IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Conjoined Cases No: 4104090/2016 and 4106953/2017 Heard at Edinburgh on 18, 19, 25, 26, 27 and 28 September, 02, 03, 29 October and 01, 12 and 13 November 2018 and on 4 February and 5 February 2019 and Deliberations on 28 February, 1 March 2019, and 15 and 16 April 2019

Employment Judge J G d'Inverno, QVRM, TD, VR, WS
Tribunal Member Ms P McColl
Tribunal Member Mr S Currie

Ms M Hamilton	**Claimant** **Represented by:-** **Mr M Allison, Solicitor**
Fife Council	**Respondent** **Represented by:-** **Ms A Sneddon, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is:-

(First) That the claimant's complaint of discrimination in terms of section 21(2) of the Equality Act 2010 succeeds in terms and in respect of:-

(a) Issue (Second) paragraph 2.2(a) being the respondent's failure in applying to the claimant their policy LNCT 06, to take into account the claimant's health, including her Asperger's Syndrome, in the decision making process that resulted in her being selected as a member of

staff surplus to requirement and liable to transfer; and the respondent shall pay to the claimant the sum of £6,250 as damages for hurt to feelings in respect thereof, together with interest at the judicial rate of 8% per annum from 3 March 2016 until the date of this Judgment;

(b) In terms of Issue (Second) paragraph 2.2(b)(i), (ii), (iii) and (iv) in respect of the respondents' convening of the claimant to and conduct of the meeting of 26 April 2016; and the respondent shall pay to the claimant the sum of £2,300 in damages for consequential hurt to feelings in that regard, together with interest thereon at the judicial rate of 8% per annum from 26 April 2016 until the date of this Judgment;

(Second) The claimant's claims are otherwise dismissed.

_____
Employment Judge

_____
Date of Judgment

Entered in Register and Copied to Parties _____

REASONS

1.0 These cases, combined for the purposes of hearing, called at Edinburgh before a Full Tribunal for a final hearing. The contingent issues of challenge to the

Jurisdiction of the Tribunal by Reason of Time Bar, in respect of some or all of the claimant's complaints of harassment (section 26 EqA 2010) and of victimisation (section 27), had been reserved for determination at the hearing.

1.1 The claimant, Mrs Hamilton, was present and represented by Mr Allison, Solicitor. The Respondent Council was represented by Mrs Sneddon, Solicitor instructed by Mrs J Cameron, HR Service Manager.

2.0 **The Issues**

Judge Macleod's Order 4 of 26 February 2017, in terms of which he directed that, no later than seven days prior to the commencement of the hearing, parties having first adjusted the same between them should lodge with the Tribunal an Agreed List of Issues requiring determination at hearing, had not been complied with. In the course of Case Management Discussion, consequently conducted with parties at the outset of the hearing; and by reference to the Note of Output issued following the earlier held Case Management Discussion which proceeded in Case Number 4104090/2016 only on 29 September 2016 but adjusting the same to take account of the subsequently raised and now conjoined claims in Case Number 4106953/2017, the following were identified, and confirmed by parties representatives and were recorded by the Tribunal, as the Issues, and reserved Preliminary Issues, requiring investigation and determination at final hearing.

Direct Discrimination because of the Protected Characteristic of Disability
Section 13 of the Equality Act 2010

2.1 **(First)** Whether, because of her protected characteristic of disability, the respondents treated the claimant, whom it is accepted was at the material time a person possessing the protected characteristic of disability by reason of her Asperger's Syndrome, less favourably than they would treat a hypothetical comparator who was not so disabled, by:-

(a) determining that she was "surplus to the staffing requirements" and should be compulsorily removed and transferred from her part-time teaching position in Queen Anne High School, Fife;

(b) by summarily advising her of the same and by placing her name on a list of staff to be transferred from the school, all on 3 March 2016; and,

(c) by the then Rector of Queen Anne School stating to the new Principal Teacher of Religion and Morals, on 3 March 2016, that she believed that the claimant's absence from school on the preceding day was in part due to her disability; and thus,

did the respondent directly discriminate against the claimant in terms of section 13 of the Equality Act 2010.

(In his written submissions on the evidence dated 7 December 2018 – reiterated in oral submission, the claimant's representative confirmed that the claimant no longer insisted upon Issues 2.1(a) and 2.1(b) above which accordingly fall away. The claimant stood upon Issue 2.1(c).)

Asserted Breach of Duty to make Adjustments sections 20 and 21 of the Equality Act 2010

2.2 **(Second)** Whether the respondent placed the claimant at a substantial disadvantage, in comparison with others who were not disabled, by reason of the fact that sufferers of Asperger's Syndrome, which is a communications disorder, suffer from higher levels of anxiety and are unable to cope with certain types of change and accordingly by their subjecting her to substantial stress, in circumstances which gave rise to a duty to make adjustments in terms of section 20 of the Equality Act 2010; as evidenced in;-

(a) in their applying to, amongst others, the claimant

(i) the Local Negotiations Committee for Teachers 06 ("LNCT 06") policy, either at all or absent adjustment;

(ii) an asserted practice of locally adjusting the LNCT 06 procedure, to be followed by schools when they identify surplus staff within a school, and in their doing so,

(iii) in a way which included dispensing with the requirement for holding a departmental meeting and whole school meeting the latter normally held with a view, amongst other things, to seeking volunteers either to adjust their working patterns or to move to other schools as a means of avoiding the need to compulsorily remove staff from occupied posts, all before decisions are reached on which employees, if any, are to be compulsorily moved; and,

(iv) such as to result in the claimant being summarily informed by the Rector on 3 March 2016, without any prior notice, that she was already designated as being surplus to staff requirement and was to be compulsorily removed from her post and transferred.

(b) And or by their applying to, amongst others, the claimant a practice of

(i) convening the claimant to a formal meeting

(ii) at which she was asked to present grounds which might justify a reconsideration of the Rector's decision that she was surplus to requirement and be compulsorily removed from post,

(iii) without notice and,

(iv) without the opportunity to prepare for the meeting or the right to be accompanied and supported at the meeting by a work colleague or trade union representative;

(v) both such as to place the respondent under a duty, in terms of section 20 of the Equality Act 2010 to take such steps as it is reasonable to have to take to avoid the disadvantage;

(c) And or by their refusing to accept or deal with the claimant's grievance appeal brought on 15 January 2017

(i) at all, on the ground that it was late; and

(ii) by failing to take account or in the alternative failing to take adequate account, of the causal relationship between the claimant's disability and that lateness.

Section 21 EqA 2010 Discrimination

2.3 **(Third)** Whether the respondent in failing to hold the departmental and whole school meetings in the manner indicated by the LNCT 06, in failing to give the claimant formal and reasonable notice of the meeting of 26 April 2016 and, in failing to afford her the right to be accompanied and supported by a work colleague or trade union representative at that meeting, and or by failing to deal with the claimant's grievance appeal all as set out at paragraph (2.2) sub-paragraph (c) above, failed to comply with a duty to make reasonable adjustments arising in terms of section 20 of the Equality Act 2010 and thus; did the respondent discriminate against the claimant in terms of section 21(2) of that Act.

Harassment section 26 of the Equality Act 2010

2.4 **(Fourth)** Whether the respondent, variously at the hands of the Rector of Queen Anne School Ruth McFarlane, the Deputy Rector Laura Martin, members of the admin staff Kerry Gibson and Denise Ewing and HR Officer Leanne Hutchison, engaged in unwanted conduct related to the claimant's protected characteristic of disability which had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant as evidenced by:

(a) The Investigating Officer appointed to the claimant's first grievance insisting that the claimant's return to work meeting in June of 2016 be conducted by the Rector against whom her first grievance was in part directed.

(b) By the Rector and the other named individuals conspiring to give and giving false statements about the claimant and about the conduct of the meeting of 26 April 2016 in the course of being interviewed during investigation of the claimant's first grievance.

(c) By the respondents accepting of those false statements in preference to those of the claimant and in their reliance upon them in failing to uphold her grievance; and

(d) By the Rector, on 3 March 2016, advising the claimant's new Principal Teacher that the claimant was "a difficult person to work with in consequence of her disability" and by giving the Principal Teacher stereotypical and erroneous information about the manifestation of the claimant's disability; and thus,

Did the respondents harass the claimant in terms of section 26 of the Equality Act 2010

Victimisation section 27 of the Equality Act 2010

2.5 **(Fifth)** Whether

(a) The claimant in lodging grievances with the respondent, on 27 April, 21 June and 27 June, about; the conduct of the meeting to which she was convened on 26 April and in respect of the conduct of the Rector during that meeting, all 2016, and or in making complaints of disability discrimination (either expressly or by implication) and by commencing an Employment Tribunal claim on 26 July 2016, carried out a protected act or acts for the purposes of section 27 of the Equality Act 2010; and whether,

(b) The respondents, in subsequently accepting the assertedly false statements made by the parties named at paragraph (2.4) above, including that of the Rector, in preference to those of the claimant and, in reliance upon those statements in not upholding the claimant's grievances, so acted because of one or more of the protected acts; and, thus, subjected the claimant to a detriment otherwise in delaying and or failing to adequately deal with the claimant's grievances and in making and maintaining the decision to deem the claimant surplus to staffing requirement and in failing to offer to or to make the claimant aware of the role advertised in August 2017; and thus, did the respondent victimise the claimant in terms of section 27 of the Equality Act 2010.

Jurisdiction (Time Bar) section 123 of the Equality Act 2010

2.6 **(Sixth)** Whether the claimant has Title to Present and the Tribunal Jurisdiction, in terms of section 123 of the Equality Act 2010, to consider all or any of the claimant's complaints of Harassment in terms of section 26 of and or of Victimisation in terms of section of 27 of the Equality Act 2010.

Discrimination arising from Disability Section 15 of the Equality Act 2010

2.7 **(Seventh)** Whether the claimant suffered discrimination arising from disability by reason of the statements given by the respondents' five witnesses, taken during the course of the investigation into the claimant's first grievance and subsequently relied upon by the respondents in their outcome decisions in respect of all three grievances, being deliberately made false statements based upon prejudice and stereotyping, the same constituting unfavourable treatment because of something arising in consequence of disability; and separately, by reason of the respondents failing to substantially address the claimant's grievance appeal at any point up to and including the date of the claimant's resignation in circumstances where the lateness of the submission of the said Appeal was caused, or materially contributed to by the claimant's disability, the same separately constituting unfavourable treatment because of something arising in consequence of the claimant's disability contrary to the provisions of section 15 of the Equality Act 2010.

Constructive Dismissal

2.8 **(Eighth)** Whether the conduct (or any of the conduct) particularised at paragraph 53 of the paper apart to the claimant's 2017 ET1, that is with Case Number 4106953-2017, occurred; and if so whether such conduct, if any as occurred, was conduct which, either individually or collectively, constituted a repudiatory breach of the condition of "confidence and trust" which was implied within the claimant's contract of employment, such as to entitle the claimant to resign, without notice; and whether the claimant resigned in consequence of any such repudiatory breach; and thus, was the claimant constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996 (in which latter case it is accepted by the respondents that the dismissal falls to be regarded as unfair).

Remedy

2.9 **(Ninth)** In the event that the respondents did constructively and unfairly dismiss the claimant and or discriminate against or harass and or victimise her as asserted and denied, to what remedy, respectively by way of basic and

compensatory award and or by way of declaration and or damages is the claimant entitled.

Other Preliminary Matters

3.0 Other preliminary matters were discussed, parties heard thereon and disposed of as follows:-

(a) **Detriment in consequence of Protected Interest Disclosure:-**

The claimant confirmed and the Tribunal recorded that the claimant no longer insisted upon her complaint of having suffered detriment in consequence of making a Protected Interest Disclosure and that claim, previously identified and recorded at the Case Management Discussion which proceeded in Case Number 4104090 of 2016 on 29 September 2016 was and is treated as withdrawn.

(b) That whereas Cases 4104090/2016 and 4106953/2017 had been combined for the purposes of Hearing by Judge Macleod on 23 February 2018, there had been no subsequent consolidation of the pleadings in the combined case and that accordingly it would be necessary, where appropriate, to have reference to both forms ET1 and both forms ET3 together with their correlative papers apart. It was noted, by way of overview, that the pleadings in the 2017 case (4106953-17), while adding the complaint of constructive dismissal, largely duplicated the pleadings in the 2016 case (4104090-16) with the exception of the complaint of harassment for the specification of which reference continued to be required to be made to the pleadings in the 2016 case.

(c) **Additional Documents for the Claimant**

The claimant tendered, and the Tribunal received additional documents 678 to 720 inclusive together with a substitute and

updated Schedule of Loss. In respect of these the respondents' representative maintained objection to document 693 being a letter from a Rachel MacRitchie, a person who was not to give oral evidence, and which, on its face appeared to constitute the expression of an opinion. The respondents' representative made clear her objection to the admission of and reliance by the claimant, upon, the letter purporting to be expert evidence not properly set up, given notice of or called for by the Tribunal. The letter was received subject to those objections which the respondents' representative indicated she would renew and stand upon as appropriate in the course of evidence and submission.

Additional Documents for the Respondents

3.1 The respondents' representative tendered and there were received, additional documents to the Joint Bundle at pages 152 to 157 to which no objection was maintained by the claimant's representative.

Subsisting Potential Preliminary Issue of Time Bar

3.2 The respondents' representative confirmed that there remained live between the parties a potential issue of Jurisdiction (Time Bar) relating to certain aspects of the claimant's complaints of harassment in terms of section 26 and victimisation in terms of section 27 of the Equality Act 2010. She indicated that although accepting that it was unsatisfactory that the issue even at this stage in proceedings, could only be articulated in general terms this, she explained, resulted from the fact that the potential issue/issues would emerge only from the evidence to be heard in the case.

Transcripts of Tape Recording

3.3 The respondents' representative had, in the week preceding the Hearing maintained objection to the late production by the claimant's representative of the

transcripts, which now appeared in the Joint Bundle, of the tape recording, clandestinely made by the claimant of her meeting with the then Rector of Queen Anne High School and of a subsequent discussion about that meeting with colleagues and one of the Deputy Rectors. The objection was one maintained not on the grounds of the clandestine nature of the recording per se but rather on the grounds of lateness of intimation. The respondents' representative confirmed that in the intervening period she had now had opportunity to carry out the necessary comparisons of the transcripts with what appeared to be recorded on the pieces of digital recording which had been sent to her and that she no longer maintained her objection to the lodging of the transcripts. The other issue which had been focused in relation to the recordings related to the fact that there was in fact only one continuous recording which had been edited by the claimant in terms of her removal from it of a discussion, which proceeded between herself and two colleagues immediately after her meeting with the Rector and relating to that meeting but before the Deputy Rector joined the group, with the result that what was produced before the Tribunal was two separate voice files. The claimant and her representative explained that while the discussion indeed related to what were in effect the other portions of the recording and to the subject matter thereof, she (the claimant) had decided to exclude them because she considered it immoral to leave them included without the permission of her colleagues; and, in contradistinction she did not regard the making or the inclusion of the other parts of the recordings as immoral on the ground that, in her perception, she required to clandestinely record and to now produce the same in order to prove her case. While noting that explanation, the respondents' representative reserved the right to make submissions, as she considered appropriate, as to the diminished evidential value of what was in effect an incomplete clandestine recording.

Objection to the Evidence of Julie Philip, Speech and Language Therapist

3.4 One of the additional witnesses lately intimated by the claimant included Jude Philip who was designed as a "Speech and Language Therapist". The respondents' representative maintained and maintains objection to the leading of

evidence from Ms Philip on the grounds doing so appears to be an attempt to adduce expert evidence as opposed to evidence in fact. By way of response the claimant's representative maintained that his intention was to adduce only non expert evidence of fact from Ms Philip as to her direct observations of the impact upon the claimant of the events of 2016 onwards. The respondents' representative's position was noted as was the claimant's representative's response. While no decision to exclude the evidence of Jude Philips was sought or taken prior to the commencement of the hearing, the respondents' representative reserved her right to take objection, upon the grounds given notice of by her, in the event that an attempt to adduce expert opinion evidence from Ms Philip was to emerge in the course of the hearing.

Additional Witnesses

3.5 Parties advised that since the listing of the case for final hearing, in terms of which six days had been allocated for the hearing of evidence and submissions, a requirement had been identified to lead several additional witnesses but that no adjustment had been made to the listing. An analysis of the likely time required for examination in chief and cross examination of the 13 witnesses (including the claimant) now identified, suggested a requirement of some 38 hours for the examination in chief and cross examination of the same. To this fell to be added some time for re-examination, questions from the Tribunal and submissions which, taken together, suggested that a total of ten days would be required and not allowing for the fact that the morning of the first day was given up entirely to confirmation of the Issues, dealing with Preliminary and contentious matters. In the event, although one of the respondent's witnesses did not give evidence, the estimates of time required, for the claimant to give her evidence in chief and for cross examination of the respondent's principal witnesses, proved to be significantly inadequate resulting in the hearing of evidence extending across some 13 days of split hearing with a 14th-Continued day required for oral submissions. Due to the requirement to identify a day upon which parties, their representatives and the Tribunal as constituted had co-inciding availability, the Continued Hearing fixed of 4 February 2019 was several weeks distant from the

last day upon which evidence was heard. In accordance with the Tribunal's direction, therefore, parties each prepared, exchanged and lodged with the Tribunal, within 21 days of the 13 November 2018 a list of the proposed essential findings in fact which they respectively contended the evidence supported and would invite the Tribunal to make, together with their respective assessments of the credibility and reliability of the witnesses who appeared. In the event each party also exchanged and lodged written submissions.

Documentary Evidence:-

3.6 Parties lodged a Joint Bundle of Documents, to which certain additions were made, as recorded at paragraphs 3.0(c) and 3.1 hereof, extending to some 722 pages and a substantial number of which reference was made in the course of evidence and submission.

Oral Evidence:-

3.7 The Tribunal heard oral evidence upon oath or affirmation from the following witnesses, all of whom were subjected to cross examination.

(a) **For the Claimant**

Mrs Moray Hamilton (the claimant) on her own behalf
Mr Struth (the claimant's partner)
Ms Jude Phillips, a friend of the claimant who was a Speech and Language Therapist
Mr Andrew Igoe, former work and departmental colleague of the claimant at Queen Anne High School
Mr Lennie Turk, former Religious, Moral and Education ("RME") Head Teacher at Queen Anne High School

For the Respondent

(b) Ms Ruth McFarlane, Rector (Head Teacher) of Queen Anne High School

Ms Kerry Gibson, Clerical Administrative Coordinator and Secretary to Ruth MacFarlane

Mr William Struthers, Business Manager of Queen Anne High School

Mr Kevin Funnell, Team Manager in Fife's Directorate of Operations

Mr Douglas Sinclair, a Deputy Rector (Deputy Head Teacher) at Queen Anne High School involved in managing the claimant's sickness absence

Mr Ken Robertson, a Depute Rector of Queen Anne High School with responsibility for timetabling

Ms Sarah Else, an Education Manager with Fife Council with responsibility for Queen Anne High School and Investigating Officer in respect of the claimant's 3 grievances

Findings in Fact

4. In the course of submissions parties' representatives identified in writing a number of agreed facts which they intended be binding upon the Tribunal for the purposes of the hearing. With a view to recording the essential Findings in Fact in a broadly chronological order the "**Agreed Findings in Fact**" are not grouped separately below but rather are incorporated within the essential Findings in Fact made on the evidence led, but are identified as "**Agreed Findings in Fact**" by being set out in **bold type**. The Findings in Fact set out below which are not in bold type are the essential Findings in Fact made on the oral and documentary evidence respectively presented and referred to at the hearing.

5. The claimant whose date of birth is 31 March, 1975, commenced employment with the respondent in August 2006 as a probationer teacher and went on to become a permanent registered teacher in August, 2007 and continued her employment with the respondent.

6. The claimant was employed by the respondent from on or around 1 August 2006. She was contracted to work 0.6 Full Time Equivalent (FTE).

7. The claimant latterly, from in or around December 2011, was based at Queen Anne High School. She worked within the Religious and Moral Education Department (RME) otherwise known as the Religious, Moral and Philosophical Studies Department (RMPS).

8. The claimant possesses the protected characteristic of disability, for the purposes of section 6 of the Equality Act 2010. The claimant has High Functioning Autism (HFA), otherwise known as Asperger's. She obtained a diagnosis of the same on or around 4 December 2013. That diagnosis has not been altered to date. Asperger's is a lifelong condition.

9. The claimant can become anxious, particularly in high stress or high conflict situations. She has a tendency to react angrily and or emotionally when she finds herself in a high anxiety situation.

10. The claimant stated in evidence that her Asperger's affected her in the following ways:

> "(a) She can on occasion have a greater awareness of anxiety which in turn can cause the level of anxiety experienced by her to be exacerbated.
>
> (b) There can be occasions, when receiving particularly challenging information or news which she finds unwelcome, when she may require more time to process the information which she prefers to have clearly set out. She likes to have a routine. She prefers to prepare for difficult situations and can require additional time and notice to allow her to do so.
>
> (c) She considers that she is highly focused on concepts of truth and justice which she sees in a largely 'binary fashion'. She can find it difficult to concentrate on important matters when she finds herself in a high anxiety situation."

11. The claimant's employment ended on 12 September 2017 by virtue of her resignation.

12. The respondent knew, at all material times (that is from 2 March 2016 to the end of the claimant's employment) that the claimant had Asperger's Syndrome (an Autism Spectrum Disorder) in terms of the letter from Dr Jane Neil-MacLachlan dated 4 December 2013 a copy of which the claimant provided to them, per Graeme Hamilton the then Deputy Rector of Queen Anne High School, in or around December 2013. That letter is copied and produced at page 235 of the Bundle and is in the following terms:-

> "*The date 4.12.13*
> ***TO WHOM IT MAY CONCERN***
> ***Re: Moray Hamilton, 8 Preston Terrace, Linlithgow, West Lothian, EH49 6HU (DOB 31.03.75)***
> *This woman was assessed in November 2013 by the Regional Autism Spectrum Disorder Consultancy Service and found to have an Autism Spectrum Disorder. This is a lifelong neurodevelopmental condition affecting Social Communication, Social Interaction and Social Imagination. Sensor hypersensitivities may also be a factor. These difficulties may become more pronounced at times of stress and change.*
> *Some people on the autism spectrum may also have executive functioning difficulties. These affect organisation, planning and carrying out activities of daily living to a greater or lesser extent depending on the individual. If required, please contact me for further information.*
> *Dr Jane Neil-MacLachlan*
> *Adult Autism Coordinator"*

13. The letter confirming diagnosis provided only a general description of Autism Spectrum Disorder and of some of the areas in which some persons suffering from the Disorder may or may not be affected by it. The letter provided no further information as to how the Disorder specifically affected the claimant and was the

only information ever provided to the respondent by the claimant with regard to her diagnosis and condition.

14. Following receipt of the letter confirming diagnosis, Graeme Hamilton the then Depute Rector of Queen Anne High School, asked the claimant to provide the respondents with a written description of how her diagnosed Asperger's Syndrome affected and impacted upon her. The claimant, who preferred to keep those matters and her diagnosis itself private, did not provide any such information, or any further information in that regard, to the respondent. The letter (copied and produced at page 235 of the Bundle) provided only basic information with regard to the diagnosis describing it as "an autism spectrum disorder".

15. On or around 2 March 2016 Ruth McFarlane met with Karen Fotheringham the incoming and newly recruited Principal Teacher for Religious, Moral and Philosophical Studies. In the course of the meeting, as was normal practice, the Rector briefly mentioned each of the staff in the new Principal Teacher's Department and for whom she would be responsible, including both Andrew Igoe and the claimant. The Rector disclosed to Karen Fotheringham the fact that one of the members of staff for whom she would be responsible, namely the claimant, suffered from Asperger's Syndrome which did not impact upon her teaching. In relation to the claimant the Rector also said to Karen Fotheringham that the claimant could become "a bit emotional and anxious".

16. The claimant asserted in evidence, allegedly hearsay of Andrew Igoe, that at her meeting with Karen Fotheringham on or around 2 March the Rector had also stated to Karen Fotheringham that the claimant was "difficult to work with" and that her absence from school on the preceding day was in part due to her disability. The claimant also stated that she had clandestinely recorded a conversation between herself and Andrew Igoe in which she asserted that Andrew Igoe had recounted to her (by means of hearsay) that Karen Fotheringham had told him that Ruth McFarlane had said to her (Karen Fotheringham) that the claimant was "difficult to work with".

17. The claimant produced at page (140) 647 to 649 of the Bundle what she described as a partial transcript of her clandestinely recorded conversation with Andrew Igoe. The transcript was created and produced by the claimant. The recording of which it was said to be a transcript was not produced.

18. The asserted transcript, produced at page 691 of the Bundle, does not purport, in its terms, to show Andrew Igoe as reiterating what Karen Fotheringham said Ruth McFarlane had in turn said to her about the claimant. Rather the asserted transcript purports to be a transcript of Andrew Igoe's assessment/opinion/interpretation of the effect of the alleged remarks of Ruth McFarlane hearsay of Karen Fotheringham. In the 9th and 10th lines of the transcript at page 691, he is shown as saying, both after and before the descriptions of effect which precede and follow it:- "*Well she just said that she was like you might have a few problems with (I'm not saying it verbatim) her, she's quite difficult to work with*".

19. In dealing, inter alia, with situations where a surplus arises in a school and there is a need to redeploy a staff member, the respondent operates a formal policy called Local Negotiations Committee for Teachers 06 (LNCT 06). The policy is intended to be operated consistently, Council wide, although the central Education Authority are aware that some schools in practice alter the order of the meetings referred to at paragraph 19. That is the only variation which the Education Authority are aware of or condone.

20. LNCT 06 is a provision, criteria or practice for the purposes of section 20 of the Equality Act 2010.

21. The claimant's grievances of 21 and 27 June made allegations of disability discrimination. Further, by raising her Claim Number 4104090/16 lodged on 26 July 2016 [page 1], the claimant made complaints of disability discrimination. These all constituted protected acts.

22. The claimant's specialism is religious and moral education. This is the subject she is registered to teach through the GTCS. She is not registered with the GTCS to teach any other subject.

23. In August 2007, the claimant was employed by the respondent as a Teacher of Religious Education at St Columbus High School, Dunfermline, Fife. In 2008 the claimant became involved in a dispute with management at St Columbus High School. In December 2011 she requested a move to another school as she had a dispute with the school's management staff (page 228 of the Bundle).

24. The claimant was employed on a full time basis from 2007 until 2009 when she returned to work at St Columbus High School on a part time basis following a period of maternity leave. From this point she was contracted to work three days per week which was equivalent to 0.6 FTE.

