Beard
Dated: 8 April 2019

Judgment sent to Parties on
16 April 2019

For the Tribunal Office