25. The claimant began work at Queen Anne High School in December 2011. She was employed to work in the Religious and Moral Education Department. The Rector at the time she started working at Queen Anne High School was James Bellshaw. He retired in October, 2013. Between October, 2013 and January, 2014 Depute Rector, Graham Hamilton, acted up and, in January 2014, Ruth McFarlane was appointed full time Rector of the school.

26. When the claimant started work at Queen Anne High School in December 2011, Lennie Turk was the Principal Teacher of her department and her Line Manager was initially Morag Patterson, Depute Rector and then Ken Robertson, Depute Rector.

27. The claimant considered she had a close relationship with her colleagues in the department in which she worked at Queen Anne High School. She had few relationships with other teachers out of her department.

28. From the point of Ruth McFarlane becoming Rector at Queen Anne High School in January 2014 until (02) March, 2016, **the claimant considered she had a good working relationship with her.**

29. In December 2015, Lennie Turk, Principal Teacher of the RME Department retired. In advance of that, discussions within the Department took place regarding replacement of his post and an incorporation of some outdoor learning line management.

30. A decision was reached to look for a replacement who could act not only as Principal Teacher of RME but who would also have responsibility for outdoor learning as part of the role. The successful applicant did not have to be an RME specialist. The successful applicant, Karen Fotheringham was appointed in February, 2016 and was in fact, an RME specialist.

31. Karen Fotheringham took up post in March 2016. The RME Department then comprised Karen Fotheringham as full time Principal Teacher of RME, Andrew Igoe, full time Teacher of RME and the claimant as a Teacher of RME on 0.6 FTE basis.

02 March 2016

32. The claimant's husband, Gordon Struth returned to work at the Scottish Government following a period of ill health, on 2 March 2016. Just after 9 am that morning the claimant received a telephone call from her husband advising that their daughter was ill and asked if she could come home to look after her as he had to attend an important meeting at work that day.

33. The claimant immediately went to speak to Bill Struthers, Business Manager at Queen Anne High School to ask if she could go home after period 2 or 3. Bill Struthers told the claimant that she would have to ask Ruth McFarlane, Rector, due to the school being short on cover that day.

34. The claimant had only ever requested time off by telephone prior to this occasion and had never previously sought permission to be released to go home when already at school, that is after the working day had commenced. The claimant accepted in evidence that, in those circumstances, it was normal practice to have to speak to the Rector rather than the Business Manager, to make the request. The claimant had previously disputed that that was the normal practice and requirement. In giving her evidence on this point at the hearing, the claimant accepted for the first time that doing so was in line with the policy which existed, namely LNCT/7, Discretionary Leave for Teachers (which is produced at page 409 of the Bundle).

35. On 2 March the claimant left Bill Struthers to find the Rector Ruth McFarlane. She located the Rector and there followed a conversation between them in which the claimant asked if she could go home to look after her daughter. In the course of the conversation the Rector, who did not know the claimant's daughter's age, made the following enquiries of the claimant in a single continuous sentence:- "*How old is your daughter and could she cope at home alone for a few hours?*". The claimant advised Ruth McFarlane that her daughter was 11 years of age. The exchange between them ended at that point with the Rector believing, for her part, that the claimant would be going home as that was appropriate given the age of her child and the claimant, for her part, intending to go home for the same reason.

36. After her discussion with Ruth McFarlane, the claimant telephoned her husband and told him that Ruth McFarlane had told her to leave her daughter at home alone. The claimant then went back to the Rector's office where a further discussion ensued in the course of which the claimant, for her part, stated that Ruth McFarlane ought not to have told her to leave her daughter at home alone and the Rector, for her part, denied that she had told the claimant to do so.

37. The claimant again left Ruth McFarlane's office but waited outside the office door. A third discussion then ensued between the claimant and the Rector in which the claimant enquired about whether she would be paid for the day when she went

home. The Rector, who did not know how much paid leave, if any, the claimant had already had, referred the claimant to policy (LNCT/7) which indicated where staff had already taken a prior day off to look after dependants then they would not have an automatic entitlement to pay. In the event the claimant was paid for that day of leave 02 March 16.

38. The claimant was permitted to go home on 2 March 2016 to look after her daughter **and she was paid for that day.**

39. On 2 March, 2016, following this exchange between the claimant and Ruth McFarlane, an email was sent to the claimant from Ruth McFarlane's administrative coordinator, Kerry Gibson reproducing an extract from LNCT/7 policy detailing the "Discretionary Leave for Teachers" paragraph.

40. On 3 March, 2016 an email was sent from Kerry Gibson, on behalf of Ruth McFarlane, to the whole school staff indicating that there were difficulties with securing supply staff and "there had been an increase in requests from staff to be out of school for a variety of reasons and this is compounding the problem". A copy of the LNCT 07 policy was attached to the email and drawn to the attention of the whole staff.

41. On 2 March 2016 the claimant made contact with her Trade Union representative, Heather Heneghan to make her aware of the discussion she had with the Rector about not being paid when going home to look after her daughter.

42. At some point the following day, being 3 March, 2016, Heather Heneghan met with Ruth McFarlane to discuss the issues raised by the claimant the previous day. Heather Heneghan reported back to the claimant by email confirming that an OH referral for the claimant had been suggested as well as counselling and having someone within the school the claimant could speak to.

43. On 9 March, 2016, Heather Heneghan, Trade Union representative passed over responsibility for the claimant's case to Alison Karalar, a more experienced Trade Union representative.

44. Upon reflection the claimant formed the view that she may have acted inappropriately towards the Rector in the course of her exchanges with her on 2 March 2016 and she became fearful, as she described it in evidence, "that she had blown her relationship" with the Rector.

The 3 March 2016

45. On 3 March 2016, the Rector attended at three different departments within Queen Anne High School for the purposes of declaring surplus within the school.

46. The Rector specifically selected 3 March to advise relevant departments and affected personnel of the surplus due to the fact that the Geography Department, one in which surplus had been identified, were having a departmental meeting that day. The meetings which she had on 3 March including her meeting with the claimant were planned prior to 3 March.

47. During the luncheon break on 3 March the Rector attended firstly at the computing base where she advised the solitary member of staff that his post and therefore he was surplus. She then attended the geography base and advised that there was a full time surplus in the coming academic year in that Department. She finally went to the RMPS Department and spoke with Andrew Igoe who was in the base. She was unable to speak with the claimant at that time because the claimant had already left the base to prepare for her afternoon teaching duties.

48. The Rector informed Andrew Igoe that a surplus had been declared in the Department in the coming year 2016/2017. She asked Andrew Igoe, who was the senior member of staff as between the claimant and himself, whether he

wished to volunteer to move to another school and or to reduce his hours, to each of which enquiries he responded in the negative.

49. On completion of her discussion with Andrew Igoe, the Rector entered the claimant's classroom and asked her to attend at her office later that day following the conclusion of her teaching duties.

50. At the completion of her teaching duties on 3 March the claimant attended at the Rector's office. The Rector advised the claimant that there was a surplus within the Department and that the claimant was the member of staff who, in terms of length of service as detailed in the LNCT 06 policy, was the teacher liable to be identified as surplus and placed upon the compulsory transfer list in the absence of a volunteer. Having established earlier that day that Andrew Igoe, the more senior of the two members of staff was not prepared to volunteer or to reduce his hours, the Rector advised the claimant, at the meeting of 3 March, that she, the claimant, was being declared surplus and would be placed on the transfer list.

51. The claimant stated in evidence before the Tribunal that she believed that the Rector had declared her surplus on 3 March 2016 by way of personal vendetta against her as a retaliation to the claimant having asked to be allowed to go home on the previous day 2 March 2016. The claimant did not say anything to that effect or otherwise communicate such a belief to the Rector at the meeting of 3 March.

52. The existence of a surplus in the RMPS Department had been confirmed by the Rector, in consultation with Bill Struthers, prior to 2 March and prior to the claimant's request, made by her on 2 March, to be allowed to go home. The identification of the claimant as the individual member of departmental staff who was liable to transfer resulted automatically, let it be assumed all other things were equal, by reason of length of service, from the LNCT 06 policy. The claimant accepted in the course of cross examination that under the LNCT 06 policy she, the claimant, was the junior member of staff and, if all other things were equal, and in the absence of Andrew Igoe being prepared to volunteer to

move to another school or to reduce his hours, she, the claimant, was the member of staff likely to be declared surplus and, in due course, compulsorily transferred to another school.

53. The LNCT 06 policy is a policy which governs a transfer of teachers and is used annually in surplus situations where they occur in the schools across Fife. The policy was referred to by the Rector during her meeting on 3 March with the claimant but she did not go into its terms in any detail. The claimant obtained a copy of the policy on the evening of 3 March 2016 when her husband Mr Struth accessed the policy on the internet.

54. The claimant gave secondary hearsay evidence, at the hearing, of a conversation which allegedly took place between Andrew Igoe and Karen Fotheringham in which it was alleged that Karen Fotheringham had told him that during her visit to the school (on 2 March 2016) Ruth McFarlane had told her, Karen Fotheringham, that the claimant was difficult to work with. And that separately in the course of the conversation of 2 March 2016 Ruth McFarlane had informed Karen Fotheringham that the claimant suffered from Asperger's Syndrome.

55. Ruth McFarlane did tell Karen Fotheringham, in the course of her meeting with her on 2 March 2016, that the claimant suffered from Asperger's Syndrome. In her capacity as Rector she had a duty to inform Karen Fotheringham who was assuming the role of Principal Teacher of the Department in which the claimant worked, of that fact.

56. The claimant sought and obtained from her General Medical Practitioner an increase in her antidepressant medication prescription in May and August of 2016.

57. When permanent teachers in Fife are transferred to another post within Fife (i.e. a different school) the policy LNCT 06 is used to facilitate the transfer. Various witnesses made reference to this policy and surplus generally when giving evidence (namely Ruth McFarlane, the claimant, Sarah Else,

Ken Robertson, Gordon Struth and Kevin Funnell). Kevin Funnell's evidence was specifically related to the surplus process and the application of this policy within schools.

58. Teachers who possess the protected characteristic of disability are not exempt from application of the LNCT 06 policy. It is commonly the case that teachers with the protected characteristic of disability are identified as members of staff declared surplus and are transferred under the policy with various adjustments being made. No proposal that the LNCT 06 policy should be adjusted so as to automatically exempt teachers possessing the protected characteristic of disability has ever been made by the Trade Union Side. The policy is one negotiated, agreed and adjusted between management and Trade Union Sides.

59. The surplus process begins at school level when a school starts to plan its staffing and curriculum requirements for the coming August session. The exact time on which the process begins differs between schools but, generally speaking, can be any time from November-January in an academic year.

60. The process begins with pupils selecting course choices. Pupils can select which courses they want to study in August. It is predicated on things like anticipated exam results. The school then takes the pupil choices and looks at resources in terms of staff, teachers, classrooms etc.

61. Ken Robertson, Depute Rector and Bill Struthers both gave evidence on this process. Ken Robertson is the "timetabler" for Queen Anne High School. He is responsible for collating all information from the course choice sheets completed by pupils to gauge the requirements for the school in the coming academic year in terms of staffing, classrooms, etc. It is an annual process and it is the process which determines where a potential surplus may exist.

62. In 2016/17 there was a surplus identified and declared in the RMPS Department. Demand was for 50 lessons (periods to be taught) per week in RMPS. There was one full-time teacher in the Department (Andrew Igoe) and the claimant was employed on 0.6 full-time equivalent. Contractually teachers can be required to deliver 27 teaching periods but have been traditionally asked to deliver 26. In 2016/17 for the Principal Teacher, Karen Fotheringham, there were 23/22 teaching periods and there were 26 for Andrew Igoe, to be delivered. There were a number of teachers qualified to teach RMPS within the school which added an element of flexibility as to how the teaching requirement could be fulfilled in parallel with other teaching and preparation/administrative requirements made of teaching staff. During the annual surplus process Ruth McFarlane and Ken Robertson discussed the project timetabling at various times and discussed with her the relevant numbers.

63. The timetables copied and produced at pages 715 to 716 were timetables produced by Ken Robertson as part of that process. The timetable lodged by the claimant, copied and produced at page 397 was given to her by Andrew Igoe. It was not an official high level timetable produced by Ken Robertson. Rather it appeared to be a timetable produced within the Department by the Principal Teacher and adjusted to show herself teaching only 23/22 teaching periods which she had been allocated in the high level timetable and which were the number she would have been expected to teach. That timetable, as internally adjusted by the Principal Teacher did not define the surplus, which existed notwithstanding that timetable.

64. The high level timetable produced for session 2016/2017 by Ken Robertson showed a surplus within the RMPS Department. The surplus existed and was not fabricated. It resulted from reasons wholly unconnected with the claimant's request, made by her on 02 March 2016, that she be allowed to go home. When the surplus within RMPS was declared in March 2016 it was a 0.6 full-time equivalent surplus and was not a range of between 0.2 and 0.6 full-time equivalent at that particular time.

65. The evidence of Ken Robertson, Kevin Funnell and Ruth McFarlane, regarding the generation identification and declaration of the 2016/2017 surplus in the RMPS Department, all supported the position that a surplus was identified and declared in the Department prior to 2 March 2016 and for reasons wholly unconnected with the claimant's request, made by her on 2 March 2016 that she be allowed to go home to look after her daughter.

66. Kevin Funnell is employed by the respondents as the Team Manager of the Education Directorate Operations Team. They have a remit for staffing and workforce planning. As a team they do not get involved until March when they ask every school in Fife to return a staffing return (surplus declaration form) which is a simple template for the school to advise his team of their staffing requirements for the August session. This is very much an indicative return in March but it helps the team determine how many staff they may need to recruit. For the whole of Fife a generic advert is placed to recruit necessary staff and once appointed they are allocated to a particular school at a later date.

67. From the returns submitted the Central Team is able to form an initial view of how many specific teachers in any department they need to offer a post to. The returns also provide an indication to the Team of the postholders who may be surplus. The situation is a fluid one particularly at the early stages and the position initially disclosed may be impacted by a number of factors including decisions on the parts of some staff to retire or to move to another job/school, or changes in pupil choices. The return form is regularly updated by the school and a number of versions will typically be produced and transmitted to the Central Team between the time of initial lodging and the end of the transfer period.

68. LNCT policies form part of teachers' terms and conditions of employment. They are accessible by teaching staff.

69. The claimant asserted in evidence before the Tribunal that the surplus within the RMPS Department had been fabricated by the Rector following the claimant's

exchange with her on 2 March 2016 in order to remove the claimant from the school as a punishment. There was no basis in fact for that belief by and assertion of the claimant.

70. When permanent teachers in Fife are transferred to another post within Fife (i.e. a different school) the policy LNCT 06 is used to facilitate the transfer. Various witnesses made reference to the policy and surplus generally when giving evidence (namely, Ruth McFarlane, the claimant, Sarah Else, Ken Robertson, Gordon Smith and Kevin Funnell.) Kevin Funnell's evidence was specifically related to the surplus process and application of this policy within schools. Ruth McFarlane, in her capacity as Rector, was familiar with the policy document and referred to it in the course of discharging her duties, as required.

71. The surplus process begins at school level when a school starts to plan its staffing and curriculum requirements for the coming August session. The exact time on which the process begins differs between schools but, generally speaking, can begin any time from November-January in an academic year.

72. The process begins with pupils selecting course choices. Pupils can select which courses they want to study in August. It is predicated on things like anticipated exam results. The school then takes the pupil choices and looks at resources in terms of staff, teachers, classrooms etc. Ken Robertson, Depute Rector and Bill Struthers both gave evidence on this process. Ken Robertson is the "timetabler" for Queen Anne High School. He is responsible for collating all information from the course choice sheets completed by pupils to gauge the requirements for the school in the coming academic year, in terms of staffing, classrooms, etc. It is an annual process and it is the process which determines where a potential surplus may exist.

73. Kevin Funnell is employed by the respondents as the Team Manager of the Education Directorate Operations Team. They have a remit for staffing and workforce planning. As a team they do not get involved until March when they ask every school in Fife to return a staffing return (surplus declaration

form) which is a simple template for the school to advise his team of their staffing requirements for the August session. This is very much an indicative return in March but it helps the team determine how many staff they may need to recruit. For the whole of Fife a generic advert is placed to recruit necessary staff and once appointed they are allocated to a particular school at a later date.

74. LNCT 06 is a "provision, criterion or practice" for the purposes of section 20 of the Equality Act 2010.

75. The managing of staffing surpluses, where they arise in schools, and the associated need to redeploy staff members is subject to the policy "Local Negotiations Committee For Teachers 06 (LNCT 06). The policy is one which is the subject of collective negotiation between Trade Union and Management Sides and while intended to be operated consistently Council wide, is subject to locally negotiated variation. The policy as applied in and to Queen Anne High School was the subject of a locally agreed variation.

76. The policy, which is produced at pages 123 to 134 of the Bundle, envisages that where a surplus necessitating staff transfer has been identified the respondents will first explore the possibility of a volunteer to transfer. In the event that a volunteer is not identified the policy specifies the basis upon which members of staff to be compulsorily transferred are to be identified. These include total length of continuous service in Fife, total length of continuous service based in the school and total length of all teaching service amongst others. (Paragraph 24 of the policy – page 127 of the Bundle).

77. The LNCT 06 policy was referred to. Paragraph 3 of the policy specifies the circumstances in which the requirement to move or transfer to another school will *normally* be the result of the following circumstances:-

> **"*Circumstances relating to falling school roles***
> ***School closures and amalgamations***

Circumstances relating to the reduction of service provision in the base school.
***The application of LNCT/16 as a result of restructuring*"**

78. Paragraph 19 of the LNCT 06 policy details the procedure for looking at voluntary transfer in a secondary school specifying that the Head Teacher will:

> "***(a) call a full staff meeting to advise all staff of any surplus being declared; and***
> ***(b) call a meeting with all staff in all subjects in which a surplus has been identified.*"**.**

79. The initial surplus [sic return] **of Queen Anne High School staff for the term 2016/2017 was drafted by Ruth McFarlane and lodged with Kevin Funnell's central team on 15 March 2016. On this form the claimant was named as a member of staff to be transferred with her FTE hours detailed as 0.6 FTE.**

80. The LNCT 06 policy provides that when voluntary transfer is not an option, compulsory transfer becomes a necessity. Departmental and whole school meetings referred to in the policy did take place in relation to the 2016/17 surplus. The policy does not prescribe that the meetings take place in a particular order. The policy, as applied, was subject to local variation as agreed between Trade Union and Management Side.

81. Paragraph 29 of the LNCT 06 policy was referred to by several witnesses during the Tribunal hearing. It states,

> ***"Notwithstanding para 24 above",*** [the criteria by which compulsory transferees are to be identified] ***"in determining the appropriateness of any compulsory transfer, personal circumstances such as travel, family or health will be taken into account in any decision making process in relation to both the selection of the member of staff liable***

***to transfer and the suitability of any post to which he/she may be transferred*".**

82. Paragraph 29 of the policy requires that personal circumstances, which include under the heading of Health the claimant's Asperger's Syndrome, be taken into account not only at the subsequent stage of identifying and or implementing an actual transfer but at the initial stage of identifying an individual member of staff as a person to be declared surplus and liable to transfer.

83. In the decision making process undertaken by her and which led to the selection of the claimant as a member of staff who was liable to transfer, Ruth McFarlane did not take into account the claimant's Asperger's Syndrome under the heading of Health. She believed that that was a factor which would be taken into account by the Central Team at the point of identifying a potential transfer for the claimant and before any compulsory transfer was effected. She was unaware that she also should have taken issues of health including the claimant's Asperger's into account at first instance when identifying the claimant as a person liable to be transferred. Standing the terms of the provision and her declared familiarity with the policy she ought reasonably to have been aware of the requirement that she do so.

84. The Central Team issue to schools, a stock of transfer preference forms to be used by potential transferees as a vehicle through which to communicate to their own school and to the Central Team preferences in relation to any proposed transfer. The "Transfer Preference Form" is a different form from the Secondary Surplus and Vacancy Return Form which latter form has an additional notes section which can be utilised by a Rector to record preferences of which they had been made aware by the individual liable to transfer and or additional factors which they consider should be taken account of. The claimant did not complete a Transfer Preference Form. She was unaware of the existence of such Forms. She was not provided with a copy of such a Form by the respondent nor was she asked to complete one. Such a Form, had she been provided with it and had she chosen to complete it, would have afforded the claimant an additional opportunity

of communicating her transfer preferences and information about her personal circumstances which she wished the Central Team to take into consideration. The completion of such a Form would not have been a vehicle for communicating such information for the purposes of determining whether the claimant should be identified as a person who was liable to transfer because the Forms were designed to be issued only to those persons who had already been so identified.

85. On the Secondary Surplus and Vacancy Return Form 2016, under the heading "Additional Notes" the claimant was detailed as,

> **"*0.6 FTE lives in Linlithgow so would prefer West Fife (Inverkeithing or Dunfermline)***
>
> **when this form is received by the central team, team members input data onto a master spreadsheet. Information on vacancies and transfers are on the spreadsheet for the team to collate the information. At this point the staffing exercise is commenced by the team. Appointments are made based on this return. The team list all staff members who need a post from surplus and identify suitable posts.**

86. The policy LNCT 06 contains specific provision for the taking into account in the making of the relevant material decisions amongst other matters a potential candidate's health which includes, in the case of the claimant, her Asperger's. The application to the workforce of the policy LNCT 06 did not of itself place the claimant at a substantial disadvantage when compared with a hypothetical comparator identical in all circumstances but not having Asperger's. The Application of the policy under omission of the first part of its paragraph 29 provisions did so place the claimant at a substantial disadvantage.

87. During the "matching" process the Central Team identified possible suitable transfers and begin communications with the school. It is a fluid process and the postholder is not told at that stage what possible transfers are being investigated. Possible staffing allocations including new, probationers and transfers are sent from the Central Team to all Head Teachers and school Business Managers.

That is an internal management process subject to limited information exchange. In or around May matters tend to progress and transfers begin to be confirmed but even at that stage there is restricted communication with the postholders who are to be transferred. Only once a transfer is agreed will it be communicated by letter to a postholder.

88. Certain factors are considered by the central team when deciding on a suitable transfer. The first consideration is that of travel constraints. Members of staff identified for transfer are given a pro forma in which they indicate their address, schools they like to work in and the areas they wouldn't like to work in. There is also a section for allowing members of staff to include notes of additional factors they would like to be taken into account.

89. There are other ways in which significant transfer information can and is brought to the attention of the Central Team. Sometimes through the Trade Union representative, the Head Teacher, HR and or by the individual personally. The claimant contacted Kevin Funnell personally by telephone and email on a number of occasions. (Page 573 of the Bundle). The issues which she raised with him on those occasions were restricted to issues of travel and child care constraints. The claimant contacted Angela Hunter, a member of Kevin Funnell's Central Team by telephone on or about 7 June 2016. In an email from Angela Hunter to Kevin Funnell she details a discussion between herself and the claimant in which the claimant was querying her selection as an individual liable to transfer. There is no evidence within these communications of the claimant mentioning her disability. The claimant was represented by her Trade Union at the initial stages of raising issues regarding the surplus and her identification as a member of staff liable to transfer. The claimant's Trade Union representatives did not raise any issues regarding the claimant's disability with the same Central Team.

90. The claimant sent an email, dated 22 April 2016, to Ruth McFarlane advising that she thought errors had been made in the application of the LNCT 06 policy. The email was forwarded on by Ruth McFarlane to Kevin Funnell, Sarah Else and

Shelagh MacLean. Sharing and escalating the correspondence in that fashion was normal practice for the Rector as one of the functions of the Central Team is to ensure that the policy has been followed and that the correct person had been identified for transfer.

91. All involvement of the Central Team ended in June 2017 when the claimant lodged a grievance relating to, amongst other matters, the surplus. In line with the grievance policy, in those circumstances the status quo ante applied and the work being taken forward by the Central Team in relation to the claimant's potential transfer was put on hold. There subsequently became superimposed upon that "putting on hold" of the transfer process the fact that the claimant commenced, and remained on, a long period of sickness absence.

92. **In the email of 22 April, 2016 the claimant stated,**

> **"*I have looked into the possible alternative schools and I would prefer to remain at Queen Anne.*"**

There was no mention of the claimant's disability in the email of 22 April, 2016. The claimant requested a response to the email by 29 April 2016.

93. The email, is in the following terms:-

> "*22nd April 2016 1543*
> *Ruth*
> *Having considered all the options I have concluded that I do not wish to move to another school and I am asking you to reconsider your decision to place me involuntarily on the redeploy list. I have looked into the possible alternative schools and I would prefer to remain at Queen Anne.*
> *I have consulted with my union and with my employment lawyer and I am satisfied that there have been enough errors both in fact and in process to mean that, if it comes to it, I would be able to prevent my redeployment – either through internal procedures or at an Employment Tribunal. I do not*

wish to go into these grounds at this stage as I do not want to risk inflaming the situation or creating unnecessary conflict. If you reverse your decision then there would be no need to air matters that could cause friction. However, you may wish to reflect on whether the proper processes were followed under the relevant policies.

I would be grateful for a quick response, preferably by Friday 29th April. If I have to go down the route of moving to an Employment Tribunal I would have to apply soon.

Regards,

Moray"

94. Ruth McFarlane, to whom the email was addressed, considered that it had an ominous undertone. In the email the claimant did not identify the specific errors she believed had occurred because, as she explained in evidence before the Tribunal, she *"did not want to show her hand*".

The meeting of 26 April 2016

95. On 26 April 2016 Ruth McFarlane discussed the claimant's email of 22 April 2016 with Leanne Hutchison, an HR Advisor who was in the school and meeting with the Rector on other matters. In circumstances where the claimant had declined to set out in her email the alleged errors of fact and in process relating to the application of policy LNCT 06, Leanne Hutchison advised that it would be useful to meet with the claimant informally with a view to ascertaining from her what she believed to have been the factual and process errors which had occurred in the application of the policy. At her suggestion Ruth McFarlane decided to ask the claimant to come to her office for an "informal chat". Her purpose in doing so was to explain to the claimant the steps and the policy which had been followed and to try and ascertain from her what she, the claimant, considered had been wrongly done.

96. On 26 April 2016, during the morning interval, the claimant was in the RMPS base with colleagues, Karen Fotheringham and Andrew Igoe. During the interval

period the claimant received a telephone call from Kerry Gibson, the Rector's secretary.

97. The claimant stated in oral evidence that she had secretly recorded the entire interval period within the RMPS base. She produced, at page 651 of the Bundle, what she described as a transcript of that recording. The recording itself was not produced by the claimant.

98. In the course of the telephone conversation with the claimant, Kerry Gibson conveyed a request from the Rector that the claimant "*pop along to the Rector's office for a chat*". The claimant initially acceded to the request but, after the telephone conversation had ended, became apprehensive about attending the meeting which apprehension she discussed with Karen Fotheringham. She advised Karen Fotheringham that she did not wish to attend the meeting but would rather meet with the Rector on the following day when, as it happened, her Trade Union representative was going to be in the school and would be available to accompany her to the meeting. Karen Fotheringham conveyed that position on the claimant's behalf by telephone to Kerry Gibson who, in response encouraged the claimant to attend on the basis that the meeting was to be "*really informal and that the Rector just wanted a quick 5 minute chat*". The claimant agreed to attend.

99. The claimant was not told what the purpose of the meeting was, nor was she given notice of the meeting or an opportunity to prepare. She was asked to attend instantly. The claimant was advised that someone from HR would be present. Following the meeting, and on the same day, 26 April 2016, the claimant sent an email to her Trade Union representative Alison Karalar in which she stated, amongst other things:-

> "*When I got there, a woman from HR was present – I think they mentioned this on the phone but I hadn't caught it".* (Page 541 of the Bundle)

100. The claimant went along for the meeting with Ruth McFarlane on 26 April, 2016. She covertly recorded this conversation. Leanne Hutchison, HR Advisor was in the room with Ruth McFarlane when the claimant entered. A recording produced by the claimant and transcribed by the claimant as evidence was played during the Tribunal proceedings. The recording played did correlate (in the main) with the transcript produced in evidence.

101. Present at the meeting of 26 April were the claimant, the Rector Ruth McFarlane and Kerry Gibson from the HR Department. The Rector Ruth McFarlane tried to establish with the claimant what the errors, referred to in the claimant's email of 22 April, were in relation to the question of surplus. The claimant, for her part, was not prepared to detail what she believed the errors to be.

102. The claimant thereafter took the initiative in the conversation. She began making a statement to Leanne Hutchison, the HR Officer, about the Rector. She said that it felt to her that her selection as a member of staff declared surplus was happening because she had had to go home on 2 March to look after her daughter. She stated to Karen Fotheringham that when she had asked the Rector that she be allowed to go home to relieve her husband who was looking after their daughter that the Rector had suggested to her that she "*leave your daughter at home on her own for a few hours*". Ruth McFarlane denied making any such statement. The claimant became angry and an exchange then occurred between the claimant and Ruth McFarlane in terms of which Ruth McFarlane disputed the claimant's version of events. Ruth McFarlane described the claimant's statement that she had told, or suggested that, the claimant should leave her daughter at home on her own for a few hours as a "*blatant lie*". In response the claimant raised her voice shouting that Ruth McFarlane had accused her of lying and shouted at Ruth McFarlane:- "*Don't you ever accuse me of lying*". The claimant then left the room slamming the door behind her.

103. The claimant covertly recorded the meeting of 26 April. In going into the meeting she took steps to disguise the fact that she was recording, using her "banana guard keys" to disguise the fact.

104. Immediately after the claimant left Ruth McFarlane's office she had an exchange with Kerry Gibson whose office was opposite. She shouted at Kerry Gibson angrily. She appeared upset and, to Kerry Gibson, to be behaving aggressively towards her.

105. The meeting of 26 April 2016 was prompted by Leanne Hutchison, the HR representative who was present in the school to discuss other matters with the claimant. Ruth McFarlane's intention in asking the claimant to meet with her was to ascertain from the claimant the nature and details of the errors that she, the claimant, had referred to in her email of 22 April 16. The description of the meeting conveyed to the claimant when she was asked to attend it namely, "just a quick chat" did not accurately describe the nature or purpose of the meeting. In that respect it was not an informal meeting. There was, in the circumstances, a duty incumbent upon the respondent, arising in terms of section 20 of the 2010 Act to take steps as it was reasonable to have to take to avoid the disadvantage to which the claimant was put. Those steps included:-

(a) To have given the claimant notice of the nature and purpose of the meeting including any information that might be requested from her, thus allowing her an opportunity to prepare for and effectively participate in the meeting in the event that she opted to attend it.

(b) To have given the claimant the right to be accompanied at the meeting by her trade union representative.

(c) Not to have prevailed upon the claimant to attend the meeting after she initially declined to do so and expressed the desire to have the meeting on the following day in the company of her trade union representative.

(d) That the respondent failed to take any of the above steps and in doing so breached the duty arising in terms of section 20 and thus

discriminated against the claimant in terms of section 21(2) of the Equality Act 2010.

106. The claimant left school and went home that day and immediately sent an email to her Trade Union representative providing details of what happened. The claimant then lodged grievance 1 the following day.

107. By 27 April 2016, the day upon which she lodged her grievance, the claimant had taken the decision that she would not return to Queen Anne High School whilst Ruth McFarlane remained as the Rector. She had formed a view that Ruth McFarlane had, for her part, formed the view that she wished to be rid of the claimant because of the exchange which had occurred between them on 2 March 2016 in connection with the claimant asking to be allowed to go home. The claimant's view in that regard was erroneous. Ruth McFarlane had not formed the view that she wished to be rid of the claimant because of the conversation which had taken place between them on 2 March 2016.

108. The day after the meeting of 26 April 2016, the claimant lodged grievance number 1 [PG193]. In the document the claimant detailed her version of what happened at the meeting of 26 April 2016. The stated purpose of the grievance was to raise the issue of unacceptable conduct of the Head Teacher at that meeting but there were repeated references within the document to the issue of the declaration of surplus. The claimant stated in the document that surplus would be;

"*Subject to a further grievance, which I will submit in due course.*"

109. In the grievance document lodged the claimant stated,

"*I felt that to summon me to such a meeting, where the format was so very different from what had been promised was inappropriate and unfair. Further the way the actual meeting was conducted was*

***upsetting (and particularly as HR was present) and unprofessional. This is even more so, given my disability.*"**

The claimant goes on to state,

"***I feel that I was misled about the nature of the meeting, that it was an ambush, that it was conducted inappropriately. I wish to formally complain about it and the way I was treated during it.*"**

110. The claimant in her reference to the format of the meeting used the terminology "*unfair and inappropriate*".

111. In relation [*sic* to] **the claimant's disability, it was referenced in her grievance lodged in the following way,**

"***It is important to note that Ruth knows I have a disability, specifically Asperger's Syndrome. This is a factor in two specific reasons; as I was unprepared for the discussion I found it impossible to hold my position that I didn't want to talk without my union rep being present; and I cannot cope with injustice, which manifested when she accused me of making up the discussion about my daughter. To have respected the impact of my disability, Ruth would only have had to give me more notice about the meeting, been upfront about its nature, allowed me to be accompanied as I have requested and not make a false allegation during it. This is of course applied to everyone but is far more important in the case of a person with Asperger's Syndrome".***

112. The claimant did not expressly bring to the respondent's attention any particular symptoms of her disability, clinically confirmed or otherwise, or of how it impacted upon her. At or about the time of her first disclosing her diagnosis the then Depute Rector, Graeme Hamilton, had asked the claimant to write down and give

to the school the detail of how Asperger's impacted upon her but she failed to do so and did not provide that information to the respondent.

113. The claimant stated in her evidence before the Tribunal that she was unable to cope with what she perceived as injustice and that she believed that this was a consequence of her having Asperger's Syndrome.

114. The resolutions being sought by the claimant in relation to grievance 1 were detailed as:

> ***"Ruth is requested to apologise for wrongly accusing me of lying, misleading me about the meeting and not respecting my request to have a Union rep present. The matter be considered under disciplinary procedures, and any development needs addressed.***
> ***Ruth be moved from her post pending investigation, because I feel my workplace is too hostile an environment to return to."***

115. The claimant wished to remain working at Queen Anne High School and to return from sickness absence to Queen Anne High School. She was not prepared to do so unless the Rector, Ruth McFarlane, was removed from her post as Head Teacher. She believed that the Rector had manufactured a surplus in order to punish her by declaring her surplus and putting her on the transfer list. She believed that if the Rector were removed from her post then she, the claimant, would no longer be regarded as surplus and would not be transferred.

116. The claimant returned to school for only two days having gone home following the meeting of 26 April 2016. She was absent due to ill health (stress/anxiety) from April 2016 until her resignation in September 2017 with the exception of two days which occurred just prior to the end of the 2015/2016 term.

The Grievance Investigation

117. Sarah Else, Education Officer, was tasked with carrying out the investigation into the claimant's grievance. She began her investigation into the grievance lodged by meeting with the following individuals:

(i) The claimant (in the presence of her Trade Union representative)
(ii) Ruth McFarlane, Head Teacher
(iii) Kerry Gibson, Administrative Coordinator
(iv) Laura Martin, Depute Head Teacher
(v) Denise Ewing, Administrative Assistant
(vi) Leanne Hutchison, HR Advisor
(vii) Bill Struthers, Business Manager
(viii) Karen Fotheringham, Principal Teacher IDL and Outdoor Learning

She also received a written statement from Robert Pennell, Technician.

118. Sarah Else met with all individuals on 18 May 2016 (with the exception of Karen Fotheringham whom she met on 31 May 2016) and took statements from them. On 1 June 2016, Sarah Else produced a grievance investigation report pack which contained copies of all statements taken from the various witnesses and which is copied and produced at page 137 of the Joint Bundle.

119. Her findings (at page 140) are summarised as follows:-

"*(i) The meeting of 26th April 2016, was meant to be an informal chat. The claimant knew that an HR rep was there and the reason why and simply because of HR's presence did not render the meeting formal.*

(ii) The meeting was not "intended" to be unfair and inappropriate. She was not ambushed but it would have been more appropriate to

have the meeting as a planned meeting so the claimant had more time to consider her attendance at the same.

(iii) The role and purpose of HR at the meeting was conveyed to the claimant and if she wanted further clarification she simply had to ask.

***(iv) Ruth McFarlane did not use inflammatory language and did not accuse the claimant of being a liar.*"**

120. In recommendations, Sarah Else stated (see page 141 of the Bundle):

"*The finding of this investigation is that no serious breach of either school or Council policy was evident in RM's actions. In order to address this grievance it is recommended that a restorative meeting be arranged between RM and MH.*"

121. The grievance investigation pack was sent to the claimant on completion. On receipt of the pack the claimant sent a letter, dated 13 June 2016, to Peter McNaughton, Head of Education in which she alleged that several colleagues had misrepresented events and her behaviour in highly negative terms. She went on to disclose that she had been covertly recording conversations for some time using her phone in situations "*that have the potential to be emotional*". She included a "*transcript*" of what she considered to be the relevant meetings and advised that she would be lodging a further grievance with regard to the comments made to Sarah Else during her investigation of the first grievance.

122. On 16 June, Peter McNaughton sent an email to the claimant confirming that the grievance hearing scheduled for the following day would be postponed and Sarah Else would be contacted to confirm how best to proceed.

123. On 17 June, Peter McNaughton emailed the claimant to advise that to ensure a thorough and fair investigation Sarah Else had been tasked with

obtaining access to the original recording to then review the recording with the current statements and note any discrepancies. The claimant was also informed that Sarah Else would meet with the witnesses concerned to make them aware of the new information regarding the covert recording. He advised that the investigation report would then be amended to take into account the additional information.

124. On 21 June 2016 the claimant sent an email to Peter McNaughton advising that she wished to have the issues of the alleged misrepresentations treated as a further grievance. The claimant lodged 'grievance 2' by email to Peter McNaughton on 27 June 2016 (page 545 of the Bundle). This was a document specifically referencing three relevant discussions together with copies of the Minutes from those individual's interviews with Sarah Else and a transcript produced by the claimant. This specific documentation copied in with the email of 27 June 2016 was not produced in the Joint Bundle.

125. On 21 June 2016, Sarah Else sent an email to the claimant requesting a copy of the audio files relating to the ongoing grievance. There was then some correspondence between the claimant, Gordon Struth and Sarah Else regarding the format of the recordings, size of the files and where the recordings were to be dropped off. A flash drive with the recordings was produced on or about 28 June 2016.

126. On 21 June 2016, 'grievance 3' was lodged by the claimant (page 257 of the Bundle). This grievance related to the circumstances of the claimant being declared surplus.

127. In an email from Peter McNaughton to the claimant he confirmed that the original investigation would be reopened and Sarah Else would be tasked with collating any additional information and updating the investigation report.

128. Sarah Else reopened the investigation to enable her to further investigate grievances 2 and 3, lodged by the claimant. Sarah Else interviewed the following individuals on 23 August 2016.

(Pages 293 to 309 of the Bundle)

(i) Ruth McFarlane, Head Teacher (page 201 of the Bundle)
(ii) Heather Heneghan, Trade Union rep and Teacher at QAHS
(iii) Andrew Igoe, Teacher
(iv) Kerry Gibson, Administrative Coordinator
(v) Dennis Ewing, Clerical Assistant
(vi) Karen Fotheringham, Principal Teacher
(vii) Laura Martin, Depute Head Teacher

On 25 August 2016 Sarah Else interviewed Kevin Funnell. On the same date Sarah Else sent a letter to Leanne Hutchison, HR Advisor, confirming that the claimant had covertly recorded the meeting of 26 April 2016 at which she had been present. On 30 September 2016, Bill Struthers was interviewed by Sarah Else and notified of the covert recording.

129. The claimant was also re-interviewed by Sarah Else on 30 August 2016. The claimant was supported at that interview meeting by her husband Gordon Struth.

130. Sarah Else had been instructed by the respondents to inform each of the witnesses, at the point of advising them that they had been covertly recorded, of their right to make a formal complaint in that regard to Peter McNaughton, in the context of the duty of care owed by the respondent to all employees potentially affected by the covert recording. She so advised each of the witnesses when re-interviewing them.

131. Individuals who had been covertly recorded were given the option of listening to the recordings in the presence of Sarah Else. All opted to do so with the exception of Ruth McFarlane. Sarah Else had herself listened to all of the recordings. She informed Ruth McFarlane that she, Ruth McFarlane, could be

heard on the recording stating '*That's a blatant lie*'. She further informed Ruth McFarlane that the claimant was alleging that she, Ruth McFarlane, had called the claimant a liar but that that could not be heard on and was not borne out by the recording. Ruth McFarlane had not in fact called the claimant a liar.

132. Had the claimant asked for permission to record particular meetings within the school or discussions by way of the making of a reasonable adjustment in light of her Asperger's Syndrome, for example, in order to assist her in subsequently understanding what had been said at a meeting, the Rector Ruth McFarlane would have been supportive of such recording taking place with the knowledge and consent of the other parties participating at the particular meeting or discussion.

133. The claimant did not make any such request of the respondents. The claimant had developed the practice, in the course of her employment at Queen Anne High School, of routinely but clandestinely recording her discussions and conversations with other people and discussions which proceeded amongst colleagues. She explained in the course of oral evidence that she did so for a variety of reasons principally so that she could feel safe and be confident, in the event that she wanted to prove that someone had said something inappropriate, that she would be able to do so. She explained that it was necessary, in her view, to covertly record because if individuals were aware that they were being recorded they might be careful not to say the things which she might subsequently require to accuse them of.

134. Sarah Else concluded her investigation and produced an updated grievance investigation report dated 12 September 2016 (page 327 of the Joint Bundle). The grievance outcome recommended, amongst other matters, that the identification of the claimant as a member of staff liable to transfer out of Queen Anne High School due to surplus should stand.

135. A stage 1 grievance hearing was initially scheduled for 3 October 2016 but required to be rescheduled with the hearing then arranged for 1 November 2016.

136. On 28 October 2016 Peter McNaughton wrote to the claimant advising that the stage 1 grievance hearing would be chaired by Carrie Lindsay, Head of Education and Children's Services (Early Years and Early Primary).

137. The stage 1 grievance hearing went ahead on 1 November 2016 (page 419 of the Bundle). At the hearing the claimant was supported by her husband Gordon Struth. Sarah Else was present as the Investigating Officer presenting details of her report. Ruth McFarlane was also present. The Grievance Teaching Policy makes it clear that where a formal grievance hearing involves the action of another and, where appropriate, all parties are present the person whom the grievance is about will be present. (Page 156 of the Bundle).

138. During the stage 1 grievance hearing on 1 November 2016 the matter of the covert recordings was raised and in particular an issue arose with regard to the claimant's editing of one recording into two different "clips". When the recordings were first provided at the time at which grievance 2 was lodged, two separate recordings on a flash drive were produced. The claimant had advised that the full recording had been edited to remove a private conversation which occurred between her and her colleague Andrew Igoe and Karen Fotheringham after she left Ruth McFarlane's office on 26 April 2016 but before the arrival of Laura Martin into the RMPS base. Kerry Gibson, for her part, stated that the recording which was produced did not fully reflect what actually occurred in respect of the claimant's conduct towards her after the claimant had left Ruth McFarlane's office.

139. In the course of the 1 November 16 stage 1 grievance hearing Gordon Struth offered to make the full recording available to Carrie Lindsay. Carrie Lindsay asked that the full recording be made available to her before she reached a

decision. The hearing of 1 November 2016 was adjourned for that purpose and the timetable leading to an outcome decision was adjusted to accommodate the same.

140. The complete recording was not produced to Carrie Lindsay who wrote to the claimant on 11 November 2016 pointing out that she had not received the recording. In response the claimant sent an email to Carrie Lindsay on 18 November 2016 advising that she had reconsidered the position with regard to providing a full recording and was not going to release it.

141. A stage 1 Grievance Hearing outcome letter was sent to the claimant dated 5 December 2016. The outcomes were as follows:-

> **"*Grievance 1 – partially upheld this grievance due to the misrepresentation of HR's attendance and that I believe it would have been better that a formal meeting was arranged to discuss your concerns and take account of your disability.***
> ***Grievance 2 – in reading the transcripts and listening to the short recordings that correlates to the statements that led me to believe that there is no evidence of misrepresentation or false statements. The same language being used by people may be perceived differently and the statements provided were from the individual's perception and memory of the conversation. I find that there is no evidence of collusion in the statements.***
> ***Grievance 3 – from the information provided I do not uphold any of the elements in relation to grievance 3*" (page 442-444 of the Bundle).**

142. The claimant was advised in the final paragraph of the correspondence, of her right to complete an enclosed Grievance Form requesting a Stage 2 Hearing to be submitted to the Executive Director of Education and Children's Services within 10 days of receipt of the letter, outlining her reasons for appeal (page 445 of the Bundle).

143. The Grievance Form enclosed with and attached to the letter of 5 December 2016 also specified that the Form had to be lodged within 10 days of receipt of the outcome letter (page 453 of the Bundle).

144. The claimant lodged an appeal letter against the Stage 1 Hearing by sending a letter to Steve Grimmond, Chief Executive dated 15 January, 2017. This was over one month after receipt of the outcome letter and in breach of the 10 day deadline specified in the correspondence. (Page 459).

145. The appeal letter was sent to Steve Grimmond as opposed to Carrie Lindsay as Carrie Lindsay had taken over the role of Executive Director in the intervening period. On the final page of the claimant's appeal letter she included a paragraph on 'timing' and explained that she was in a state of shock after reading the outcome letter and stated,

> **"*As a person with Asperger's ….. it has taken me this long to compose myself sufficiently to make a proper, detailed appeal.*"**

She went on to state "*Ten days is nowhere near long enough to appeal in such a lengthy, detailed and complex case, and the pressure of this deadline significantly added to my anxiety*".

146. The claimant was aware of the 10 day deadline for lodging an appeal against the Stage 1 outcome. Neither she, nor, her by then representative Gordon Struth, (her husband) contacted the respondent within the 10 day period to ask for an extension of time to lodge the appeal because of any matter said to be connected with the claimant's Asperger's Syndrome, or at all. The claimant did not comply with the 10 day deadline. The claimant took no steps to progress an appeal or an attempted appeal against the Stage 1 outcome until 15 January 2017, some six weeks after the date of the correspondence sent to her electronically, and by post, intimating the outcome, advising her of the right to appeal and of the 10 day period during which that right required to be exercised.

147. The claimant's request that she be allowed to submit a late appeal against the Stage 1 outcome and set out in her letter of 15 January 2017, was considered by the respondent's Chief Executive Steve Grimmond. In doing so Steve Grimmond gave consideration to the claimant's stated reasons for the late timing of her appeal and in order to inform that consideration took advice from a specialist in Asperger's and other related ASD spectrum disorders, Vivian Sutherland, Principal Psychologist in Education with expertise in ASD spectrum disorders. That advice, as contemporaneously sourced by Steve Grimmond, is copied and produced at page 488 of the Bundle.

148. Upon his consideration of the claimant's request Steve Grimmond declined to accept the claimant's late appeal against the Stage 1 outcome. By letter dated 31 January 2017 (page 463 of the Bundle) Steve Grimmond wrote to the claimant advising her of that decision and setting out his reasons. In relation to the claimant's assertion and stated reason for lateness that 10 working days was not sufficient time to submit an appeal in what was a complex matter, he noted that the claimant had not requested that any additional time be allowed to her nor had she indicated, at any prior time, that she thought that the 10 day period would be insufficient. He accordingly rejected that ground.

149. The second point set out in her letter of 15 January 2017 was, – "*As a person with Asperger's this*" [the decision communicated in the respondent's letter of 15 December advising the Stage 1 outcome] "*is considerably more difficult to take. It has taken me this long to compose myself sufficiently to make a proper detailed appeal,*" Steve Grimmond explained, in relation to this ground that the specialist advice which he had taken was to the effect "*that a formal letter, such as the one sent on 5 December, outlining in clear terms a decision which has been taken should not have been something that someone with your condition would be assumed to have difficulty with and in fact could be seen to be a helpful measure in supporting understanding. In my view the Council could not have been expected to make any adjustment without evidence, in advance, of a difficulty with processing written information.*" He went on to advise, taking into account all that the claimant had said and the specialist's advice received by him,

that he did not accept the claimant's explanations for her late submission or failure to comply with the timeframes outlined in the procedure, and that her grievance would not be progressed to Stage 2. He was, in the circumstances, reasonably entitled to so conclude in reliance upon the expert clinical advice which he had sourced and received.

Harassment

Section 26 Equality Act 2010

Return to work meeting

150. A meeting took place between Sarah Else and the claimant on 30 June 2016 at which Gordon Struth was in attendance in support of the claimant. Amongst matters as discussed at the meeting were arrangements for the claimant's return to work and the process to facilitate the same. Sarah Else advised that a return to work meeting would take place between the claimant and Ruth McFarlane. The claimant and Gordon Struth expressed the view that that would not be appropriate given that the claimant's pending grievance was in part directed against Ruth McFarlane.

151. The meeting of 30 June 2016 was adjourned by Sarah Else to allow her to address the claimant's concerns. The meeting having reconvened, arrangements were put in place for Ann Davey, Depute Rector to conduct the return to work interview. Sarah Else did not insist on the return to work interview being conducted by Ruth McFarlane. She immediately made alternative arrangements when the claimant voiced her concerns.

152. Arrangements were also put in place with a view to ensuring that the claimant need have no contact with the five individuals named by her in her grievance and it was agreed that the claimant would return to work after the school holidays. The claimant did not return to work after the holiday. She remained absent through ill health until the point of her resignation in September of 2017.

Alleged Collusion to give false statements during the investigation of Grievance 1

153. The claimant raised a grievance–2 alleging that a number of individuals Ruth McFarlane, Laura Martin, Leanne Hutchison, Kerry Gibson and Denise Ewing had given deliberate, false statements and had deliberately misrepresented her behaviour and conduct at the meeting of 26 April 2016 and shortly afterwards.

154. The claimant asserted in her oral evidence that the deliberately false statements were given as a result of collusion between five named individuals who gave the statements and Ruth McFarlane at the instigation of Ruth McFarlane.

155. The claimant produced a flash drive with two audio files when lodging grievance-2 together with a transcript of those audio files which she also produced. At some point prior to the Grievance Hearing in November 2016 the audio files and the transcripts produced were reviewed and minor amendments were made by an HR representative.

156. It is accepted that the recordings produced at the Tribunal Hearing (being produced in three parts as opposed to two) are the same as the recordings referred to at the Grievance Hearing in September 2016.

157. The recordings ultimately produced and listened to at the Hearing before the Employment Tribunal and referred to at the internal Grievance Hearing were said by the claimant to form part of a larger more complete, allegedly continuous, recording covertly made by her.

158. The recording(s) had been edited by or on behalf of the claimant prior to their being produced by her, by which is meant it being divided variously into two/three parts and by the removal of part of the recorded material.

159. The direct evidence of the claimant on the one hand and of her husband Gordon Struth on the other hand, in relation to the “editing”, differed and was in part contradictory. The claimant stated in evidence that “it was my husband who split

them". The claimant's husband, Gordon Struth, in his evidence, stated that he did not know about the existence of the recordings until after receipt of the initial grievance investigation pack in June of 2016. Both the claimant and Gordon Struth stated that neither of them listened to the recording of 26 April 2016 until June of 2016. Gordon Struth stated that he himself had never listened to the full original recording. He stated that it was the claimant who split the recordings.

160. Sarah Else was tasked with listening to the recordings, in the internal grievance investigation, and comparing what she heard with what was stated in the statements of Ruth McFarlane, Laura Martin, Leanne Hutchison, Kerry Gibson and Denise Ewing.

161. When the recording produced by the claimant in the course of the grievance procedure was played by Sarah Else to Kerry Gibson, Kerry Gibson's position was that it did not reflect what had happened on the day. She considered that a section must have been removed. In giving evidence before the Tribunal Kerry Gibson adhered to that position. She remained firm in that view in the course of cross examination. She gave evidence, in relation to various floor coverings in the office area and in the corridors and in relation to the sound made when they were walked upon and in relation to the timing and positioning on the recording of the phrase:- "*It was not a good idea to speak without the Union*" being the only part of the exchange involving herself and witnessed by Bill Struthers which she and Bill Struthers recognised as represented in the recording which was played, which supported her view that editing of the recording had occurred to the extent of removing a section and of moving another section to another location. She adhered to the version of events given by her in her statement made in the course of the internal grievance procedure. She stated that the balance of the claimant's interaction with her did not appear on the version of the tape which was played to her.

162. From the exercise, carried out by Sarah Else, of listening to the tapes three issues were focused for her:

(i) Ruth McFarlane did use the phrase “That’s a blatant lie” during the meeting of 26 April 2016.

(ii) Ruth McFarlane did not call the claimant “a liar” in the course of the meeting.

(iii) Kerry Gibson raised an issue with regard to the recording not being an accurate reflection of what took place including in particular the claimant’s conduct towards her after she, the claimant, left the Rector’s office on the first occasion.

(iv) The perception of parties in relation to what they had witnessed was important.

(v) She considered that it was perfectly possible for various witnesses to a series of incidents which occurred in closely related physical locations and timescales, to be different. She did not consider that such differences in perception as might have occurred as between the various witnesses established that they had deliberately made false statements, nor that they had colluded with a view to making deliberately false statements.

163. Ruth McFarlane in her interview of 18 May 2016 stated (page 172 of the Bundle):

“*MH was pointing and shouting at me. I kept very quiet and said calmly that MH and I had a different perception of what had happened. In my opinion, MH lost control, headed towards me and pointed in my face. I thought MH was going to physically assault me. MH grabbed the door with both hands and slammed the door closed. The door has a soft closure mechanism but MH managed, with some force, to slam the door closed. I could still hear her screaming and shouting. I was concerned that there could be pupils or parents in that area. This was an unsafe and unprofessional way to act within school.*”

164. Leanne Hutchison in her interview of 18 May 2016 stated (page 183 of the Bundle):

"*There was a disagreement over what MH believed RMcF said. MH then said to RMcF "Are you calling me a liar?" I said that there were clearly different perceptions but that that was nothing to do with why we were here and that we were there to discuss the process carried out to declare staff surplus. MH got up and kept shouting "I am not a liar". MH then slammed the door with some force. MH was then shouting in the corridor or at someone in another room".*

165. Kerry Gibson in her interview of 18 May 2016 stated (page 175 of the Bundle):

"*I heard a raised voice, it was clear and the voice said 'So you're calling me a liar'. ME, BS, BP and DE were also in the office. It was not RMcF's voice. I have not heard her with a raised voice before. I heard the door opening and then heard it slam. It has a slow closure and in 12 years I have not heard the door slam. It was slammed shut and MH left. MH then came back to the office ranting and accused me of leading her into a meeting with RMcF. MH pointed her finger in my face in an aggressive manner. I could see MH was upset, angry and agitated. MH was accusing me of leading her into a meeting which was not informal.*"

She went on to state, (page 176 of the Bundle),

"*MH was abrupt and rude to me*".

166. Denise Ewing in her interview of 18 May 2016 stated (page 181 of the Bundle):

"*I was in the office with KG and BS when I heard someone shouting, 'I'm not a liar'. MH came out of RMcF's office and closed the door with such a force that it bounced. MH went away and then came back*

***into the office Bill and Kerry share. She was very angry and shouting directly at Kerry from just inside the door that KG had misled her by saying that she 'didn't need anyone' at the meeting she had attended with RMcF. MH said that RMcF had called her a liar and that she was going home as she felt unwell.*"**

Denise Ewing went on to describe MH as being "angry" and "aggressive".

167. Laura Martin in her interview of 18 May 2016, stated, (page 179 of the Bundle):

"***MH was anxious and not rational. MH had no awareness of how she was coming across. MH said she had been called a liar by RMcF and was very angry. I said that I was sure RMcF wouldn't think that. MH said that RMcF was out to get her as she had had a day off to look after her child. I asked MH if there was anyone at home as I was concerned. MH said she hated being called a liar. MH said she had gone to the Ombudsman about her children and someone lying. I was unable to reason with MH. MH was very stressed and said about the transfer and that she was unsure where she was going. I said I'd be the same. MH said that RMcF was unprofessional and had called her a liar. MH was like a child when information was not 'chunked down'. MH spoke about her sister's health condition, about a book and about going home to make recipes from this book. MH was not coherent. I thought MH was not rational.*"**

168. No evidence which established collusion or conspiracy to provide deliberately false statements amongst or between some or all of the five named individuals and or Ruth McFarlane, was placed before the Tribunal.

Victimisation

Section 27 of the Equality Act 2010

169. The respondent carried out investigation in respect of all three grievances lodged by the claimant. Grievance-1 was partially upheld at the Hearing in November 2016. The Grievance Hearing was adjourned to allow the claimant an opportunity to provide the original recordings (which she ultimately decided not to do).

170. The Grievance Officer, Sarah Else, stated in evidence that the grievance(s) were complicated to investigate.

171. The period of six months taken to fully investigate the separately lodged grievances was not unreasonable, in the circumstances which included school holidays and the disclosure, in the course of investigation, of clandestine recording which necessitated re-interviewing of witnesses.

172. In relation to the allegation of collusion, Sarah Else listened to the recordings provided, she re-considered the statements of the five named witnesses, she gave each witness the opportunity to listen to the recordings and to comment, she compared the recordings with the written statements. She concluded that the recordings did not amount to evidence of collusion. That was a view which she was reasonably entitled to reach on the evidence presented to her.

173. The protected acts, relied upon by the claimant for the purposes of her section 27 Equality Act 2010 complaint of victimisation, occurred at a point in time after the decision to declare the claimant surplus was taken.

174. On 8 August 2017 a job advert for a Teacher of Religious Education, full-time at Queen Anne High School was placed on an external and internal recruitment website. It was a permanent post being the post previously occupied by Andrew Igoe who had left Queen Anne High School to take up a teaching post at another school. The respondent required to fill the advertised post in time for the commencement of the new term in August 2017.

175. As at 8 August 2017 the claimant continued to be absent from work through ill health medically certified unfit to work. Her internal grievance had resolved in January of 2017 with the outcome that the decision to declare her surplus remained in place. Douglas Sinclair, Depute Rector at Queen Anne High School was engaging with the claimant regularly to try to facilitate an OH assessment to support her return to work.

176. The vacancy in the RMPS Team was not brought to the attention of the claimant by either the school or anyone from the Central Transfer Team. The claimant saw the advert in August 2017 herself and became aware of it then. Andrew Igoe had told the claimant in May of 2017 that he would be leaving and that his post would be vacant. The claimant, for her part, did not contact either the school or the Central Team to advise them that she would be interested in such a position as and when it became vacant. She was in regular contact with Douglas Sinclair. She did not mention interest in the potential post or, after its advertisement the actual post, to him.

177. Queen Anne High School required a full-time teacher to teach in the coming academic year 2017/2018. The claimant was part-time and while still employed at the school was on the transfer list and continued to be absent due to ill health certified unfit to work. The claimant had separately stated that she would not return to teach at the school unless the Rector Ruth McFarlane was removed from her post. There were no plans to remove the Rector from her post in the academic year 2016/2017.

178. The policy LNCT 06 created no right on the part of the claimant to be offered and no obligation on the part of the respondent to offer the advertised post prior to its being advertised. Such a right accrues under the policy only to employees who have already been compulsorily transferred in consequence of being declared surplus. The claimant had not been compulsorily transferred. She remained employed at Queen Anne High School, albeit absent due to ill health and certified unfit to work.

179. The evidence presented established no causal link between the respondents not making the claimant aware of the advertised role in August 2017 or not offering the post to her prior to its being advertised, on the one hand, and any of the protected acts relied upon by the claimant on the other.

Jurisdiction (Time Bar)
Victimisation

180. In relation to paragraph 2.5(a) of Issues above,

(a) no notice was contained in the ET1 in claim number 4104090 of 2016 first presented on 26 July 2016, of reliance as protected acts upon the grievances lodged by the claimant on 21 and 27 June 2016 (as opposed to that lodged by her on 27 April 2016), or upon making by her complaints of disability discrimination (either expressly or by implication) and or upon the commencement of an Employment Tribunal claim on 26 July 2016.

(b) Neither were those matters given notice of as so relied upon at the Closed Preliminary Hearing of 29 September 2016, nor are they recorded as relied upon in the context of the Issues set out, under the heading of “Victimisation”, at paragraph 2.5 of the Tribunal’s orders and note issued following the 29 September 16 Hearing.

(c) The claimant first gave notice of seeking to rely upon those matters for those purposes in the ET1 constituting her second claim, number 4106953 of 2017, first presented on 12 December 2017. That notice is given outwith the primary time period allowed in terms of section 123(1)(a). No case is advanced in respect of section 123(1)(b) of the EqA 2010.

181. With reference to making and maintaining the decision to deem the claimant surplus to staffing requirement and to failing to offer or to make the claimant

aware of the role advertised in August 2017, as being relied upon by the claimant as consequential detriments, was first given notice of in claim 4106953/2017 presented on 12 December 2017, whereas the alleged detriments are said to have occurred respectively on 3 March 2016 and on 8 August 2017.

182. Notice of reliance upon the matters set out above, respectively as protected acts and as consequential detriments was first given by the claimant outwith the three month period proscribed in terms of section 123(1)(a) of the Equality Act 2010. No argument is advanced in terms of section 123(1)(b) of the 2010 Act.

183. In so far as founded upon the matters noted above which were given notice of outwith the primary period prescribed in section 123(1)(a), the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider, in terms of section 123 of the Equality Act 2010, the claimant's complaints of victimisation.

Jurisdiction (Time Bar) - Harassment

184. The specific claim of harassment set out at paragraph 2.4(d) of the Tribunal's order of 13 November 18 and at the same numbered paragraph of Issues above, is not referred to in the original ET1 in claim number 4104090/2016 first presented by the claimant on 26 July 2016.

185. At the Closed Preliminary Hearing (Case Management Discussion) which proceeded in the case on 29 September 2016 for, amongst other matters the purpose of identifying and recording the Issues in the case, the claimant was represented by her husband Gordon Struth. Under the heading of "Harassment" the claim now set out at paragraph 2.4(d) of Issues above was not identified on the claimant's behalf nor recorded by the Tribunal.

186. In terms of the Tribunal's orders issued following the Closed Preliminary Hearing of 29 September 2016, there was allowed to the claimant a period of time within which to further particularise her claim of harassment. The claimant lodged a Minute of Amendment and lodged an Application to amend dated 13 October

2016 (page 47 of the Bundle). That Application was opposed by the respondent. The Application to amend was subsequently withdrawn by the claimant's then solicitor Mr McParland who appeared on her behalf at a subsequent Closed Preliminary Hearing proceeding before Judge Macleod on 23 February 2018. In his Note of Output, issued following the Closed Preliminary Hearing of 23 February 18, Judge Macleod records at paragraph 13 the respondent's representative's undertaking, in the event that the application to amend was withdrawn, that the respondent would not argue subsequently that the claimant was in default of the Tribunal's earlier Order to provide Further Particulars. At paragraph 14 and 16 of the Note, Judge Macleod records as follows:-

> "*14. That undertaking having, very reasonably, been given by the respondent, Mr McParland confirmed that the claimant was content to withdraw the application to amend and accordingly, it is treated as withdrawn.*
>
> *"16. However, it is important to record that the respondent seeks to reserve its right to argue that any part of the claim, set out in either the 2016 or the 2017 claim, may be time barred and thereby falls outwith the jurisdiction of the Employment Tribunal."*

187. The claim recorded at paragraph 2.4(d) of Issues above, relating to an alleged incident said to have occurred on 3 March 2016 in terms of the second claim ET1, 4106953/2017 and first presented by the claimant on 12 December 2017, is presented outwith the primary time period prescribed in terms of section 123(1)(a) of the Equality Act 2010. No argument is presented to the effect it falls within the Tribunal's jurisdiction in terms of section 123(1)(b) of the 2010 Act.

188. The claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider, both in terms of section 123 of the Equality Act 2010, the claimant's claim of harassment as set out at paragraph 2.4(d) of Issues above.

Discrimination arising from Disability Section 15 of the Equality Act 2010

189. Of the five named individuals alleged to have made false statements about the claimant, only one, Ruth McFarlane, knew of the existence of the claimant's disability (being Asperger's Syndrome). The statements made by those individuals, absent that knowledge, were not based upon prejudice and stereotyping.

190. At the time of the incidents referred to and relied upon by the claimant, apart from that contained within the letter of diagnosis of 4 December 2013 which contained no information as to how Asperger's Syndrome affected the claimant specifically, the respondent had no information as to the extent to which the claimant's disability impacted her day to day life and as to what specific symptoms of Asperger's Syndrome the claimant exhibited. The claimant chose to keep her diagnosis private and, although, having disclosed it to the respondents, she was asked to provide detailed information on how it impacted upon her she did not do so.

Constructive Dismissal

191. Paragraph 53 of the paper apart to the ET1 lodged by the claimant in 2017 set out a course of conduct being relied upon by the claimant to present a case for constructive dismissal. The list is as follows (page 86 of the Bundle):-

(i) The respondent's unfair decision to declare her surplus to requirements which the claimant contends is in reprisal of her asking to go home on 2 March 2016 to look after her daughter.

(ii) The respondent's failure to follow the LNCT 06 policy.

(iii) The treatment she suffered from Ruth McFarlane.

(iv) The statements given by the witnesses in the investigation.

(v) The refusal by the respondent to acknowledge that the statements were false and or misleading despite the production of the recordings.

(vi) Predetermining the grievance outcome and not giving proper and fair consideration to the grievance.

(vii) The refusal to consider the claimant's appeal against the grievance.

(viii) Failing to discuss with the claimant alternatives to redeployment (such as reduction in hours)

(ix) The decision to advertise for an external candidate to work in the claimant's Department and not discuss same with the claimant.

192. Historically, schools had retained sufficient resources to allow them to absorb some small surpluses, "in school" without the need to identify staff to be transferred. By the onset of the academic year 16/17 the squeeze on available resource across the respondent's area of responsibility which impacted upon the individual schools was such that the ability to tolerate and absorb surpluses was reduced.

193. The claimant had not expressly brought to the respondent's attention any particular effect upon her behaviour which she believes was caused by her Asperger's. The Depute Rector of Queen Anne High School had asked her to provide that information to the respondents in writing at the time when she first disclosed her diagnosis to them. The claimant who wished to keep her diagnosis private declined to do so.

194. In deciding on 3 March 2016 to declare the claimant surplus to requirement and in identifying her as a member of staff to be placed on the transfer list, Ruth McFarlane (the respondents) did not do so in reprisal for the claimant asking to go home on 2 March 2016 to look after her daughter.

195. In their arrangement and conduct of whole school and departmental meetings in relation to the claimant being declared surplus the respondent did not fail to follow the LNCT 06 policy as locally collectively varied.

196. On or about 3 March 2016 the respondent, per Ruth McFarlane, failed, as required in terms of paragraph 29 of the LNCT 06 policy to take account of the claimant's health (including and in particular her Asperger's Syndrome) in the decision making process in relation to the selection of the claimant as a member of staff liable to transfer. That failure was, by its nature, a failure capable of constituting a breach of contract. That failure occurred on or about 3 March 2016. The claimant was aware of the failure from on or about 3 March 2016.

197. The claimant did not resign until 13 September 2017.

198. At the point of resigning the claimant did not identify the respondent's alleged failure to take account of her health (Asperger's Syndrome) in the decision making process which identified her as a member of staff to be declared surplus, as one of the reasons in response to which she was resigning. The claimant did not resign in response to that failure.

[Note to self: when next revising double check the source elements of the following paragraph and adjust as appropriate].

199. The respondents' (Ruth McFarlane's) failure to apply paragraph 29 of LNCT 06 policy to her decision making process was not given notice of, prior to the commencement of the oral hearing on the merits, as a specific failure upon which the claimant founded for the purposes of any of her claims. [Neither was it identified in the course of case management conducted at the outset of the hearing for the purposes of confirming and recording the issues. It is not recorded at paragraphs 2.2 to 2.8 of "Issues" above as relied upon in the context of any of the claims – when revising check that it is not referred to at paras 2.2 to 2.8 inclusive] rather the alleged fact of the specific failure and its reliance upon for the purposes of one or other of the claimant's claims was a matter which emerged in evidence in the course of final hearing. When resigning on 13 September 2017, the claimant did not do so wholly, or partly, in reliance upon that failure.

200. The respondents (Ruth McFarlane's) identification of the claimant as a member of departmental staff who was surplus did not constitute a breach of contract.

201. Ruth McFarlane's treatment of the claimant at her meetings with her on 2 and 3 March 2016, did not constitute a breach of contract.

202. On 02 March 2016 Ruth McFarlane did not tell, or propose to the claimant, that she should leave her daughter to look after herself at home.

203. At the meeting of 26 April 2017, which occurred 17 months prior to the claimant's resignation, a heated exchange occurred between the claimant and Ruth McFarlane. The heated nature of the exchange was contributed to as much by the claimant as by Ruth McFarlane. In the circumstances in which the Tribunal has not found on the evidence presented on 2 March 2016 that Ruth McFarlane told the claimant that her daughter should look after herself at home, Ruth McFarlane's treatment of the claimant (her conduct at) at the meeting of 26 April 2017 did not constitute a breach of contract on the part of the respondents.

204. In circumstances where the Tribunal has found on the evidence presented that on 2 March 2016 Ruth McFarlane did not tell the claimant that her daughter should look after herself at home, Ruth McFarlane's making of the statement "That is a blatant lie" in response to the claimant's assertion, made to the then present HR Officer that she had so told her, however undiplomatic, did not constitute a breach of contract.

205. The tape recording of 26 April 2016 played by the claimant at hearing discloses the claimant raising her voice to an extent that she might properly and objectively be described as shouting. The tape recording does not disclose the claimant "screaming" as opposed to shouting.

206. The use by Ruth McFarlane, in her statement given in the course of the internal grievance investigation, of hearing the claimant "screaming" after she left her office, let it be assumed that the recording is not incomplete as was asserted by

Kerry Gibson, a matter upon which the Tribunal has been unable to make a definitive finding, could amount to an inaccurate characterisation of the claimant's conduct. The use of that term as opposed to the term "shouting", in the circumstances of recollecting and recounting what had been a heated and emotionally charged exchange between the individuals which left both upset, did not constitute a breach of contract".

207. The named individuals Ruth McFarlane, Laura Martin, Leanne Hutchison, Kerry Gibson and Denise Ewing did not conspire together in order to deliberately falsify the statements given by them in the internal grievance process in order to malign the claimant's character.

208. The respondents gave proper and adequate consideration to the claimant's grievance. The respondent did not predetermine the grievance outcome. The respondent partially upheld grievance 1.

209. The first point at which the claimant expressed dissatisfaction with the grievance process was when she received notification of the outcome of the grievance in December 2016. No presumption to the effect that the grievance outcome had been predetermined or to the effect that the respondent had not given proper and fair or adequate consideration to the grievance arises from the fact that the grievance was, in the main, not upheld.

210. The respondent's decision not to receive the claimant's late tendered appeal, in the circumstances and on the grounds presented to them by the claimant at the time, did not constitute a breach of contract. The decision to decline to accept the late tendered appeal was one which was permitted under the contract.

211. The claimant enjoyed no contractual right to be offered the full time teaching position in Queen Anne High School in advance of its being advertised by the respondents on 8 August 2017. The respondent was under no contractual obligation to offer the position to the claimant in advance of advertising it. The requirement and post advertised was for a full-time teacher commencing later

that month in August of 2017. The claimant was a 0.6 full-time equivalent teacher who was at that time absent due to ill health certified as unfit to work. The respondent's decision to advertise, on 8 August 2017, for an external full-time candidate to work in the claimant's department in the academic years 17/18 without first discussing or offering that post to the claimant, did not constitute a breach of contract.

212. The respondent was under no contractual obligation to proactively discuss with the claimant a reduction or increase in her hours as an alternative to her being placed on the transfer list. The claimant did not at any point raise with the Central Transfer Team or with Ruth McFarlane the possibility of reducing or increasing her hours or of her qualifying to teach in another subject as an alternative to potential transfer.

213. The respondent's failure to discuss with the claimant the possibility of her changing her hours did not constitute a breach of contract.

214. In August 2017 the claimant had already made clear the view formed by her that she would not return to work at Queen Anne High School until and unless the Rector Ruth McFarlane was removed from her post. As at 8 August 2017 there were no proposals on the part of the respondents to remove the Rector from her post for the academic year 2016/17.

215. The only conduct on the part of the respondent which the Tribunal has found, on the evidence, in fact occurred as alleged and which also had the potential to constitute a breach of contract was Ruth McFarlane's failure to apply the adjustment, contained in paragraph 29 of the LNCT 06 policy, to the decision making process by which, on 2/3 March 2016, she identified the claimant as a member of staff to be declared surplus and liable to transfer.

216. The respondent's conduct of 3 March 2016 (failure to apply paragraph 29 of the policy to the decision making process) insofar as it fell to be regarded as a breach of contract falls to be regarded as a single act occurring at that time.

217. Following the conduct of 3 March 2016 the claimant continued in her employment engaging with the respondent in respect of various matters, both while at work and while on sick leave, including a grievance process and a mediation process, and resigning only some 18 months later on 13 September 2017. In doing so the claimant affirmed the contract.

218. That conduct, which occurred on 3 March 2016, when taken together with the last straw identified by the claimant (the advertising of the full-time teaching post on 8 August 2017), did not constitute a course of conduct comprising several acts or omissions which, viewed cumulatively amounted to a repudiatory breach of contract; nor did they constitute a series of breaches of contract or a course of conduct for the purposes and with the effect of reawakening the conduct of 3 March 2016 as repudiatory conduct which, in September 2017, could be relied upon for the purposes of constructive dismissal notwithstanding the claimant's intervening affirmation of the contract.

219. The respondent's conduct of advertising on 8 August 2017, the full-time teaching post without first offering or discussing that post to or with the claimant was conduct which was permissible under the contract. It was conduct carried out by the respondents in good faith and with reasonable and justifiable grounds, the same being the imminent requirement to fill the post for the commencement of the academic year later that month. The conduct was conduct which, even if genuinely but mistakenly, interpreted by the claimant as hurtful and destructive of her trust and confidence in her employer did not, in the circumstances, constitute a final straw for the purposes of her constructive dismissal claim and or for reawakening a right to rely upon the respondent's conduct of 3 March 2016, notwithstanding the claimant's intervening affirmation, as conduct repudiatory of the contract.

Resignation

220. The claimant resigned on 13 September 2017 by letter sent to Fife Council Human Resources (page 720). In the letter of resignation the claimant made no specific reference to the job advert for the full-time Religious Studies Teacher post which she saw advertised externally on or about 8 August 2017 as forming a reason for her resignation. The claimant had knowledge of the post becoming vacant from on or about May 2017 when Andrew Igoe informed her that he was leaving as he had another job elsewhere.

221. Douglas Sinclair, Depute Rector was tasked with dealing with the claimant's absence from work. He could not recall when he initially became involved in managing the claimant's absence but expects it would have been around the time of August 2016 which would be the start of academic year 2016/2017. Email correspondence between Douglas Sinclair and the claimant were lodged in the Joint Bundle with the earliest email being dated 28 October 2016 (page 502). In that email there was reference to previous correspondence indicating that Douglas Sinclair was involved at an earlier point.

222. On 28 March 2017 the claimant attended an Occupational Health appointment as part of the process of preparing to return to work. The claimant stated in evidence that she had recorded her exchanges with the Occupational Health practitioner made in the course of the appointment. The recording itself was not produced but the claimant lodged what she described as a "*rough transcript of the OH meeting second half*" at pages 513 to 518 of the Bundle.

223. At page 514 of the produced partial transcript the claimant is seen to state "*I am considering resigning. I mean, they are out to get me.*" And at page 515 of the transcript "*And my husband's best friend has advised that you can only go for constructive dismissal if they do something that completely breaks your confidence, and that's hi doing it, so I've been told that I really need to get my skates on and resign, EM.*" The claimant was considering resigning as at 28 March 2017.

224. The Occupational Health Report was produced to the claimant on 24 April 2017. The claimant lodged a formal complaint regarding the content of the report including a concern that the Occupational Health Assessor was not a clinical expert with expertise in Asperger's.

225. On 5 September 2017 Douglas Sinclair sent an email to the claimant advising that he was happy to submit a new Occupational Health referral to new Occupational Health providers.

226. The claimant was continuing to engage in the process of attempting to facilitate a return to work as at 6 September 2017 that is one month after she had had sight of the job advert placed by the respondents for the full-time teaching post in Queen Anne High School. The 6th of September was a date prior to the date upon which the Judicial Mediation was to take place on 11 September 17.

227. The claimant engaged in a Judicial Mediation on 11 September 2017. That Mediation did not resolve the parties' dispute. The claimant resigned two days later on 13 September 2017. The claimant resigned in part in consequence of the failure of the Judicial Mediation to resolve matters.

228. In August of 2017 when the claimant became aware of an advert in respect of Andrew Igoe's full-time post within the Queen Anne High School, she had been aware for several months that the post would be becoming available as Andrew Igoe had told her that he was transferring to another school. At that time the claimant had not been compulsorily transferred. She had no entitlement under paragraph 31 of LNCT 06 to be offered the post nor, in terms of the policy, were the respondents under an obligation to offer the post to the claimant or to expressly bring it to her attention prior to its being advertised. Separately, and in any event, the post was a full-time post which required to be imminently filled for the commencement of the 2016/17 academic year. The claimant was 0.6 full-time equivalent and, as at that time, she was absent due to ill health and certified as unfit for work. She so remained absent and certified until the date of her subsequent resignation on 13 September 2017. The claimant had stated that

she would not return to work at Queen Anne High School until and unless the Rector was removed from her post. There were no proposals to remove the Rector from post for the academic year 16/17. The fact of the respondent's non-contacting the claimant in respect of the advertised post either prior to or subsequent to its being advertised and or of not offering the post to the claimant on a priority basis, did not constitute a breach of contract on the respondents' part. Separately in the circumstances pertaining, it did not constitute a "last straw" for the purposes of a section 94 ERA 1996 constructive dismissal.

Remedy (Findings in Fact)

229. Subject to parties' representatives' completing submissions as to their applicability to the facts of the case, the relevant dates and the value of the arithmetic calculations set out in the claimant's Schedule of Loss, produced at page 673 of the Bundle and updated as at 5 February 2019, were the subject of agreement between the parties.

230. The claimant was born on 31 March 1975. She commenced employment with the respondent on 1 August 2006. The Effective Date of Termination of her employment was 13 September 2017. As at the Effective Date of Termination the claimant was aged 42 years and had accrued 11 complete years of service. Her relevant gross weekly wage was £416.77. Her relevant gross annual basic pay was £21,672. Her relevant net weekly pay was £348.84. In the event of her complaint of unfair dismissal succeeding the claimant seeks a basic award of £4,792.86.

231. In the event of her complaint of constructive unfair dismissal succeeding the claimant seeks a compensatory award of:- past wage loss, from the Effective Date of Termination to the last day of hearing 5 February 2019, of £18,837.36 and 52 weeks of future wage loss in the sum of £18,138.68, compensation for loss of statutory rights in the sum of £400 these elements amounting to a total compensatory award of £37,377.04 adjusted and, restricted in terms of the statutory cap to an amount of £21,672.

232. It was a matter of agreement between the parties:-

(a) in the event that the claimant's complaints of disability discrimination were to succeed in all their elements that the financial assessment detailed by the claimant in respect of damages for injury to feeling, and set out in the updated Schedule of Loss (page 673) as updated at 5 Feb 2019 was accepted by the respondent as being a fair and reasonable quantification but subject to parties competing contentions and submissions as to whether the claims were made out in whole or in part and if only made out in part as to proportionate adjustment and reduction to reflect that partial success.

(b) In the event that the complaint of constructive unfair dismissal were to succeed then the arithmetic calculations of financial loss as set out in the claimant's Schedule of Loss (p673 of the Bundle) as updated as at 5 February 2019, were accurate and that the sums brought out thereunder as between basic and compensatory award were likewise accurate, subject to parties respective submissions as the appropriate period over which the respondent should be held liable for future loss, if any, and as to contribution and mitigation of loss.

233. Prior to the exchange which she initiated with the Rector on 2 March 2016;

(a) the claimant felt relatively settled and content in her teaching appointment at Queen Anne High School.

(b) She enjoyed a good working relationship with her then departmental colleagues and with the Rector, Ruth McFarlane.

(c) She was not entirely sanguine about her position to the extent that, for several months prior to March 2016, she had been undertaking

the practice of clandestinely recording meetings and conversations including those with and between herself and her colleagues and some conversations in which she, although herself not participating or involved, she was sufficiently close as to enable her to make a recording.

(d) The claimant's explanation for why she had undertaken such recording was varied but included, amongst other reasons, a desire to be able to retrospectively prove that individuals had said particular things and thus, "to feel safe".

(e) Notwithstanding her concerns about "feeling safe", teaching at Queen Anne High School, as opposed to at another school, had become and remained her firm preferred option.

(f) Her selection and identification as a member of staff who was surplus to staffing requirement and liable to transfer was an occurrence which caused her considerable worry and angst.

(g) She did not want to move away from Queen Anne High School and separately did not consider a move to any of the potential alternative schools as desirable either because of their locations or the views she had formed about their staff including, in the case of one school, its Rector.

234. The failure of the respondent (per the Rector of Queen Anne High School) to take into account the claimant's health, including in her case her Asperger's, in the decision making process which resulted in her being identified as a member of staff surplus to staffing requirement and liable to transfer, was a factor which rendered more probable than less, all other things being equal, her being so selected.

(a) Had the respondents taken that factor into account, in the initial selection process, there is no guarantee that it would have resulted in the claimant not being so selected.

(b) Across the schools for which the respondents have responsibility members of staff possessing the protected characteristic of disability have been and continue to be so selected, notwithstanding their disability, with the same again being taken into account at the point of considering any particular transfer and with appropriate adjustments being made.

235. The second occasion upon which the respondents were under obligation, in terms of paragraph 29 of LNCT 06 to take account of amongst other matters, the claimant's disability, that is to say in relation to any particular transfer being considered, had not yet arisen as at the date of the claimant's resignation, due to the claimant's continued absence on sick leave.

236. There was a chance, had the respondent made the adjustment embedded in paragraph 29 of the policy at the initial selection stage that the claimant might not have been identified as a person liable to transfer. On the other hand it was equally possible, notwithstanding their taking account of the claimant's disability, that she would nevertheless, and as not infrequently occurs in the schools for which the respondents have responsibility, nevertheless have been so identified, with the matter being revisited with further such consideration as and when any particular, and otherwise considered by the respondent suitable, transfer had been identified.

237. On the balance of probabilities the possibility of not being so identified had account of her Asperger's been taken by the respondents at the initial stage, (that is to say but for their failure in their section 20 EqA duty to make that adjustment) and constituting injury to her feelings was likely to be at its highest, not more than 50%. Such worry and angst on the part of the claimant, as is properly attributable to the respondent's failure continued to be experienced by the claimant up to the point of her resignation.

238. Separately, from on or about the date of the claimant's meeting with the Rector of 26 April 2016, an additional contributory cause of the persistence, beyond that date of the worry and angst experienced by the claimant in consequence of her selection and identification as a member of staff who was surplus and liable to transfer, arose.

(a) That additional contributory cause was the prior condition attached by the claimant to her return to work at Queen Anne High School, let it be assumed that she was deselected as a member of staff who was surplus and liable to transfer and also certified as fit to work namely, that the Rector, Ruth McFarlane, be removed from post as a prior condition to the claimant's return and be made the subject of disciplinary process in respect of her alleged conduct towards and regarding the claimant.

(b) At no time in the period between on or about 26 April (the date of the claimant's last meeting with the Rector) and the date of the claimant's resignation on 13 September 2017, was there any intention on the part of the respondent, or any prospect, of their removing the Rector from post, and or of them subjecting the Rector to disciplinary proceedings on the grounds required by the claimant.

239. In consequence of the respondent's failure, as found in fact, to make adjustments in respect of the convening of the claimant to and conduct of the meeting of 26 April 2016, the claimant suffered anxiety and stress, the same constituting injury to her feelings;

(a) The anxiety and stress suffered, was so suffered; by way of apprehension in the short period between being asked to attend the meeting and her attending at it and, thereafter, chiefly during the course of the meeting in consequence of the altercation which developed between her and the Rector;

(b) That altercation and the intensity with which it developed, occurred as much in consequence of the claimant's conduct during the meeting as that of Ruth McFarlane (the respondents). The Tribunal apportions that causation as between the claimant and Ruth McFarlane at 50% each;

(c) The respondents' purpose of the meeting was to obtain from the claimant specification of the errors which, in her earlier email to the Rector, she alleged the respondents had made in the application of the LNCT 06 policy in identifying her as surplus to staffing requirements and liable to transfer.

(d) The tape recording of the meeting, clandestinely made by the claimant and played in the course of the hearing discloses Ruth McFarlane opening the meeting on that basis and seeking to obtain that information from the claimant, the claimant declining to provide that information and then herself taking over and changing the purpose and conduct of the meeting by addressing a statement, to the Human Resources representative who was present, in which she accused the Rector of having told her, on 2 March 2016, to leave her daughter at home to look after herself.

(e) The recording then reveals the Rector intervening to deny that accusation and, in the face of the claimant's reiteration of it, the Rector again intervening and stating "*That is a blatant lie*" and the claimant in her turn shouting in response that the Rector had called her a liar.

(f) The claimant terminating the meeting by leaving and slamming the door and thereafter engaging in the further immediately following and subsequent exchanges as earlier found in fact above.

240. Following the meeting the claimant experienced a feeling of continuing resentment arising:-

(a) firstly from her perception that on 2 March 2016 (a meeting in respect of which it is not alleged the respondents were in breach of a section 20(3) EqA duty, that the Rector had told her to leave her daughter to look after herself at home (something which, on the evidence, the Tribunal has not found in fact that the Rector did,) and,

(b) secondly from her misperception, as evidenced by the tape recording, that the Rector had "*called me a liar*" at the meeting of 26 April 2016.

Submissions for the claimant as to the reliability and credibility of witnesses

241. The claimant's representative invited the Tribunal to regard the claimant as credible and reliable in all the evidence which she gave and, insofar as it was in conflict with that of the respondent's witnesses, to prefer the claimant's evidence over that of the respondent's witnesses.

242. In relation to the evidence of Mr Struth the Tribunal was likewise invited by the claimant's representative to accept his evidence in full.

243. In relation to the evidence of Jude Phillips the claimant's representative invited the Tribunal, in submission, to accept her opinion evidence as well as her evidence of fact. He did so notwithstanding the clarification, recorded at paragraph 3.4 above, as provided by him in the course of Case Management Discussion at the outset of the hearing and in the face of the respondent's objection to the introduction of Jude Phillips as a potential "expert witness". That clarification was to the effect that the claimant's representative intended to adduce, from Ms Phillips, only evidence of fact as to her direct observations of the impact upon the claimant of the events of 2016 onwards and not expert opinion evidence.

244. He invited the Tribunal to regard the evidence of Andrew Igoe and of Lenny Turk as credible and reliable.

245. In relation to the respondent's witnesses the claimant's representative invited the Tribunal to regard the evidence of:-

(a) Ruth McFarlane as dogmatic, incredible and dishonest and as evidence which should be rejected when in conflict with that of the claimant;

(b) Sarah Else as dissembling and therefore incredible and unreliable, and to be accorded little weight unless corroborated by another source;

(c) Ken Robertson as credible but of limited value;

(d) Bill Struthers as credible and reliable;

(e) Kerry Gibson as "tainted by patent dishonesty" because she consistently adhered to the position adopted by her when the edited recordings were first played to her namely that they did not reflect the totality of the claimant's conduct towards her upon the claimant's exiting the Rector's office;

(f) Douglas Sinclair as, "at times hostile"; and

(g) Kevin Funnell as generally credible and reliable and evidence which should be accepted in relation to the application of LNCT 06.

Submissions for the respondent on the credibility and reliability of witnesses

246. The respondent's representative invited the Tribunal to regard the evidence of the claimant as largely unreliable and in parts incredible. She submitted that the

manner in which the claimant gave her evidence was not straightforward, that when challenging questions were put to her she became very defensive, that in the course of her evidence the claimant spoke in a very derogatory manner about employees of the respondents, in particular she continuously evidenced a strong dislike of Ruth McFarlane making offensive comments about her, she repeatedly asserted a theory of conspiracy amongst numerous employees of Queen Anne High School alleging collusion amongst them with the object of removing her from Queen Anne High School. She made that serious allegation without presenting any evidence for it beyond the coincidence of the fact that these individuals had, to a greater or lesser extent, given statements which adversely reflected upon her conduct and which in her opinion and assertion were incompatible with those parts of the clandestinely made recordings which she produced.

247. The respondent's representative submitted that various aspects of the claimant's evidence supported the proposition that it was not to be viewed as credible and reliable; viz,:-

(a) She had been regularly and covertly recording conversations with her colleagues and conversations amongst her colleagues of which she was not necessarily part but was within recording distance of. Among the reasons advanced by her for doing so was that she be in a position to prove that persons were being untruthful if they denied matters with which she might later accuse them;

(b) On a number of occasions, in the course of giving her evidence, the claimant disclosed for the first time that she had made additional covert recordings of certain conversations, including her third exchange with Ruth McFarlane on 2 March, but had neither produced nor had previously disclosed the fact of such recordings;

(c) Whereas, on the one hand, the claimant repeatedly stated in evidence that as a consequence of her Asperger's Syndrome she

was incapable of telling even a white lie, on the other hand it emerged in evidence that she had been dishonest about:

(i) The "quadrupling" of her antidepressant medication

(ii) As to whether it was she or her husband who had "edited" (split up) the original single continuous recording

(iii) Whereas in her letter seeking to submit a late appeal against her grievance outcome she had expressly stated certain reasons for it not having been timeously presented, she gave oral evidence before the Tribunal which contradicted those and which was inconsistent with and was in part contradicted by the evidence of Gordon Struth.

(iv) She had been dishonest about the number of times/occasions upon which she had covertly recorded conversations.

(v) She had been dishonest/disingenuous about the reasons as to why she covertly recorded conversations.

248. The respondent's representative invited the Tribunal to prefer the evidence of the respondent's witnesses where it was in conflict with that of the claimant.

249. The respondent's representative invited the Tribunal to regard the evidence of Gordon Struth as unreliable and in parts incredible.

(a) His evidence had to be placed in the context of his being both the claimant's husband and, for parts of the conduct of the case, her representative.

(b) Parts of the evidence given by him correlated word for word with what was stated by the claimant giving the impression of it having been discussed and agreed in advance and rehearsed. Both the claimant and Gordon Struth made frequent reference to the claimant's "strong sense of injustice" and to her "black and white thinking";

(c) On the other hand, there were occasions where the evidence of Gordon Struth contradicted the evidence given by the claimant. When asked to explain why she had not set out in her email of 22 April 2016 the various errors which she said the respondents had made and which she stated in the email would result in her being able to prevent the respondents transferring her, the claimant stated in evidence that she "*didn't want to show her hand*". When Gordon Struth was asked if that was why the claimant had not provided specification of the errors, he had responded by saying that "*she did not have the capacity to be that manipulative*";

(d) In relation to receipt of the outcome letter and the late appeal, the claimant stated before the Tribunal that she did not read the hard copy letter whereas Gordon Struth stated in evidence that he saw the claimant read the hard copy letter.

250. The respondent's representative invited the Tribunal to regard the evidence of Gordon Struth as largely unreliable where it bore to be primary to evidence of fact and to attach little weight to it where his evidence was secondary or in the category of commenting or expressing opinions upon the claimant's conduct.

251. In relation to Jude Phillips, the respondent's representative invited the Tribunal to regard Miss Phillips' evidence as to fact as credible and reliable. It was, she submitted, evidence which was arguably more supportive of the respondent's position, in relation to the facts, than that of the claimant. She gave evidence of the fact that in early 2016, as a friend of the claimant, she saw her regularly for a chat. She recalled the claimant discussing the exchange which she had had with Ruth McFarlane on 2 March 2016 but what she recalled as communicated by the claimant to her at that time was that the claimant was upset about the suggestion that she might not be paid for the leave that she was taking. Even when prompted to try and recollect further she made no mention of the allegation that Ruth McFarlane had suggested to the claimant that she leave her sick daughter at home alone. The claimant, in her evidence, however, asserted that that alleged statement was the catalyst for all that followed including Ruth McFarlane informing her on the following day that she had been identified as a member of staff to be placed on the transfer list and an alleged conspiracy and collusion amongst various staff members orchestrated by Ruth McFarlane, to see her removed from the school.

252. In relation to what emerged in the course of the hearing as an attempt to present Jude Phillips as an expert witness whose opinion evidence should be accepted by the Tribunal, the respondent's representative invited the Tribunal to reject that proposition. She made reference to the fact that notice of intention to lead evidence from Jude Phillips had been given by the claimant to the respondent only one week before the commencement of the hearing. At that time it was unclear whether the claimant's representative's intention was that the witness who was described as a "friend of the claimant who was also a speech and language therapist specialising in the area of autism (children particularly)", be the source of expert opinion evidence, as opposed to evidence of fact in her capacity as a friend of the claimant. The respondent had objected to the admission of the witness if the latter was the intention. In the course of the Case Management Discussion conducted at the outset of the hearing (and as recorded at paragraph 3.4 above), the claimant's representative had confirmed that his intention was to lead Jude Phillips' only as a witness as to fact. The hearing had

proceeded on that basis but when leading the witness the claimant's representative had changed his position asserting that the witness should be regarded as an expert witness. The respondent, again as recorded at paragraph 3.4, had continued to stand upon its objection in that regard. The respondent's representative submitted that no weight should be attached to the so called "expert/opinion" evidence of Jude Phillips. She had not been properly set up as an expert witness. She had no knowledge of the claimant's Asperger's Syndrome other than the fact that it had been diagnosed in 2013 and her knowledge of the claimant in her capacity as a friend/acquaintance. She had never assessed the claimant. She specialised in assessing children. The witness did not speak to any report or document lodged. There had been no opportunity for the respondents to properly test anything stated by the witness in relation to the field of autism.

253. The respondent's representative invited the Tribunal to regard the evidence of Andrew Igoe, friend and previous colleague of the claimant at Queen Anne High School, as largely unreliable and in parts incredible. He was a colleague who had a close friendship with the claimant notwithstanding the fact that he was not prepared to reduce his own hours as an alternative to the claimant being identified as surplus and liable to compulsory transfer. He, it was submitted, also had an axe to grind with the Rector Ruth McFarlane as he had been acting up as Principal Teacher of RMPS before Karen Fotheringham was appointed. He was, she submitted bitter about not being appointed to the post on a permanent basis. Little weight should be attached to his evidence particularly in relation to the question of surplus as he was not privy to the bigger picture.

254. In relation to the evidence of Lenny Turk (friend of the claimant and previous Principal Teacher of RMPS at Queen Anne High School), the respondent's representative invited the Tribunal to regard the same as both credible and reliable.

255. In relation to the respondent's witnesses the respondent's representative invited the Tribunal to regard the evidence of:-

(a) Ruth McFarlane as credible and reliable on all material matters. She had presented her evidence in a straightforward way and, notwithstanding the passage of time did recall the significant aspects of the various incidents. She had not sought to avoid taking responsibility. She was clear in evidence that with hindsight she would not have gone along with Leanne Hutchison's suggestion that she invite the claimant along to her office on 26 April to discuss the issue of the alleged errors in applying the LNCT 06 policy. She stated frankly that "*it had gone horribly wrong*" and gave very credible evidence that she herself was upset by the turn of events both personally and for the claimant. She had intended it to be a supportive measure and a positive thing, but events had unfolded as they did. She accepted in cross examination that she could have "*softened her language*" but remained adamant that she had never told the claimant that she should leave her sick daughter at home alone on 2 March. While she accepted that, in the course of the meeting of 26 April, she had described the claimant's repeated assertion, made to Leanne Hutchison that she had done so as a "blatant lie", she had not called the claimant "a liar", the latter being a statement which if she had made it, would have given rise to more general implications about the claimant's character. She had given very clear evidence on the issue of the declaration of surplus and her evidence on surplus was corroborated by that of Kevin Funnell and Ken Robertson. The respondent's representative invited the Tribunal to accept that evidence as conclusive evidence of the fact that the decision to declare the claimant surplus and to identify her as a member of staff to be placed on the transfer list was not one taken by Ruth McFarlane for personal reasons or in any sense in retaliation for the claimant having requested permission to go home on the preceding day 2 March. There was no prior history of any difficulty with the claimant in the performance of her teaching duties at Queen Anne High School nor of her having been criticised by Ruth

McFarlane in any way in that regard, even after the meeting of 26 April 2016.

(b) Sarah Else (Education Officer) as both credible and reliable. She had accepted, that, after the passage of time she had had difficulty in recalling some of the detail. Notwithstanding, she had given clear evidence in relation to the investigation which she carried out and having explained why she spoke to the individuals in question. While she had appeared to be nervous at times in giving her evidence that, submitted the respondent's representative, did not result in her evidence falling to be regarded as incredible or unreliable. She had been criticised in cross examination for not being more aggressively challenging with the witnesses whom she had interviewed in the course of her investigation of the claimant's grievance. Her response and explanation was, submitted the respondent's representative, an entirely proper one namely, that she was taking statements from people who were professionals and it was appropriate to ask them questions and to accurately note their responses.

(c) Kevin Funnell (Team Manager) as credible and reliable. He had provided his evidence in a straightforward fashion and was informative in relation to providing full detail of the transfer procedures within schools when surplus is declared. There was no suggestion that he had any agenda in the presentation of his evidence as was made clear when he gave evidence in relation to the "preference form". The respondent's representative invited the Tribunal to accept his evidence as credible and reliable.

(d) Kerry Gibson (Administrative Coordinator) as both credible and reliable. The evidence that she gave was consistent and remained completely unchanged from that which she gave originally in the grievance investigation process. There was no evidence presented which could go to substantiate the accusation, made by the claimant,

that Mrs Gibson's version of events as per her statement and oral evidence was fabricated. She had been strongly pressed in cross examination in relation to her evidence that the recording played before the Tribunal and played to her in the grievance investigation, did not portray an accurate and complete version of what had happened. She had remained composed in the face of that cross examination consistently adhering to her position and giving evidence about the state of the floor coverings in the vicinity of her own and the Rector's rooms and the noise made when walking on them, and about the sequencing of the events (their timing and positioning) as they appeared on the recording which was produced and played in the hearing, all of which lended credibility to her evidence and which was not countered by any evidence of the claimant who relied entirely upon those parts of the covertly made recording which she ultimately decided to present. The respondent's representative invited the Tribunal to accept Kerry Gibson's evidence on this matter, as undermining the weight to be accorded to the tape recordings per se and in particular to the conclusions which the claimant invited the Tribunal to draw from them in relation to alleged collusion and conspiracy.

(e) Bill Struthers (Business Manager, Queen Anne High School), as credible and reliable albeit as a witness whose recollection of detail had been impacted by the passage of time. In giving his evidence initially he was unaware of the suggestion and challenge maintained by the respondents to the integrity of the recordings which were played to him and when he was asked to agree with the proposition that what he heard on the tape must be what had happened. He had confirmed in re-examination that he could not actually recall the specific detail of what was said at all.

(f) Douglas Sinclair (Depute Rector, Queen Anne High School), as credible and reliable albeit that he was a witness whose recollection

of detail was affected by the three year passage of time. His evidence, which was limited to dealing with the Occupational Health referrals and the return to work process generally, had been given in a straightforward manner when taken to the various documents which served to refresh his memory of events.

(g) Ken Robertson (Depute Rector, Queen Anne High School) as credible and reliable. He had provided clear and detailed evidence on the surplus process, specifically within Queen Anne High School. His evidence regarding the structure of timetables was also informative and authoritative. The respondent's representative invited the Tribunal to accept his evidence and prefer it to that of the claimant and or of Andrew Igoe in relation to the issue of "surplus".

Submissions on the Evidence and the Law

256. Each party's representative prepared a written note of submissions on the evidence incorporating proposed Findings in Fact, and identifying certain agreed Findings in Fact, together with submissions in law, in relation to each of the Issues (First) to (Ninth) above inclusive. Those written submissions were extensive and are not reproduced in their entirety here. The Tribunal makes clear that it fully considered, in detail and in their entirety, each of the parties' written submissions, both in relation to proposed Findings in Fact and assessment of the evidence and, as to submissions in law, together with the oral submissions made at hearing.

257. Given the number of issues and sub-issues at large between the parties at hearing each is dealt with below, following the sequence in which they are set out at paragraphs 2.1 to 2.9 of "Issues" above, under the headings:

- Summary of Submissions
- Applicable Law
- Discussion and Disposal

Direct Discrimination – (Issue First) – Section 15 EqA 2010

258. The only instance of alleged less favourable treatment at the hands of the respondents which was ultimately insisted upon by the claimant in support of her section 13 EqA 2010 complaint, was that which is recorded at paragraph 2.1(c) of Issues namely, treatment said to be constituted:-

> "(c) by the then Rector of Queen Anne School stating to the new Principal Teacher of Religion and Morals, on 3 March 2016, that she believed the claimant's absence from school on the preceding day was in part due to her disability;"

Summary of Submissions for the Claimant (Direct Discrimination)

259. The claimant's representative relying upon the hearsay evidence of Andrew Igoe and under reference to the asserted "part transcript" created and produced by the claimant, invited the Tribunal to:-

(a) find in fact that the alleged remark had been made; and

(b) to hold let it be assumed that it had been made and, in his submission standing the alleged reference to "disability" that it fell, self-evidently, to be regarded as a discriminatory remark and thus less favourable treatment.

260. The claimant, he accepted, was not in a position to give direct evidence on the matter both the first and the second hearsay conversations having taken place outwith of her presence.

Summary of Submissions for the Respondent (Direct Discrimination)

261. The respondent's representative invited the Tribunal to reject as unreliable the second degree hearsay evidence by which the claimant offered to prove the making of the remark. She submitted that the asserted "partial transcript" of the claimant's conversation with Andrew Igoe was one to which there should be attached little or no weight given that the document, which had been created by the claimant, bore in its terms only to be a partial transcript and further and importantly, that the principal recording of which it was said to be a transcript had never been produced by the claimant for comparison purposes. Separately what Andrew Igoe was recorded, in terms of the transcript, as reportedly saying did not amount to an assertion that the Rector had made the statement relied upon. At its highest, even assuming no challenge to the provenance of the transcript, it appeared to recount only Andrew Igoe's impression or interpretation of the effect of what the Principal Teacher had recounted to him. Andrew Igoe himself, when giving oral evidence had not spoken directly to the matter.

Applicable Law – Direct Discrimination

262. Section 13 of the Equality Act 2010 provides:-

"**13. Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

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

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7)."

Discussion and Disposal – Direct Discrimination

263. The only instance of alleged less favourable treatment ultimately stood upon in support of the section 13 complaint was that set out above being an issue in respect of which the burden of proof sat with the claimant. On the evidence presented the Tribunal did not find that alleged treatment to be established in fact. It rejected the hearsay evidence set out in the "partial transcript" as unreliable and insufficient to discharge the burden of proof and preferred the primary evidence of Ruth McFarlane. Thus the Issue at 2.1(c) above is determined in the negative and the complaint of direct discrimination is dismissed.

Issues (Second) and (Third) – Section 20 and 21 Equality Act 2010 Discrimination

The Issues

264. The Issues relating to whether a duty of care in terms of section 20 of the 2010 Act existed and was incumbent upon the respondent; and, as to whether the respondent had failed in that duty and thus discriminated against the claimant in terms of section 21(2) of the 2010 Act, were those set out at paragraphs 2.2 and 2.3 of "Issues" above.

Summary of Submissions for the Claimant – Sections 20 and 21 Equality Act 2010

265. Under reference to paragraphs 17 to 27 of his proposed Findings in Fact the claimant's representative submitted that sections 20 and 21 of the Equality Act 2010 impose a positive duty on employers to treat disabled persons differently (including more favourably where it is reasonable to do so in proscribed circumstances).

266. Under reference to the Code at Practice at paragraph 6.10 and to ***Lamb v The Business Academy Bexley*** UKEAT/0226/15 at paragraph 26, the claimant's representative made the following submissions:-

(a) That although not formally defined, the phrase "provision, criterion or practice" includes formal and informal practices, policies and arrangements and, in certain cases, can include one of decisions.

(b) That the LNCT 06 being a formal policy was also a PCP applied to the entire comparison group in the same way and that the LNCT 06 policy, by way of adjustment, should have been disapplied in its entirety to the claimant because of her Asperger's.

(c) That the convening of and arrangements for the meeting of 26 April 2016, irrespective of being a one off action, qualified as a PCP (being a "practice") and particularly so when in the circumstances it

concerned and was bound up with the application of the LNCT 06 PCP, rather than being a freestanding decision.

(d) That the decision not to receive the claimant's grievance appeal out of time could be regarded as a PCP, although arguably a "one off" decision, because it amounted in effect to a practice of imposing and relying upon a strict time limit within their grievance policy making that aspect of the policy arguably the PCP.

(e) That each of the PCPs relied upon at paragraph 2.2(a)(i) and 2.2(b), assessed objectively, put the claimant, as opposed to the group, at an actual and substantial disadvantage in relation to them.

267. Under reference to ***Naeem v Secretary of State for Justice*** [2017] UKSC27, the claimant's representative submitted:-

(a) that there is no need to show the "reason why" the claimant was put at a substantial disadvantage. It was enough that the PCP did so.

(b) That what was required was not a causal link between the conduct (the PCP) and the protected characteristic but rather a causal link between the PCP and the disadvantage. That, he submitted, was something established in the instant case self-evidently in relation to the failure to apply the adjustment contained in terms of paragraph 29 of the policy to the decision which identified the claimant as a member of staff liable to transfer.

268. He submitted, in relation to the nature, purpose, manner of convening and conduct of the meeting of 26 April, and in comparison to a person not suffering from Asperger's:- that these had heightened the claimant's anxiety, caused her significant distress and had inhibited her ability to effectively participate in the meeting.

269. In relation to the requirements of paragraph 20(1)(b) of Schedule 8 to the Equality Act 2010, that the respondents must have known or have been reasonably expected to know that the claimant had a disability (in this case Asperger's) and was likely to be placed at the disadvantage in question.

270. Under reference to paragraph 6.19 of the Code of Practice:-

(a) that the requirement, which was satisfied in this case, was that the respondent knew that the claimant was disabled:

(b) That it was not necessary for the claimant to establish that the respondent had a detailed knowledge of the manner in which her condition might affect her. Rather, it was for the employer, being aware, as they were, of the claimant's disability to do all that they could reasonably be expected to do in relation to informing itself, not only as to the disability but the likelihood of particular steps taken by it placing the claimant at a substantial disadvantage.

271. The respondent, he submitted and in particular Ruth McFarlane and the Human Resources Officer who convened the meeting of 26 April, were under a duty to consider whether the particular steps taken by them would put the claimant at a disadvantage. They failed to do so, in a context in which Ruth McFarlane's own evidence based upon her own experience of interaction with the claimant, she knew how the claimant's disability might well affect her in meeting circumstances including that the claimant could become anxious in high stress or high conflict situations and in which, he submitted, they should be taken as knowing, she would, because of her Asperger's, have a greater awareness of anxiety, or that she might require more time to process information, particularly challenging information and news that was difficult to hear and further, that she needed careful planning and routine and required additional time and notice to prepare for difficult situations.

272. High anxiety situations were more likely, he submitted, to trigger an angry or emotional response in the claimant.

273. The above were matters upon which the claimant's representative submitted the Tribunal could be satisfied on the evidence and, in the circumstances, that the respondents knew or ought reasonably to have known.

274. Under reference to paragraph 6.24 of the Code of Practice he submitted that there was no onus on the claimant to ask for adjustments although in fact, in relation to the meeting of 26 April, she had asked for it to be postponed to the following day and to be allowed to be accompanied at it.

275. The claimant's representative further invited the Tribunal to hold, in the circumstances, that it would have been a reasonable adjustment for the respondents to disapply entirely, in the case of the claimant, the local variation to the collective agreement and, to have held more school and departmental meetings in the manner described in the unvaried LNCT 06 policy.

276. In relation to the meeting of 26 April, he submitted that it would have been a reasonable adjustment not to convene the meeting at all or alternatively not to have prevailed upon the claimant to attend such a meeting after she initially declined to do so; or, in the event that the meeting was to be convened, to have given the claimant notice of the nature and purpose of the meeting, including any information that might be requested from her thus allowing her time to prepare for and effectively participate in it; to have given her the right to be accompanied at the meeting; to have adjusted the timing of the meeting to allow for that and to have brought the meeting to an end as soon as it became apparent that the claimant was becoming distressed and adversarial in its course.

277. Finally, under this heading, the claimant's representative submitted that it would have amounted to a reasonable adjustment in the circumstances to allow the claimant's appeal to have been received and considered notwithstanding its substantial lateness of submission on the basis that the respondent should be

held to have known at the time of their decision by not doing so they were placing the claimant at a substantial disadvantage because of her Asperger's.

Summary of Submissions for the Respondent – Sections 20 and 21 Equality Act 2010 Discrimination

278. Under reference to paragraphs 44 to 71 of the respondent's proposed Findings in Fact the respondent's representative submitted;

(a) That the proposition that the respondents were under a duty to disapply in its entirety the LNCT 06 policy to the claimant because of her Asperger's, was a matter in respect of which no notice had been given by the claimant in the pleadings or prior to that proposition emerging and being developed in the course of the hearing. She submitted that it was a matter which should be regarded as not properly before the Tribunal for determination and that the section 20/21 complaint, insofar as founded upon that asserted potential adjustment should be dismissed.

(b) That the policy, as adjusted by local variation to the collective agreement, had been applied to the claimant and that there was no evidence before the Tribunal which went to support the assertion that the application of the adjusted policy to the claimant placed her at a particular disadvantage. The respondents had not dispensed with the requirement for holding a departmental meeting and a whole school meeting. Both those meetings had taken place. She submitted that if anything it was, on the evidence, better for the claimant to be advised as early as possible that she was liable to transfer through application of the surplus process rather than having earlier conversations but leaving her in a position of not knowing whether she would or wouldn't be the person identified as liable to move.

279. In relation to Issue 2.2(b)(i) to (v) – the meeting of 26 April - and under reference to proposed Findings in Fact 74 to 85 and 93:-

(a) that the Tribunal should not consider that the claimant had been convened to a formal meeting nor to one at which she was asked to present grounds which might justify a reconsideration of the Rector's decision but rather, that she had been asked to "pop along to the Rector's office for a chat"

(b) that the claimant did not have to attend the meeting but rather that she chose to attend the meeting (notwithstanding her reservations)

(c) that she had also chosen to covertly record the meeting and that she herself quickly took control of the meeting; and separately, and in any event,

(d) that the Tribunal should not regard the arranging, or conduct of the meeting of 26 April as falling within the definition of provision, criterion or practice, rather it was simply a "one off" opportunity which arose and, which, with hindsight could be seen, to have gone spectacularly wrong.

(e) The respondent (Ruth McFarlane) had asked the claimant to attend for the meeting with good intentions and could not in the circumstances have foreseen how the meeting would develop.

280. In relation to the issue at 2.2(c)(i)-(ii) (the respondent's non-acceptance of the claimant's late appeal against grievance outcome), the respondent's representative, under reference to paragraphs 133 to 142 of the respondent's proposed Findings in Fact, submitted as follows:-

(a) Firstly that no section 20 duty arose in the circumstances because the non-acceptance of the late appeal did not result from the

application of a PCP to the claimant. Rather, the respondent had given specific consideration to the claimant's request that her appeal be considered though late upon the specific grounds advanced by the claimant in her late letter of appeal. Having considered those grounds, and having taken steps to inform their decision making process the respondent took a decision, in the case of the claimant's particular request and on the grounds upon which it was advanced, and, in the event, declined to receive the late appeal.

(b) Separately and in any event; that the case of breach of section 20 duty which the claimant advanced at hearing on this issue was advanced on oral evidence which contradicted the written position which she had adopted at the time with the respondents,

(c) that that evidence was inconsistent, and in some respects incompatible, with the oral evidence of her husband Mr Struth on the same issue.

(d) That Mr Struth's whose oral evidence, in turn, was in some regards inconsistent and incompatible with the written position which the claimant had adopted with the respondents at the time of tendering her late appeal.

281. She submitted that the Tribunal should regard the claimant's evidence and that of Mr Struth as:-

(a) incredible or at very least unreliable as to the claimant's reasons for failing to submit an appeal within the ten day time period allowed and further,

(b) as incredible and or unreliable to the extent of not establishing a causal relationship between the claimant's disability on the one hand

and her delaying for a period of almost a month before seeking to submit an appeal against her grievance outcome.

282. On the above submissions the respondent's representative invited the Tribunal to hold that the claimant had failed to establish any breach, on the part of the respondent, of a duty arising in terms of section 20 of the Equality Act 2010 and on that basis to dismiss the complaints of section 21(2) of the Equality Act 2010 Discrimination.

Applicable Law

Issues (Second) and (Third) – sections 20 and 21 Equality Act 2010

283. Discrimination under this heading occurs when the requirements of section 20 and section 21 of the Equality Act 2010 are satisfied. Those sections provide as follows:-

> *"**20 Duty to make adjustments***
>
> *(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.*
>
> *(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(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."

Discussion and Disposal – Sections 20 and 21 Equality Act 2010 Discrimination

284. Of the matters founded upon by the claimant the Tribunal found that section 20 and 21 of the Equality Act 2010 discrimination had occurred in respect of paragraphs 2.2(a)(i)-(iv) and 2.2(b) only. On the evidence presented the Tribunal held and considered:-

(a) that LNCT 06 was a PCP for the purposes of giving rise to a potential section 20(3) ERA 2010 duty to make adjustments; which duty the Tribunal further held, included in the particular circumstances, a duty to make the reasonable adjustment expressly set out in the policy at paragraph 29 of LNCT 06, that is to take account of, amongst other matters, the claimant's health, including her Asperger's, in the decision making process, carried out by Ruth McFarlane on 2/3 March 2016 in relation to the selection of the claimant as a member of staff to be declared surplus and liable to transfer, the same being an adjustment which it was reasonable to make in the circumstances for the purpose of avoiding the disadvantage

(b) the respondents applied the policy, as locally adjusted by Management and Trade Union Side, to, amongst others the claimant

(c) the policy, if properly applied, was not one which, per se, placed the claimant at a substantial disadvantage in relation to potential identification as a member of staff to be declared surplus and liable to compulsory transfer, containing as it does at paragraph 29 a specific provision (adjustment) requiring that amongst other matters the

health of individuals, which in the case of the claimant would include her diagnosed condition of Asperger's, be taken account of in the decision making process as leading to the declaration of an individual as surplus and in relation to any potential transfer;

(d) When applied to the claimant by the respondent absent that adjustment (i.e. absent the application of the paragraph 29 provisions) LNCT 06 was a PCP which did so place the claimant at an actual and substantial disadvantage in relation to the potential to be selected as a member of staff to be declared as surplus and or in relation to any decision to compulsorily transfer her including the appropriateness of any particular transfer in comparison with persons not suffering from Asperger's Syndrome.

(e) The application of the provisions of paragraph 29 of the policy in the decision making processes relating to the claimant was an adjustment which it was reasonable to make in the circumstances for the purposes of avoiding the disadvantage.

(f) That the policy as locally varied by Trade Union and Management Side was applied to amongst others the claimant but absent application of the first part of the paragraph 29 provision and that the respondent (Ruth McFarlane) did not take into account the claimant's health, including her Asperger's, in the decision making process undertaken on 2/3 March 2016 in relation to the selection of the claimant as a member of staff to be declared surplus and liable to transfer

(g) The Tribunal did not find that it was so applied in a way which included dispensing with the requirement for holding a departmental meeting and whole school meeting.

(h) That in so failing in the duty arising under section 20 the respondent discriminated against the claimant in terms of section 21(2) of the Equality Act 2010.

285. In relation to the matters relied upon at paragraph 2.2(b) of Issues above; on the evidence presented and the submissions made, the Tribunal held

(a) that (LNCT 06 was a formal policy applied to the entire comparison group in the same way, and was a PCP for the purposes of section 20 of the Equality Act 2010.)

(b) That the convening of and arrangements for the meeting of 26 April 2016, notwithstanding their being a “one off” action, did constitute the application by the respondents of a PCP for the purposes of section 20 EqA 2010 in the circumstances of its being a meeting which was concerned with the application of the LNCT 06 PCP.

(c) That the PCP consisted of convening the claimant to a meeting:-

(i) which was to inquire into and identify the errors which the claimant alleged the respondent had made in its application of LNCT 06 to identify her as a member of staff who was surplus to requirement and to be compulsorily removed from post

(ii) without notice and without affording her the opportunity to prepare for the meeting or the right to be accompanied and supported at the meeting by a work colleague or trade union representative; and, in circumstances where,

(iii) the claimant was pressed to attend the meeting in the face of her declared preference to have it on the following day when her trade union representative was available.

286. The Tribunal considered that, objectively assessed, the PCP was one which placed the claimant, a person suffering from Asperger's, at an actual and substantial disadvantage in comparison with the workforce at large.

287. The Tribunal was satisfied that the evidence presented established a causal link between the PCP and the disadvantage at which the claimant was placed.

288. The respondents, in the person of Ruth McFarlane, were aware of the claimant's disability and had personal experience of interaction with the claimant in the context of her disability including her meetings with the claimant on 2 and 3 March 2016 and knew that she could become emotional in circumstances of increased stress.

289. The Tribunal considered that there was, in the circumstances, a duty incumbent upon the respondent, arising in terms of section 20 of the 2010 Act, to take steps as it was reasonable to have to take to avoid the disadvantage to which the claimant was put. Those steps included:-

(a) To have given the claimant notice of the nature and purpose of the meeting, including notice of any information that might be requested from her, thus allowing her an opportunity to prepare for and more effectively participate in the meeting in the event that she opted to attend it.

(b) To have given the claimant the right to be accompanied at the meeting by her trade union representative.

(c) Not to have prevailed upon the claimant to attend the meeting after she initially declined to do so and expressed the desire to have the meeting on the following day in the company of her trade union representative.

290. The Tribunal held that the respondent had failed to take any of the above steps and in doing so breached the duty arising in terms of section 20 and had thus discriminated against the claimant in terms of section 21(2) of the Equality Act 2010.

291. In relation to the respondents' decision not to receive the claimant's appeal against the grievance outcome tendered by her one month after the expiry of the ten day period allowed for the making of such an appeal (paragraph 2.2(e?) of "Issues" above), the Tribunal considered that that decision did not constitute the application by the respondents of a provision, criterion or practice of imposing a strict time limit within their grievance policy in relation to the submission of appeal. Rather, as the Tribunal has found in fact, the respondents' decision was a "one off decision" taken by them after the giving of specific consideration to the grounds upon which the request was advanced by the claimant including materially her explanation of why she had delayed in submitting the appeal, which explanation they did not accept.

292. On the above basis the Tribunal sustained the section 21(2) EqA 2010 discrimination complaint insofar as it was founded upon the manner and circumstances in which the claimant was convened to the meeting of 26 April 2016 (paragraph 2.2(b) of "Issues" above). Thus, in respect of the conduct founded upon and issues contended for by the claimant, the Tribunal found that section 20 and 21 of the Equality Act 2010 discrimination had occurred in respect of paragraphs 2.2(a)(i), 2.2(b) of "Issues" above. The complaint of section 21(2) EqA 2010 discrimination is otherwise dismissed.

293. Separately and in any event let it be assumed that it had considered that the respondent's decision had constituted the application by the respondent of a PCP to amongst others the claimant, the Tribunal was not satisfied that what it considered to be the unreliable evidence of the claimant and of Mr Struth on this issue established a causal link between the PCP and the disadvantage. The Tribunal answered the issue encapsulated at paragraph 2.2(c) in the negative

and dismissed the complaint of section 21(2) Discrimination insofar as founded upon the same.

294. Separately the Tribunal considered that the respondents did not know and could not reasonably be expected to know, and notwithstanding their knowledge of the claimant's diagnosis and of the steps taken to inform their decision in the circumstances, that the claimant was likely to be placed at the disadvantage referred to by her in her subsequent letter such that it would have precluded her from submitting her appeal timeously or from requesting an extension of time in order to enable her to prepare and submit an appeal. The Tribunal considered in those circumstances and on that separate and further ground that the respondents were not subject to a section 20 duty.

(Issue Fourth) Harassment (section 26 Equality Act 2010)

The Issues

295. The issues (Fourth) requiring determination by the Tribunal was whether the respondent, variously at the hands of the Rector and other members of the respondent's staff identified at paragraph 2.4 (Fourth) above, harassed the claimant by subjecting her to unwanted conduct which was related to her protected characteristic of disability and which satisfied the requirements of section 26 of the Equality Act 2010, as allegedly evidenced by the matters given notice of and recorded at sub-paragraphs (a) to (d) inclusive of paragraph 2.4 above.

The Applicable Law

296. The establishment of "harassment" in this context is regulated by the terms of section 26 of the Equality Act 2010 which provides as follows:-

> "***26 Harassment***
> *(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*

- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation."*

To amount to harassment conduct must:

(a) be unwanted

(b) relate to the protected characteristic

(c) have the purpose of or the effect of

(i) violating the recipient's dignity or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment

297. In terms of section 26(4) the Tribunal, in determining such complaints, requires to have regard to the recipient's perception of the conduct (subjectively considered). It must also have regard to the other circumstances of the case and whether it is reasonable for the conduct to have the said effect of (objectively considered).

298. A one off incident can constitute harassment (***Reid and another v Stedman*** [1999] IRLR 299.

299. Some conduct may, by its nature, be presumed to be unwanted unless proved otherwise (Code of Conduct para 7.8). The term and concept of "related to" should be given a broad interpretation and does not require to be in every case "because of" the protected characteristic (Code of Conduct para 7.9). Remarks made are not to be assessed as remarks simply standing on their own. It is for a Tribunal who hears the witnesses, whose job it is to determine the facts, and who

considers the submissions made to it in the light of having heard those witnesses and determine those facts, to decide what the context is and to contextualise what has taken place. It may be a mistake to focus on a remark in isolation. A Tribunal is entitled to take a view that a remark, however unpleasant and however unacceptable, is a remark made in a particular context.

300. By virtue of section 109(1) of the 2010 Act harassment by an employee in the course of their employment is to be treated as if done by the employer and thus the respondent will be vicariously liable for such conduct subject to the normal restriction of it being carried out in the course of employment.

Summary of Submissions for the Claimant – section 26 EqA 2010

301. Under reference to paragraphs 28 to 31 inclusive and paragraph 9 of his proposed Findings in Fact, the claimant's representative confirmed that the instances of alleged conduct relied upon under this head were those set out at paragraph 2.4 of the Tribunal's note of 13 November 18 above and submitted as follows;

302. Under reference to the above and the authorities of ***Reid and another v Stedman***
Vakkali v Greater Manchester Buses (South) Limited UKEAT/0176/17 at paragraph 31 and ***Warby v Wunda Group Plc*** UKEAT/034/11 and ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336, the claimant's representative submitted that insofar as the Tribunal found the alleged instance relied upon at 2.4(a) to (d) inclusive established in fact, that these amounted to harassment for the purposes of section 26 of the 2010 Act.

303. In relation to the evidence regarding the incident at 2.4(d) the claimant's representative invited the Tribunal to accept the claimant's secondary hearsay evidence of a conversation which allegedly took place between Andrew Igoe and Karen Fotheringham in which it was alleged that Karen Fotheringham told him that during her visit to the school on 2 March 2016 Ruth McFarlane had told her

that the claimant was difficult to work with and that the claimant suffered from Asperger's Syndrome. He invited the Tribunal to regard that evidence as having the effect of transferring the burden of proof to the respondent such that the respondent then required to disprove the proposition and, in the event of the respondent failing to do so by adducing the evidence of Karen Fotheringham that the Tribunal should draw an inference (impliedly not only as to the character and nature of the remarks but as to their having been made.)

Summary of Submissions for the Respondent – Section 26 EqA 2010

304. Under reference to proposed Findings in Fact 184 to 187 and paragraph 38 to 43 of her written submissions the respondent's representative submitted as follows:-

(a) that the onus of proof sat with the claimant to establish in fact the occurrence of the conduct given notice of as relied upon at paragraphs 2.4(a) to 2.4(d).

(b) That on the evidence presented the claimant had failed to discharge that burden of proof.

(c) She invited the Tribunal, on that basis, to dismiss the complaint of harassment in terms of section 26 of the Equality Act 2010 insofar as founded upon all four instances 2.4(a) to 2.4(d).

305. She submitted that whereas it was accepted that the respondent had, at first instance advised the claimant that her return to work meeting would be conducted with the Rector (as would have been the normal procedure) the Investigating Officer did not insist upon the same. *Per contra* when the claimant raised obvious concerns in the context of she having advanced a grievance against the Rector, the Investigating Officer adjourned the meeting with the claimant so as to take advice from HR and thereafter, with the claimant's consent, arrange for the return to work interview to be conducted by another member of staff.

306. In respect of the alleged continued relied upon at 2.4(b) and (c) the respondent's representative submitted that the evidence in this regard comprised entirely of speculation on the part of the claimant and taken at its highest and even allowing for a comparison of the written statements on the one hand with those parts of the clandestinely made recordings which the claimant had provided in the course of the first grievance and had played in the course of the Tribunal hearing, that evidence fell far short of what would be required to establish collusion between the individuals named at paragraph 2.4 (Issue (Fourth)) amounting, in effect, to a conspiracy to deliberately falsify statements regarding their impression of the claimant's conduct on 26 April 2016.

307. Likewise in relation to the respondent's acceptance of those statements she submitted that there was no evidence that supported a Finding in Fact that the respondents accepted the statements knowing them to be false or produced as a result of collusion between the various witnesses. On that basis she invited the Tribunal to dismiss the complaint of section 26 Harassment insofar as founded upon the conduct alleged at paragraphs 2.4(a), (b) and (c).

Harassment – Time Bar

308. Regarding paragraph 2.4(d) the respondent's representative's separate submission was that the Tribunal should hold, upon determination of the reserved issue of challenge to jurisdiction, that the claim, insofar as founded upon the conduct alleged at paragraph 2.4(d) was time barred and that the claim, insofar as so founded should be dismissed for want of jurisdiction.

309. The respondent's representative submitted that the particular averments on which the claimant sought to rely at paragraph 2.4(d) formed no part of the initiating application lodged by the claimant in July 2016.

Discussion and Disposal (Section 26 EqA 2010) Harassment

310. On the evidence presented and the submissions made, the Tribunal has not found in fact that the conduct, on which the claimant offers to prove the occurrence of section 26 EqA 2010 Harassment, set out at paragraphs 2.4(a) to 2.4(d) above inclusive, occurred. Upon that basis the Tribunal holds that the claimant having failed to discharge her burden of proof in respect of the complaint of harassment, that that complaint falls to be dismissed.

311. In relation to the alleged conduct at 2.4(a) the Tribunal found on the evidence that while the Investigating Officer had initially suggested that the claimant's return to work meeting planned for June 2016 be conducted by the Rector it was not a position insisted upon. *Per contra* when the claimant raised obvious concerns, the Investigating Officer adjourned the meeting with the claimant, took advice from HR and with the claimant's consent arranged for the meeting to be conducted by another senior member of staff.

312. In relation to 2.4(b) there was no evidence before the Tribunal that went to establish that Ruth McFarlane and the other named individuals had conspired together to give deliberately false statements about the claimant at the meeting of 26 April 2016 in the course of being interviewed during the investigation of the claimant's first grievance. The only source of that allegation was the claimant and taking the claimant's evidence at its highest it amounted to no more than speculation on her part. No presumption in law as to the occurrence of collusion, conspiracy and the making of deliberately false statements arises from the content of the individual statements themselves or from a mere comparison of the witness statements with those parts of the clandestinely made recordings which the claimant ultimately produced. The onus is squarely with the claimant to prove such an allegation and the Tribunal considered that she failed to discharge that burden.

313. In relation to paragraph 2.4(c) the Tribunal considered that the evidence did not establish that the respondent had accepted the statements of witnesses which

they knew to be false (deliberately inaccurate and or deliberately misrepresentative of the circumstances which the witnesses had observed).

314. Separately and in any event, the Tribunal found the evidence regarding the extent to which recording had been made and or had been edited and by whom, to be; inconclusive, contradictory as between the evidence of the witnesses, including for example the claimant and Kerry Gibson who were present on 26 April and gave oral evidence of their recollections, and unreliable. The claimant stated in evidence that it was her husband Gordon Struth who had split the recordings (edited them) whereas Mr Struth in his evidence advised that he had been entirely unaware of the existence of the recordings until after the receipt of the initial grievance investigation back in June of 2016 and that he himself had never listened to the full original recording. For his part he stated in his evidence that it was the claimant who split (edited) the recordings. The Tribunal did not consider that the evidence supported the making of an express Finding in Fact as to precisely how much of what had occurred on 26 April, precisely where and when it had occurred and between which parties was included in or accurately represented the recordings produced at the grievance hearing of September 2016 and played in the course of the Tribunal hearing.

315. In relation to 2.4(d) the Tribunal separately held, on a proof before answer basis, that the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider that particular complaint of harassment, by reason of time bar. The incident relied upon as giving rise to alleged harassment occurred on 2 June 2016. The claimant's original ET1, lodged by her on 26 July 2016 contains no reference to the incident. Beyond the commonality that the alleged remarks are said to have been made by the Rector to Karen Fotheringham, the averments of fact as between those sought to be introduced by way of amendment (paragraph 2.4(d)) and the position as previously pled, disclosed factually different averments. They do not amount to a Selkent relabelling. The reserved issue of time bar therefore is relevant and requires to be determined.

316. In the Case Management Discussion which proceeded in the case on 29 September 2016, at which Mr Struth appeared as representative for the claimant and which was fixed for the purpose, amongst others of identifying and recording the issues in the case, the incident was not one given notice of as founding an alleged complaint of harassment. Neither was it included in the issues under the heading of Harassment appearing at paragraph 2.4(a) to (d) inclusive of that order.

317. In terms of order (First) of the Tribunal's orders of 29 September 2016 the claimant was directed to furnish to the respondent Further Particulars of, amongst other matters, her complaint of harassment under section 26, the same being specification of all of the instances of conduct which she gave notice of founding on for that purpose. The claimant did not do so but rather intimated an application for Leave to Amend (copied and produced at pages 47 to 57 of the Bundle). It is not the case, as maintained by the claimant's representative at one point in the headings that the amendment was consented to by the respondent on 18 September 2017. In terms of Judge Macleod's Note of Output, issued following the preliminary hearing which took place on 23 February 2018, at paragraph 17 and 18 thereof it is expressly recorded that the question of the challenge to jurisdiction by reason of time bar was stood upon by the respondents and, with the consent of the claimant's solicitors, was reserved for determination at final hearing. The application to amend was opposed, did not in any event contain notice of the incident which is now sought to be relied upon and separately was withdrawn by the claimant at a later procedural hearing (13 October 17) at which the claimant was legally represented by a solicitor.

318. Notice was first given of the particular incident in this context in the second ET1 first presented on 12 December 2017 whereas the incident in question was said to have occurred on 3 March 2016. No case is advanced in terms of section 123(1)(b) in relation to this instance and the complaint of harassment, insofar as founded upon, it is separately dismissed for want of jurisdiction.

319. As already confirmed above the Tribunal considered that the evidence presented was insufficient to support a finding that the alleged statement/s were in fact made by the Rector to the new Principal Teacher on 3 March 2016 as alleged.

Issue Fifth Victimisation Section 27 EqA 2010

The Issue

320. The issue, on the merits of this claim were as set out at paragraph 2.5 above.

321. There was in addition the preliminary issue, reserved for determination to final hearing, of whether the claimant had Title to Present and the Tribunal Jurisdiction to Consider all or any of the complaints of victimisation, by reason of alleged time bar.

Summary of Submissions for the Claimant (Victimisation)

322. Under reference to paragraphs 32 and 33 of his proposed Findings in Fact and in reliance upon the allegations set out at paragraphs 2.5(a) and (b) above the claimant's representative submitted as follows:-

(a) The claimant's grievances of 27 April, 21 and 27 June and her raising of proceedings in the Employment Tribunal on 26 July all 2016 each constituted protected acts which she relied upon for the purposes of her victimisation complaint,

(b) Under reference to paragraphs 9.8 and 9.9 of the "Code of Conduct" detriment should be regarded as something which a person "reasonably considers changes their position for the worse or puts them at a disadvantage" and or a threat which a party takes seriously and which, in the circumstances it is reasonable to take seriously,

(c) Under reference to **Nagarajan** and the Code of Conduct paragraph 9.10, that while there requires to be causation between any protected

act and detriment relied upon, the conduct does not have to be conscious nor does it need to be the only reason,

(d) That the claimant had suffered detriments as set out in his proposed Finding in Fact 33, in consequence of one or other or more of the various protected acts relied upon and by the respondent's witnesses colluding to provide false statements in the internal grievance inquiry (as per his proposed Finding in Fact 29),

(e) He invited the Tribunal to infer, by reason of the nature and extent of those detriments that they occurred because of "the protected acts". He invited the Tribunal to infer that the respondent's disposal of the claimant's grievance constituted "sophistry" undertaken out of self-preservation and because of the protected acts.

Summary of Submissions for the Respondent (Victimisation)

323. Under reference to paragraphs 159 to 174 inclusive of her proposed Findings in Fact the respondent's representative submitted as follows:-

(a) There had been no evidence presented which supported the assertion that there was causal connection between the respondent's consideration and assessment of the statements of the witnesses in the internal grievance procedure on the one hand and any of the alleged protected acts, on the other;

(b) That separately, under reference to Issue (Sixth) at paragraph 2.6 above (time bar), and in reliance upon the same, that the alleged protected acts of lodging grievance on 21 and 27 June 2016 and of commencing proceedings in the Employment Tribunal on 26 July 2016 were not properly before the Tribunal or available to the claimant to rely upon for the purposes of a victimisation complaint. Notice was not given in the original ET1 application of reliance upon grievances

lodged on 21 and 27 June 2016 as protected acts but rather only of reliance upon the grievance lodged on 27 April 2016, as a protected act. Separately those other acts were not identified by the claimant at or recorded amongst the issues in the detailed Note of Output issued to parties following the Case Management Discussion which proceeded in the case on 29 September 2016, as protected acts relied upon under the heading of Victimisation (see paragraph 2.5 of the Tribunal's orders and note of 29 September 2016),

(c) Accordingly, determining the same on a proof before answer basis, reliance for the purposes of having done a protected act should be restricted to the lodging of grievance 1, lodged on 27 April 2016, and likewise reliance upon alleged detriment of failing to adequately deal with the claimant's grievance should be restricted to grievance 1 lodged on 27 April 2016,

(d) There was no evidence before the Tribunal which, even if taken at its highest could sufficiently support a finding of collusion as alleged in relation to statements made in the internal grievance procedure,

(e) That the evidence before the Tribunal *per contra* supported the finding that the claimant's grievance had been adequately dealt with by the respondent. It was partially upheld in relation to the format of the meeting and to its timing viz:- ("*taking account of your disability it would have been appropriate that a planned meeting where you have time to prepare an organised trade union attendance should have been organised*") (see letter of outcome pages 441 to 445 of the Bundle) (grievances and grievance 1 partially upheld),

(f) The evidence did not support a finding that the investigation of the claimant's grievances had been substantially delayed. The Investigating Officer had confirmed in her evidence that this had been a complex case to investigate, a matter substantiated by the amount of

time taken by the evidential enquiry into the factual matrix at the Tribunal hearing. A period of six months to investigate the three grievances (lodged separately) in such a case was not an unreasonable time frame bearing in mind, in addition the need to factor in the availability of personnel during both the working term and school holidays,

(g) The decision to identify the claimant as a member of staff to be declared surplus was taken on 2/3 March 2016 a date prior to the earliest of the alleged protected acts relied upon and thus could not give rise to a complaint of victimisation,

324. On 8 August 2017 the respondents placed a job advertisement for a full time teacher of religious education at Queen Anne High School. The advertisement was placed on an external internal recruitment website. It was a permanent post. It was Andrew Igoe's former post. He had left Queen Anne High School to take up a teaching post at another school.

(a) At that time, namely August 2017 the claimant continued to be absent from work through ill health and certified as not fit to work.

(b) Her internal grievance had resolved in January 2017 with the outcome being that the decision to declare the claimant surplus had been maintained.

(c) The claimant's return to work process was ongoing with Douglas Sinclair the Depute Rector engaging with the claimant regularly to try and facilitate an Occupational Health assessment with the aim of supporting her returning to work.

(d) It was accepted that the vacancy was not proactively brought to the attention of the claimant either by Queen Anne School or the respondent's

central team. The respondents, however, were under no obligation to do so. The claimant had not been compulsorily transferred at that stage.

(e) She had no entitlement, under the respondent's policy, to be offered the post. The post was a full time post whereas the claimant was part time (0.6 FTE).

(f) The post required to be filled imminently for the start of the new term later that month.

(g) The claimant was absent due to ill health and certified unfit to work. She had not identified a return to work date.

(h) She had herself seen the advertisement in August 2017. She had been aware since May of 2017 that the post would be becoming available, because Andrew Igoe had told her, she had accepted in evidence that at no point did she contact either the school or the central team to advise that she would be interested in the position either on a full time or part time basis. She was in regular contact with Douglas Sinclair who was managing her sickness absence and attempting to arrange her return to work. She at no time mentioned any such interest to him.

(i) Separately and in any event the claimant was on record by that time as having confirmed that she could not and would not return to teach at the school unless the Rector, Ruth McFarlane, was removed from post.

(j) Accordingly, the failure to advise the claimant of the post prior to advertising did not, in the respondent's representative's submission properly fall within the definition of detriment. Objectively considered, in the circumstances it was not reasonable to regard it as doing so,

325. Separately and crucially in her submission there was no evidence presented to show a causal link between the claimant not being offered the post on the one hand and any of the protected acts which she sought to rely upon on the other,

326. On these separate grounds the respondent's representative invited the Tribunal to dismiss the complaint of victimisation,

327. Further and separately the respondent's representative, under reference to the submission recorded at 312(a), (b) and (e) above, further submitted that the claimant's asserted reliance, as protected acts, upon her lodging of her second and third grievances on 21 and 27 June 16 had neither been included in the original form ET1 lodged on 26 July 16 or identified or given notice of as potentially relied upon for the purposes of a section 27 claim. Nor had they been given notice of or recorded at or in the Note of Output issued following the closed preliminary hearing conducted in the case on 29 September 2017 (see paragraph 2.5 of the Tribunal's order and note of 29 September 16). Accordingly, she submitted, they all required to be the subject of the granting of Leave to Amend. No such Leave to Amend had been granted and, on a proof before answer basis, reliance upon those matters fell to be regarded as time barred. On that separate ground the respondent's representative invited the Tribunal to dismiss the complaints of victimisation insofar as reliant upon those protected acts and or those detriments.

The Applicable Law – Victimisation – (Issue Fifth)

328. The complaints of victimisation given notice of in this case are regulated by the terms of section 27 of the Equality Act 2010 which provides:-

"***27 Victimisation***

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

329. A complaint of section 27 EqA 2010 victimisation may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates; (Section 123(1)(a) EqA 2010).

330. That initial three month period can be extended by the operation of the Early Conciliation Regulations. Where a claim is not presented within the initial period, as extended, it can only be considered by the Tribunal in circumstances where it is satisfied that the relevant saving provisions test has been met. (Section 123(1)(b) EqA 2010.

Discussion and Disposal (Victimisation)

331. The alleged protected acts relied upon by the claimant, and as recorded at paragraph 2.5(a) above are the lodging of grievances by her on 27 April, 21 June and 27 June and the commencement of an Employment Tribunal claim by her on 26 July 2016.

332. The alleged detriments relied upon by the claimant, and as recorded at paragraph 2.5(b) above are:-

(a) The acceptance by the respondents of allegedly false statements made by Kerry Gibson, Denise Ewing, Leanne Hutchison, Ruth McFarlane and Laura Martin in preference to those of the claimant in consideration and determination of the claimant's grievances;

(b) the respondent's allegedly delaying or otherwise failing to adequately deal with the claimant's grievances,

(c) In making and maintaining a decision to deem the claimant surplus to staffing requirement,

(d) In failing to offer to or make the claimant aware of the role advertised for a permanent teaching post in Queen Anne School (impliedly prior to its being advertised).

333. Of the above alleged detriment (c), the decision to declare the claimant surplus, taken by the respondent on 3 March 2016, predates all of the alleged protected acts relied upon and the complaint of victimisation insofar as founded upon that alleged detriment is dismissed.

334. In relation to asserted detriments (a), (b) and (c) the Tribunal has not found, on the evidence, those matters to have been established in fact (including in

particular the Tribunal has not found that the statements provided by those individuals in the course of the internal grievance procedure were false, in the sense given notice of by the claimant that is to say were deliberately inaccurate in consequence of collusion between the witnesses with the common purpose of misrepresenting the claimant's character either at the instance of or influence by Ruth McFarlane). The complaints of section 27 victimisation insofar as founded upon those alleged detriments and, let it be assumed that the Tribunal had jurisdiction to consider them, would separately fall to be dismissed on that basis.

335. Separately and in any event, the Tribunal considered that no evidence was presented such as would support the making of a Finding in Fact that there was causal connection between any of the protected acts relied upon on the one hand and the alleged detriments suffered on the other. The establishment of such causal connection is an essential element of a section 27 EqA 2010 victimisation complaint and absent the same the claims must fail on that additional ground.

Discussion and Disposal - Jurisdiction – Time Bar – (Issue Sixth) Victimisation/Harassment)

336. The lodging of grievances by the claimant on 21 and 27 June 2016 are recorded at paragraph 2.5 above as protected acts, reliance upon which was given notice of in the course of case management discussion conducted on the first day of hearing, 18 September 2018. They were, however, so recorded subject to the challenge to jurisdiction (time bar) which is recorded at paragraph 2.6 above. No notice of reliance upon the lodging of grievances on 21 and 27 June, for the purposes of a section 27 Equality Act 2010 complaint, is recorded amongst the issues identified by the parties and recorded by the Tribunal at paragraph 2.5 of the Note of Output and orders issued following the closed preliminary hearing which proceeded in the case on 29 September 2016 and which was fixed for; amongst other matters, the purposes of identifying and recording the issues. Neither were those acts specified as being given notice of as alleged protected acts for section 27 victimisation purposes, in the original ET1 lodged with the Tribunal on 26 July 2016. The addition of those matters were not the subject of a

grant of Leave to Amend and the Tribunal has held, on a proof before answer basis that those acts, that is to say the lodging of grievances by the claimant on 21 and 27 June 2016 and the commencement of Employment Tribunal proceedings on 26 July 2016, were not before it for the purposes of founding a section 27 victimisation complaint.

337. Notice of reliance upon the making and maintaining of a decision to deal with the claimant surplus to staffing requirement (a decision taken on 3 March 2016) and of failing to offer to the claimant, or to proactively make the claimant aware of the full time post advertised by the respondents on 8 August 2017, prior to it being advertised, were matters first given notice of in the second ET1 presented to the Employment Tribunal on 12 December 2017. It is an asserted reliance in respect of which the respondent has maintained from the outset, and stands upon, a challenge to the Tribunal's jurisdiction to hear the claims of victimisation insofar as relying upon those alleged detriments.

338. The claims are presented outwith the primary statutory time period during which in terms of section 123(1)(a) of the EqA 2010 they can at first instance be competently presented. No case is advanced in support of the Tribunal having jurisdiction to hear the claims, though late, in terms of the relevant saving provision.

339. The Tribunal holds, on a proof before answer basis that the complaints of section 27 EqA 2010 victimisation, insofar as relying upon those detriments are time barred and on that separate ground are dismissed for want of jurisdiction. The time bar aspects of the section 26 EqA 2010 Harassment complaints are discussed and disposed of at paragraphs 310 to 313 above.

Disability arising from Discrimination – section 15 of the Equality Act 2010

Issue (Seventh)

340. The Issue for determination was that set out at paragraph 2.7 above:-

"**(Seventh)** Whether the claimant suffered discrimination arising from disability, by reason of:-

(a) the statements given by the respondents' five witnesses, taken during the course of the investigation into the claimant's first grievance and subsequently relied upon by the respondents in their outcome decisions in respect of all three grievances, being deliberately made false statements based upon prejudice and stereotyping, the same constituting unfavourable treatment because of something arising in consequence of disability; and separately,

(b) by reason of the respondents failing to substantially address the claimant's late grievance appeal at any point up to and including the date of the claimant's resignation in circumstances where the lateness of the submission of the appeal was caused, or materially contributed to by the claimant's disability,

the same separately constituting unfavourable treatment because of something arising in consequence of the claimant's disability contrary to the provisions of section 15 of the Equality Act 2010."

Summary of Submissions for the Claimant Section 15 EqA 2010

341. Under reference to his proposed paragraphs 11 to 16 of his proposed Findings in Fact the claimant's representative submitted that the contended for discrimination under section 15 was advanced and stood upon two allegations:-

(a) That the claimant had been treated unfavourably by witnesses who were interviewed in the course of the grievance investigation by those individuals making deliberately false statements based upon prejudice or stereotyping; and

(b) By the respondents' refusal to allow the claimant's grievance appeal to be received out of time.

342. Under reference to paragraph 5.7 of the Code and to **Williams v Swansea University Pension and Assurance Scheme and another** [2018] ICR 233, he submitted:-

(a) that when determining whether treatment was "unfavourable treatment" for the purposes of a section 15 claim, the issue was whether the treatment "places a hurdle in front of" or "creates a particular difficulty for" the claimant.

(b) That a two stage process should be followed namely:

(i) To identify the treatment; and

(ii) Then to consider whether the treatment is "in any sense unfavourable".

(c) There is no need for a comparator.

343. The claimant's representative acknowledged that the first allegation was predicated upon a presupposition that the statements given were deliberately false. He further submitted however that even if the Tribunal was not satisfied on the evidence that they were, it nevertheless required to consider whether they were objectively discriminatory in the sense of even if not intentionally false they were based upon subconscious prejudice or stereotyping as referred to in ***Nagarajam***.

344. Upon an invited comparison of the statements given, on the one hand, with those parts of the clandestinely made recordings which were played before the Tribunal, on the other, the claimant's representative invited the Tribunal to conclude that the statements could not be regarded, as they had been by the

respondents in the internal grievance investigation, as merely reflecting the individuals' perceptions of what they had respectively witnessed. Rather, he submitted, that they should be seen as having been influenced, consciously or subconsciously, by prejudice or stereotyping, which in turn had resulted in them misrepresenting the claimant's conduct and presentation.

345. If the Tribunal were persuaded to so conclude then such conduct, even if subconscious, would constitute unfavourable treatment because:-

(a) it put the claimant at a clear disadvantage by reason of its potential to, impact upon the grievance outcome, to put the claimant at risk of disciplinary action and, although not a necessary requirement, could be seen to have cost the claimant substantial distress all of which, he submitted was sufficient to pass the "relatively low threshold" for unfavourable treatment see ***Williams v The Trustees of Swansea University Pension and Assurance Scheme and another*** [2018] UKSC65.

(b) That the significant factor was that the conduct of the claimant, which was described in the statements by the individuals, was, per the evidence of her husband Mr Struth and of the claimant, conduct that Asperger's was capable of leading to. Or, as he alternatively described it, was conduct which was stereotypical of Asperger's in certain conditions and that the coincidence of the claimant having Asperger's (let it be assumed that such conduct was indeed stereotypical of Asperger's, on the one hand and being perceived by the individuals who gave statements as having conducted herself in the way that they describe, on the other hand was such as to be indicative of and to establish causation.

(c) Alternatively, viewing the matter in another way he submitted that the disadvantage suffered by the claimant was that as a person with Asperger's she would have been unable to dispute the accounts, in

the absence of the clandestine recordings, because her disability meant she could have behaved in that way. That disadvantage arises because of her disability because the disability is the reason why the conduct was plausible. In that event, the motive of the individuals (lest the Tribunal was disinclined to ascribe one and considers itself unable to hold that the statements were deliberately false,) was irrelevant.

346. In relation to the second allegation (the refusal to allow the late appeal to be received) the claimant's representative submitted that the imposition of a strict time limit, let it be assumed that the respondents fell to be regarded as having done that, put the claimant at a real and identifiable disadvantage.

347. The claimant's representative recognised that the evidence presented in relation to the precise reasons for the claimant delaying in seeking to submit an appeal against the grievance outcome until 15 January (some six weeks after the respondents wrote to her intimating the outcome on 5 December), at very least, "*bore out some confusion about exactly what the impact of her Asperger's was on her so delaying*". He submitted however that whichever of the various versions of events and reasons set out by the claimant and or by Mr Struth the Tribunal accepted was most probable, those versions all led, by what he described as "clear implication" to the conclusion of the claimant's disability caused or materially contributed to her delay in submitting the appeal. Under reference to **Nagarajan v Agnew and others** [1999] IRLR 572 HL, he submitted that "unless the Tribunal is able to say that the disadvantage and (in order to get to that therefore) that the delay in submitting the appeal, was in no way due to the claimant's disability, then any exercise of trying to unpick different causative factors is wholly unnecessary. He submitted that "*it was a matter of clear implication that the claimant's disability caused or materially contributed to her delay in submitting the appeal …*"

Summary of Submissions for the Respondent – Section 15 EqA 2010

348. Under reference to paragraphs 190 to 201 of the respondent's proposed Findings in Fact the respondent's representative submitted in relation to the first allegation (that of deliberately making false statements based upon prejudice and stereotyping), that four out of the five individuals so accused, (that is all those whose statements were criticised with the exception of the Rector Ruth McFarlane) were unaware of the claimant's possession of the protected characteristic of disability at all, and or that it arose by reason of her Asperger's. Accordingly, in relation to alleged less favourable treatment at the hands of those individuals, she submitted that the terms of section 15(2) of the 2010 Act were engaged such that the claims simply fell to be dismissed insofar as relying upon those statements.

349. In relation to the remaining individual, Ruth McFarlane, the only information which she had, with regards to the claimant's disability, was the diagnosis letter produced at page 235 of the Bundle.

350. There was no evidence led on behalf of the claimant that would support a Finding in Fact that the four individuals namely Kerry Gibson, Denise Ewing, Laura Martin and of Leanne Hutchison were aware of the claimant's disability when the alleged false statements were made. Kerry Gibson, who gave evidence at the hearing, specifically confirmed that she for her part had no knowledge of the claimant's suffering from Asperger's Syndrome at the relevant point in time.

351. The claimant, for her part, had advised at the outset of her evidence that it was her understanding that the majority of teachers and staff at the school would not know that she suffered from Asperger's Syndrome.

352. With regards to Ruth McFarlane, the respondent's representative acknowledged that she was aware of the claimant's possession of the protected characteristic but, she submitted and invited the Tribunal to hold, she was unaware of how it manifested/specifically affected the claimant, as the claimant had chosen not to share such information with her.

353. There was no medical evidence presented to sustain the claimant's proposition that the symptoms which she attributes to her Asperger's Syndrome are in fact linked to it in her case, nor to any other condition or personality issue. She submitted that the claimant had not established on the evidence that her own conduct, which was the subject of description by the individuals in the statements made by them, was attributable to her Asperger's Syndrome and thus she had not established that the treatment which she sought to characterise as unfavourable was treatment suffered by her because of something arising in consequence of her disability.

354. The respondent's representative made reference to the guidance on the correct approach to a section 15 claim which was set out by the EAT in ***Paisner v NHS England*** [2016] IRLR 170, EAT and to the sub-paragraphs (a) to (i) inclusive of the judgment in that case. The respondent's representative commended that approach and those steps to the Tribunal and submitted that the claimant's case in this regard failed the first step set out in **Paisner** at sub-paragraph (a):-

> "*(a) A Tribunal must first identify whether there was unfavourable treatment and by whom; in other words, it must ask whether A treated B unfavourably in the respects relied upon by B no question of comparison arises.*"

355. The alleged unfavourable treatment relied upon by the claimant in respect of this claim was the making by the named individuals, including Ruth McFarlane, of deliberately false statements about the claimant based upon prejudice and stereotyping in relation to their perception of the incident of 26th April. The respondent's representative submitted there had been no evidence led upon which the Tribunal could find in fact that the statements made by those individuals reflected anything other than their perception of what they had witnessed and certainly, no evidence which would support a Finding in Fact that the statements given by them were deliberately made false statements nor, she submitted, that the statements were based upon prejudice and stereotyping. She submitted that no prima facie case of section 15(1) discrimination had been made

out against these individuals. In short, the claimant had not established in fact that any of the statements were statements which the individuals had deliberately falsely made or had subconsciously made because of prejudice and stereotyping. On that basis she invited the Tribunal to dismiss the section 15 Equality Act 2010 complaint insofar as it relied upon the making of alleged deliberately false statements or on statements based on prejudice or stereotyping.

356. In relation to the second allegation, that is the respondent's declining to accept the claimant's late submitted appeal, the respondent's representative submitted that no sufficiently reliable and or credible evidence had been presented which could support a Finding in Fact that the claimant's delay in submitting her appeal, across a period of some six weeks, was due to or materially contributed to by her Asperger's. Such evidence as was presented, including the evidence of the claimant as to how her condition impacted upon her and how she acted in other situations, pointed in the opposite direction and, if anything went to establish that the claimant did not overlook the deadline at all and certainly not in consequence of her disability. The claimant's own evidence was self-contradictory, inconsistent, unreliable and questionably incredible as between, on the one hand, the position which she communicated in writing to the respondents at the time, and her oral evidence before the Tribunal, on the other, and as between her own evidence and that of her husband Mr Struth. She rejected and invited the Tribunal to reject that evidence as, in part, incredible and as unreliable and insufficient to establish causation as between the claimant's Asperger's on the one hand and her delay in attempting to appeal against the grievance outcome, across the period of some six weeks, on the other. Absent the establishment of that causative link the complaint of section 15 EqA 2010 discrimination should be dismissed. That was a matter in respect of which the burden set squarely with the claimant and she had failed to discharge it.

Applicable Law – Section 15 EqA 2010

357. Section 15 of the Equality Act 2010 is in the following terms:-

"**15 Discrimination arising from disability**

(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."

Discussion and Disposal – Section 15 EqA 2010

358. On the evidence presented and submissions made the Tribunal did not find the assertions of fact upon which the section 15 claim was presented to have been established and upon that basis the claims are dismissed. In particular the Tribunal did not find established that the statements, given by the respondents' five witnesses during the course of the investigation into the claimant's first grievance and subsequently taken account of by the respondents in outcome decisions in respect of the three grievances, were deliberately made false statements based upon prejudice and stereotyping ("the first factual assertion").

359. In relation to the first allegation and the proposition that the Tribunal, in the event that it did not find that the statements had been deliberately made false statements should infer that they were statements made based upon prejudice and stereotyping, the Tribunal has not found in fact and did not consider, that the evidence before it supported a Finding that the conduct of the claimant, which the individuals recount as witnessed by them in the statements was "stereotypical of Asperger's".

360. The primary evidence of the claimant and of her husband Mr Struth related chiefly to behaviour of the claimant. Separately, and in any event let it be assumed that the Tribunal had made a finding that such conduct was stereotypical of Asperger's, which it has not, there was no evidence presented which went to establish that the witnesses whose statements were the subject of criticism had knowledge of such stereotypical characterisation or, in the case of the majority, even knew that the claimant suffered from Asperger's. Persons who do not suffer from Asperger's are equally capable of behaving in the way described and frequently do. That is to say conduct of the type described in the statements is susceptible to explanation without reference to or knowledge of the condition of Asperger's.

361. The Tribunal did not accept the proposition, let it be assumed that it did not find that the statements had been deliberately falsely made, that it should nevertheless hold, by inference in the circumstances, that they were statements based upon prejudice and stereotyping.

362. Separately the Tribunal did not consider that the evidence presented supported the proposed Finding in Fact that the delay in the claimant's submission of her appeal was due to or materially contributed to by her Asperger's ("the second factual assertion"). Reference is made to paragraphs 350 and 351 above and to the respondent's representative's and the Tribunal's assessment of the quality and sufficiency of evidence, as set out therein which the Tribunal respectfully argues with and adopts. In relation to the first factual assertion, the Tribunal considered that taken at its highest the claimant's evidence in this regard amounted to a mixture of speculation and assumption on her part which, however genuinely she might have felt it to be the case, was insufficient to establish individual, far less collective provision of deliberately made false statements or separately that the statements provided were based upon prejudice and stereotyping.

363. In relation to the second factual assertion, the Tribunal found the claimant's evidence as to why she delayed attempting to appeal against the grievance

outcome for a period of some 28 days to be inconsistent as between the written reasons given by her to the respondents at the time and the position adopted by her in evidence before the Tribunal and in part contradictory of the evidence given by Mr Struth at the hearing. The Tribunal considered that evidence to be unreliable in relation to the reason for the delay and declined to make the Finding in Fact proposed by the claimant's representative founded upon it.

364. The evidence relating to the second factual assertion emanated from three sources:-

(a) Firstly the claimant, as variously asserted by her in her late letter of appeal and in her oral evidence before the Tribunal.

(b) The oral evidence of Mr Gordon Struth before the Tribunal.

(c) Thirdly the evidence of Vivian Sutherland, Principal Psychologist in Education with expertise in ASD spectrum disorders copied and produced at page 488 of the Bundle and as contemporaneously sourced by the respondents' Chief Executive Steve Grimmond to inform his consideration of the claimant's request that an appeal against the grievance outcome be allowed though submitted out of time and in particular, the claimant's assertion, made in her letter of 15 January 2017 that the ten working days' time limit was insufficient to allow her "as a person with Asperger's" to make a proper detailed appeal.

365. The evidence of Vivian Sutherland, Principal Psychologist in Education did not support the proposition that the claimant's condition would have inhibited her ability to interpret or understand the import of the respondent's letter dated 5 December 2016, sent to and received by the claimant and, in terms of which they communicated the outcome of the claimant's grievance; the same including the paragraph confirming the claimant's right to appeal against the decision and the requirement, if the claimant wished to make such an appeal, that she complete

and return the enclosed grievance form, requesting a Stage 2 hearing, to the Executive Director of Education and Children's Services outlining her reasons for appeal, within ten days of receipt of the letter of 5 December 2016.

366. ***Nagarajan*** was a case dealing with direct discrimination in which the issue focused was that of why the claimant received less favourable treatment. Was it on the grounds of race? Or was it for some other reason? If grounds of race were the reason for less favourable treatment, direct discrimination is established. The reason why the discriminator acted on racial grounds is irrelevant when deciding whether or not an act of racial discrimination occurred. It is authority for the proposition that, in a circumstance where there are mixed reasons for the operative decision or conduct, it will be sufficient that one or more of those reasons is a reason (which amounts to an important factor in the operative decision) (see page 535 of the report of the decision in the EAT (21 and 22 July 1993) referring to and adopting what was said by Stevenson LJ in ***Owen and Briggs v James*** [1982] ICR 618 at 626):-

> "*It is clear from that decision that a reason which is an important factor in the operative decision is quite enough, to quote Sir David Cairns. In our judgment, where an industrial tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the industrial tribunal finds that the unlawful motive or motives were of significant weight in the decision making process to be treated as a cause, not the sole cause but as a cause of the act thus motivated, there will be unlawful discrimination. An important factor in the decision is clearly well within that principle.*"

367. On the evidence presented, the Tribunal has not found in fact that the claimant's disability caused or materially contributed to her delay in submitting the appeal. No inference or presumption to that effect arises from the mere coincidence of the possession of the protected characteristic by the claimant on the one hand

and the occurrence of treatment which is capable of meeting the required threshold of "unfavourable" treatment on the other. There is no transfer of the onus of proof in relation to the reason for the claimant's own primary conduct, of delay, absent which the alleged discriminatory conduct of the respondents would not have occurred. It is for the claimant to discharge the onus and to prove on the preponderance of the evidence, on the balance of probabilities and to the satisfaction of the Tribunal that her Asperger's caused or materially contributed to her conduct of delaying in the submission of her appeal. On the evidence presented and for the reasons given, the Tribunal considered that the claimant had failed to discharge that onus and that complaint of section 15 EqA 2010 Discrimination is dismissed.

Discussion and Disposal (Harassment)

368. On the evidence presented and the submissions made the Tribunal has not found in fact that the conduct on which the claimant offers to prove the occurrence of section 26 EqA 2010 Harassment, at paragraphs 2.4(a) to 2.4(d) above inclusive, occurred. The Tribunal holds that the claimant has failed to discharge her burden of proof in respect of the complaint of harassment and that that complaint falls to be dismissed.

369. In relation to the alleged conduct at 2.4(a) the Tribunal found on the evidence that while the Investigating Officer had initially suggested that the claimant's return to work meeting planned for June 2016 be conducted by the Rector, it was not a position insisted upon. *Per contra* when the claimant raised obvious concerns, the Investigating Officer adjourned the meeting with the claimant, took advice from HR and with the claimant's consent arranged for the meeting to be conducted by another senior member of staff.

370. In relation to 2.4(b) there was no evidence before the Tribunal that went to establish Ruth McFarlane and the other named individuals had conspired together to give deliberately false statements about the claimant at the meeting of 26 April 2016 in the course of being interviewed during the investigation of the

claimant's first grievance. The only source of that allegation was the claimant and taking the claimant's evidence at its highest it amounted to no more than speculation on her part. No presumption in law as to the occurrence of collusion, conspiracy and the making of deliberately false statements arises from the content of the individual statements themselves or from their comparison of the sections of recording ultimately provided by the claimant to the respondent in the course of the internal grievance and played to the Tribunal at hearing. The onus is squarely with the claimant to prove such an allegation and the Tribunal considered that she failed to discharge the burden of proof in that regard.

371. In relation to paragraph 2.4(c) the Tribunal considered that the evidence did not establish that the respondent had accepted the statements of witnesses which they knew to be false (deliberately inaccurate and or deliberately misrepresentative of the circumstances which the witnesses had observed).

372. Separately, the Tribunal considered evidence regarding the extent to which recording had been made and or had been edited and by whom, to be inconclusive, contradictory as between the evidence of the witnesses including for example the claimant and Kerry Gibson who were both present on 26 April and gave oral evidence of their recollections, and unreliable. The claimant stated in evidence that it was her husband Gordon Struth who had split the recordings (edited them) whereas Mr Struth in his evidence advised that he had been entirely unaware of the existence of the recordings until after the receipt of the initial grievance investigation back in June of 2016 and that he himself had never listened to the full original recording. For his part, he stated in his oral evidence that it was the claimant who split (edited) the recordings. The Tribunal did not consider that the evidence supported the making of an express Finding in Fact as to; precisely how much of what had occurred on 26 April, precisely where and when it had occurred and between which parties, was included in the recordings produced at the grievance hearing of September 2016 and played in the course of the Tribunal hearing.

373. In relation to 2.4(d) the Tribunal separately held, on a proof before answer basis, that the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider this particular complaint of harassment, by reason of time bar.

(a) The incident relied upon as giving rise to alleged harassment occurred on 2 June 2016. Beyond the commonality that the alleged remarks are said to have been made by the Rector to Karen Fotheringham the averments of fact as between those sought to be introduced by way of amendment (paragraph 2.4(3)) and the position as previously pled disclosed factually different averments. They do not amount to a Selkent relabelling. The issue of time bar therefore is relevant and requires to be determined.

(b) The claimant's original ET1, lodged by her on 26 July 2016 contains no reference to the incident.

(c) In the Case Management Discussion which proceeded in the case on 29 September 2016 at which Mr Struth appeared as representative for the claimant and which was fixed for the purpose, amongst others of identifying and recording the issues in the case, the incident was not one given notice of as founding an alleged complaint of harassment;

(d) neither is it included in the issues under the heading of "Harassment" appearing at paragraph 2.4(a) to (d) inclusive of the order and Note issued following the 29 September 16 Case Management Discussion.

(e) In terms of Order (First) of the Tribunal's orders of 29 September 2016, the claimant was directed to furnish to the respondent Further Particulars of, amongst other matters, her complaint of harassment under section 26, being specification of all of the instances of conduct which she gave notice of founding on for that purpose.

(f) The claimant did not do so but rather intimated an application for Leave to Amend (copied and produced at pages 47 to 57 of the Bundle). That

application was opposed, did not in any event contain notice of the incident which is now sought to be relied upon and separately was withdrawn by the claimant via her solicitor a later procedural hearing on 13 October 2017 at which the claimant was represented.

(g) Notice was first given of the particular incident in this context in the second ET1 first presented on 12 December 2017 whereas the incident in question was said to have occurred on 3 March 2016.

(h) No case is advanced in terms of section 123(1)(b) in relation to this instance and the complaint of harassment, insofar as founded upon and the complaint is separately dismissed for want of jurisdiction.

374. While the provisions of section 136 of the Equality Act 2010 are available to be prayed in aid of the drawing of an inference as to motivation or other matter which would constitute the contravention of a provision of the act, they do not operate to allow inference to be drawn at the first stage of the test; That is to say, for the burden of proof to be switched there must first be established by the claimant primary facts from which, in the absence of any other explanation, the requisite inference could be drawn.

375. The Tribunal, separately, considered that the evidence presented was insufficient to support a finding that the alleged discriminatory statement was in fact made by the Rector to the new Principal Teacher on 3 March 2016, as alleged.

Constructive Dismissal (Issue Eighth) – Section 95(1)(c) ERA 1996

376. The **(Eighth)** Issue (noted at paragraph 2.9 above) was:-

(a) whether the conduct (or any of the conduct) particularised at paragraph 53 of the paper apart to the claimant's 2017 ET1 with Case Number 4106953-17, occurred;

(b) whether such conduct, if any, as is found to have occurred was conduct which, either individually or collectively, constituted a repudiatory breach of the condition of "confidence and trust", implied within the claimant's Contract of Employment, such as to entitle the claimant to resign, without notice;

(c) whether the claimant resigned in consequence of any such repudiatory breach and thus,

(d) was the claimant constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996, (in which latter case it is accepted by the respondent that the dismissal will fall to be regarded as unfair).

Summary of Submissions for the Claimant – Constructive Dismissal

377. Under reference to paragraphs 34 to 47 inclusive of his submissions on the evidence, paragraph 53 of the claimant's statement of claim in her ET1 in Case Number 4106953/2017, to the case of ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 at paragraph 38 and the authorities referred to therein, and to ***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493 the claimant's representative submitted as follows;

378. The claimant founded upon an offer to prove the occurrence of specified instances of conduct and that the same constituted a course of conduct which individually or collectively amounted to a repudiatory breach of contract entitling the claimant to resign. In the course of evidence the claimant identified as the "last straw, and as the conduct in response to which she asserts she resigned on 13 September 2017 thus constituting her constructive unfair dismissal in terms of section 95(1)(c) of the Employment Rights Act 1996, the respondent's decision to advertise for an external candidate to work in the claimant's department without first discussing with/offering the post to the claimant. The decision was one of which the claimant became aware of in early August 2017.

379. The list of conduct alleged by the claimant and founded upon by her was:-

"(i) The respondent's unfair decision to declare her surplus to requirement which the claimant contends is in reprisal of her asking to go home on 2 March, 2016 to look after her daughter.

(ii) The respondent's failure to follow the LNCT 06 policy.

(iii) The treatment she suffered from Ruth McFarlane.

(iv) The statements given by the witness in the investigation.

(v) The refusal by the respondent to acknowledge that the statements were false and/or misleading despite the production of the recordings.

(vi) Predetermining the grievance outcome and not giving proper and fair consideration to the grievance.

(vii) The refusal to consider the claimant's appeal against the grievance.

(viii) Failing to discuss with the claimant alternatives to redeployment (such as a reduction in hours).

(ix) The decision to advertise for an external candidate to work in the claimant's department and not discuss the same with the claimant." (The last straw)

380. The claimant's representative invited the Tribunal to find each of the instances of conduct founded upon to be established, that collectively when taken together with the last (straw) constituted a repudiatory breach of contract, in response to which the claimant had resigned.

Summary of Submissions for the Respondent – Constructive Dismissal

381. Under reference to paragraphs 202-229 of the respondent's proposed Findings in Fact and to the cases of:-

Blackburn v Aldi Stores Limited [2013] IRLR 846
McBride v Falkirk Football and Athletic Club [2012] IRLR 22
Western Excavation (ECC) Limited v Sharp [1978] IRLR 27
Malik v Bank of Credit and Commerce International SA [1997] IRLR 462]
Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978
Waltham Forest v Omilaju [2004] EWCA Civ 1493

382. The respondent's representative submitted that upon the evidence presented:-

(a) the claimant had failed to establish in fact the conduct relied upon at paragraphs (i) to (vi) inclusive;

(b) that the conduct relied upon at (vii), (viii) and (ix) did not constitute any breach of obligation on the part of the respondent; and thus,

(c) that no relevant course of conduct was established in fact and certainly, no course of conduct constituting a repudiatory breach of the implied condition of confidence and trust such as to entitle the claimant to resign without notice.

383. Separately and in any event the respondent submitted that the claimant had not established, on the evidence, that she had resigned in response to what she had identified in her oral evidence as the last straw, namely becoming aware in early August of 2017 of the fact that the respondent had advertised a full time vacancy within the claimant's department. Rather, it was submitted, that the claimant had resigned on 13 September 2017 as a direct consequence of not receiving a settlement at judicial mediation, a conclusion which, on the evidence, was

consistent with the undisputed fact that as late as 6 September 2017, that is one month after the occurrence of the alleged final straw, the claimant had agreed to a further Occupational Health referral the agreed purpose of which was to support her return to work.

Applicable Law – Constructive Dismissal

384. In relation to the complaint of constructive dismissal, parties representatives referred the Tribunal, to the following authorities all of which were of assistance:-

Blackburn v Aldi Stores Limited [2013] IRLR 846
McBride v Falkirk Football and Athletic Club [2012] IRLR 22
Western Excavation (ECC) Limited v Sharp [1978] IRLR 27
Malik v Bank of Credit and Commerce International SA [1997] IRLR 462
Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978
Waltham Forest v Omilaju [2004] EWCA Civ 1493

385. The complaint of constructive dismissal is advanced in terms of section 95(1)(a) of the Employment Rights Act 1996 which provides as follows:-

"**95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to sub-section (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"

Incorporated within the section is a contractual test comprising the three elements of:-

- Repudiatory conduct on the part of the employer

- Acceptance (and communication of acceptance) of the repudiation by the claimant
- Resignation by the claimant in response (or at least partly in response) to the repudiatory conduct and thus resiles."

386. The law on constructive dismissal was recently summarised by the Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 where the Court listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:-

"● what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? Has he or she affirmed the contract since that act?

● If not, was that act (or omission) by itself a repudiatory breach of contract?

● If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493) of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

● Did the employer resign in response (or partly in response) to that breach?"

387. Constructive dismissal requires the employer to be in repudiatory breach of an express term or an implied term of the contract. The breach may be actual or anticipatory. The breach may consist of a "one off" act or a "continuing course of conduct" extended over a period culminating in a "last straw". Even where the particular alleged conduct is established a party asserting constructive dismissal

must satisfy the Tribunal that the facts as proven are sufficient in law to amount to a repudiatory breach of contract. That is essentially a question of fact and degree in each instance. Unless a breach of contract is significant and either goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, it will normally fall short of repudiatory breach.

388. Under the **last straw doctrine** an employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amount to a breach of the implied term of trust and confidence. In ***Kaur v Leeds Teaching Hospital***, the Court of Appeal referred to such conduct as "conduct that crosses the ***Malik*** threshold. As Lord Nicholls said in ***Malik*** at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'.

389. Thus a relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship. The final or "last" straw however, must contribute something to the breach, although what it adds might be relatively insignificant:

- The final straw must not be utterly trivial.

- The act does not have to be of the same character as earlier acts complained of.

- It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it's likely to be so.

- An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly interprets the act as hurtful and destructive on their trust and confidence in the employer.

- The test of whether the employee's trust and confidence has been undermined is objective (***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493)

Discussion and Disposal (Constructive Dismissal)

390. In advancing a successful complaint of constructive dismissal it is for the claimant to:-

- Identify the alleged breach or breaches of contract (the claimant does so at paragraph 53 of her statement of claim to her form ET1 in Case Number 4106953/2017 these being those set out at paragraph (i) to (ix) above).

- Discharge the onus of proof in establishing the evidential basis of her claim (to establish in fact the occurrence of the alleged conduct).

- To satisfy the Tribunal that the facts, such as the Tribunal finds them to be proven, are sufficient in law to amount to a repudiatory breach of contract.

391. On the oral and documentary evidence presented and with the exception of the one instance in relation to (ii) which is noted below, the Tribunal unanimously considered that the claimant had failed to discharge that burden of proof in respect of alleged instances of conduct (i) to (vi) inclusive. That is to say, for the avoidance of doubt, the Tribunal did not find in fact:- "(i) that the respondents had unfairly decided to declare the claimant surplus to requirement by reason of their

having done so in reprisal for her asking to go home on 2 March 2016 to look after her daughter". Per contra the Tribunal found in fact that:-

- the surplus was identified by Ken Robertson as part of his annual course choice timetabling exercise, and was so identified prior to the discussion which took place between the claimant and the Rector on 2 March 2016 concerning her going home to look after her daughter.

- The identification of the claimant as the staff member to be declared surplus resulted from the application of the normal rules of seniority of service.

- The claimant's, otherwise unsubstantiated belief that the Rector had chosen her "in reprisal" was insufficient to support the making of any such Finding in Fact.

392. In relation to alleged incidence of conduct (ii) the Tribunal unanimously considered, on the evidence, that the respondents had followed the LNCT 06 policy as locally collectively varied, with the exception of Ruth McFarlane's failure to apply the terms of paragraph 29 to her initial decision process. With the exception of that failure, to take into account on or around March 2016 the claimant's health (Asperger's) in the decision making process which identified her as a member of staff liable to transfer, in respect of which see further paragraph ( ) below, the Tribunal did not find, on the evidence before it, that the respondents failed to follow the LNCT 06 policy. As at the date of the claimant's resignation on 13 September 2017, some 18 months later, the circumstance in which, if following the policy, the respondents, in terms of its paragraph 29, should again take into account the claimant's health (including her Asperger's Syndrome) namely in relation to the suitability of any post to which she may be transferred, had not yet arisen.

393. In relation to (iii) the Tribunal did not find in fact, on the evidence presented, that Ruth McFarlane treated the claimant in breach of contract in the manner alleged, viz:-

> by identifying her as the member of departmental staff who was surplus in order to punish her for seeking leave to go home on 02 March 2016;
>
> Nor at the meetings between the claimant and Ruth McFarlane on 3 March or 26 April 2016.
>
> The Tribunal found that at the meeting of 26 April 17 (some 17 months prior to the claimant's resignation) a heated exchange occurred between the claimant and Ruth McFarlane. The Tribunal considered that to be as much contributed to by the claimant as by Ruth McFarlane. The Tribunal has not found in fact that Ruth McFarlane told the claimant, on 2 March, that her daughter should look after herself at home. Absent such a finding, the Tribunal did not consider that Ruth McFarlane describing the claimant's stating to the HR representative who was present that she had so told her, constituted a breach of contract, however undiplomatic her use of that phrase might otherwise have been.
>
> In the context of having had the benefit of listening to the clandestine tape recording of the meeting of 26 April 2016, the Tribunal has found that Ruth McFarlane's use of the term "screaming" in her grievance investigation statement amounted to an inaccurate characterisation of the claimant's conduct on that day. The Tribunal however did not consider, as a matter of fact and degree in the circumstances of what had been a heated and emotionally charged exchange between the individuals, that her use of that term, as opposed for example to the term "shouting", constituted a breach of contract.

394. The allegation under head (iv) was that the various witnesses who had provided statements in the course of the investigation of the claimant's grievance had conspired together in order to and had deliberately falsified their statements in order to malign the claimant's character and had done so at the request of or under orchestration by Ruth McFarlane. The Tribunal considered that there was

no evidence before it that went to justify such a Finding in Fact, which it declined to make.

395. In relation to (v) the Tribunal did not consider, in the absence of any evidence which went to establish conspiracy, that the respondents were under any contractual obligation to acknowledge that the statements were false, a term which implies, of necessity acknowledgment of deliberate misstatement.

396. In relation to (vi) the Tribunal did not consider the evidence presented supported a Finding in Fact that the respondent had either predetermined the grievance outcome or had not given proper and fair consideration to the grievance. No presumption to that effect arises from the claimant's dissatisfaction with the grievance outcome. The claimant did not raise concerns with regard to the investigation carried out by Sarah Else when she received the final grievance investigation pack in September of 2016. She did not raise any concerns with regard to procedure, or transparency at the grievance hearing on 1 November 2016. Neither, after its conclusion, did she raise concerns regarding the conduct of the hearing of 1 November 2016. The first point at which the claimant expressed dissatisfaction was when she received notification of the outcome of the grievance in December of 2016. No presumption to the effect that the grievance outcome had been predetermined or to the effect that the respondent had not given proper and fair consideration to the grievance arises from the fact that, in the main, the grievance was not upheld.

397. In relation to paragraphs (vii), (viii) and (ix), while the occurrence of that conduct was not a matter in dispute between the parties, the Tribunal did not consider that any of those instances of conduct on the part of the respondent constituted a breach of contract on their part.

398. In relation to (vii) the Tribunal did not consider that the respondent's decision not to receive the claimant's late tendered appeal, in the circumstances presented to them by the claimant at the time, constituted a breach of contract. It was accepted by the claimant that her letter seeking an appeal hearing was submitted

by her substantially after the expiry of the ten day time period allowed during which the right to appeal existed and required to be exercised and was in fact tendered by her on 15 January, over one month after receipt of the outcome letter against which she sought to appeal.

399. On the final page of the late tendered appeal letter the claimant included a paragraph under the heading "Timing" in which she stated "*As a person with Asperger's … it has taken me this long to compose myself sufficiently to make a proper, detailed appeal.*" She went on to state "*Ten days is nowhere near long enough to appeal in such a lengthy, detailed and complex case, and the pressure of this deadline significantly added to my anxiety*". On their objective construction, the respondents were reasonably entitled to understand those words and that explanation as communicating that the claimant was aware of the ten day deadline within which an appeal had to be made, before it expired and yet took no steps to request an extension of it; and secondly and impliedly, an assertion that for a person suffering from Asperger's an appropriate period for appeal should be a substantially longer period of 30 days.

400. The respondents took advice on the second (implied) point. The advice they received was to the effect the fact that a person who suffered from Asperger's was not something which, of itself and absent some communication to that effect, gave rise to an assumption that they would have difficulty with understanding or considering the terms of a formal letter outlining the grievance outcome decision.

401. In her oral evidence before the Tribunal the claimant gave an account of the reasons for late submission which differed substantially from that set out in the late tendered letter. Her oral evidence was in part contradictory of and in part inconsistent with the oral evidence of Gordon Struth as to the reasons for late submission of the appeal.

402. The Tribunal found the oral evidence of the claimant and that of Mr Struth to be, in the circumstances, unreliable and in parts incredible, on the issue of the reasons for the late tendering of an appeal and did not accept it in relation to that

matter. The Tribunal did not consider that that evidence established that there was a direct causal connection between the claimant's disability on the one hand and the lateness of the tendering of her letter of appeal on the other and did not make such a Finding in Fact.

403. The respondent's grievance policy does not contain any express provision for the acceptance of appeals after the expiry of the ten day time limit during which they are said to be competent. The Tribunal did not consider, on the evidence before it, that the respondent's decision not to accept the late appeal, in circumstances where they had given informed consideration to the specific reasons for lateness which were placed before them by the claimant at the time, constituted a breach of contractual obligation on their part. The Tribunal considered that in the particular circumstances the decision not to accept the late tendered appeal was one which was permitted under the contract.

404. Regarding (viii), the LNCT 06 policy does not require a school to discuss alternatives to redeployment (such as a reduction in hours). The claimant, for her part did not raise the possibility of reducing her hours or qualifying to teach in another subject with either the Rector Ruth McFarlane or with anyone from the respondent's central team who were responsible for arranging transfer. The Tribunal did not consider that the evidence before it established that such non-discussion constituted, a breach of contract on the part of the respondent.

405. With regards to (ix) the Tribunal did not consider that the evidence before it supported a Finding in Fact that the respondent's decision to advertise for an external full time candidate to work in the claimant's department without first discussing the same with the claimant constituted a breach of contract. Paragraph 31 of the transfer policy and guidance for teachers (LNCT 06) (copied and produced at pages 123-134 of the Bundle) provides:-

> "*31. A teacher who is compulsorily transferred will have the first chance to transfer back to his/her former school, if a vacancy arises within that school within a calendar year of the original transfer, and a request for a*

transfer back is received in writing. Such a return revokes the right to freedom from transfer for a three year period from the date of the original transfer."

406. As at the date of the decision complained of, August of 2017, the claimant, although identified as a person who was "surplus" and liable to transfer had not been compulsorily transferred. She was on sick leave and as at the date of the conduct complained of had so been substantially for a period of 18 months. She therefore remained on the establishment of her pre-existing school with whom the responsibility of managing her sickness absence rested. She did not fall within the terms of paragraph 31 of the policy. The respondents were under no obligation to discuss what was a full time post with her or to offer the post to her prior to advertising it. Their decision to advertise the post did not, in the circumstances, constitute a breach of contract. She had advised that she could not return to work at Queen Anne High School unless, amongst other conditions set by her, the Rector was removed from post. There were no plans to so remove the Rector in the teaching year 17/18. The requirement and the vacant post was for a full time post. The claimant was a 0.6 full time equivalent. The school required the teacher to teach in the immediately following year that is the term commencing towards the end of August 2017. The claimant knew of the vacancy before it was advertised, having found out from Andrew Igoe in May of 2016 and had not intimated any interest in it to the respondent.

407. In relation to paragraph (ii) above – alleged failure on the part of the respondents to follow the LNCT 06 policy - the Tribunal found in fact that on or about 3 March 2016 the respondent failed, as required in terms of section 29 of the policy, to take account of the claimant's health (including her Asperger's Syndrome) in the decision making process in relation to the selection of the claimant as a member of staff liable to transfer. The Tribunal considered that that failure was, by its nature, one capable of constituting a breach of contract. That failure was the only breach/potential breach of contract which, on the evidence, the Tribunal has found in fact occurred. That failure occurred on or about 3 March 2016. The claimant was aware of the same from on or about the same date. The claimant

did not resign until 13 September 2017 some 18 months later. At the point of resigning the claimant did not identify the respondent's alleged failure to take account of her health (Asperger's Syndrome) in the decision making process which identified her as a member of staff to be declared surplus, as one of the instances of the respondent's conduct in response to which she was resigning.

408. The Tribunal did not consider that the evidence before it supported a finding, and the Tribunal has not found in fact, that there occurred, in the instant case, a series of breaches of contract or a course of conduct which taken cumulatively amounted to a breach of the implied term of trust and confidence.

409. The Tribunal did not consider that the incidents of the respondent's failing to apply paragraph 29 of the policy in or around March 2016, when taken together with the incident identified and relied upon by the claimant in her oral evidence as the last straw, i.e. the advertising by the respondent in early August 2017 of a full time post in Queen Anne School (let it be assumed that the same properly constituted a "last straw" in respect of which see paragraph ( ) below), constituted, in the words of the EAT in ***Kaur v Leeds Teaching Hospital*** a "series of breaches of contract or a course of conduct by their employer" or "a series of incidents" (see Dyson LJ at para 14). The Tribunal considered that the 3 March 2016 failure, insofar as it fell to be regarded as a breach of contract, fell to be regarded as a single act occurring at that time. Notwithstanding that failure on the part of the respondent, the claimant continued in her employment actively engaging with the respondent in respect of various matters, both while at work and while on sick leave, including a grievance process, a mediation process and undertaking an occupational health referral to support her return to work (after the occurrence of the alleged "last straw"), and resigning only some 18 months later on 13 September 2017.

410. In the intervening period, as the Tribunal has found in fact, the claimant, although with the exception of two days on which she worked, absent from work due to ill health, continued to actively engage with the respondents with a view to having the decision to have her placed on the transfer list revisited and participated in

occupational health referral arranged with the purpose of facilitating her return to work. In the circumstances presented, taking the above factors into account including and notwithstanding the fact that the claimant was on sick leave for the substantial part of the 18 month period, the Tribunal considered that in so acting the claimant had affirmed the contract.

411. Separately, on the authority of ***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493, the Tribunal did not consider and has not found in fact that the act of advertising, in early August 2017, the full time post at Queen Anne School and identified by the claimant in the course of her oral evidence as the "final straw", constituted a final straw.

412. In ***Waltham Forest*** the English Court of Appeal had to decide whether there can be a constructive dismissal where the employer's final act which prompted the resignation properly constituted a "final straw". The Court ruled that the key question was whether the final straw was the last in a series of acts or incidents that cumulatively amounted to a repudiation of the contract by the employer. It found against Mr Omilaju and gave the following guidance (already referred to above):-

(a) The final straw must contribute something to the breach, although what it adds might be relatively insignificant;

(b) The final straw must not be utterly trivial.

(c) The act does not have to be of the same character as earlier acts complained of.

(d) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.

(e) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

413. At paragraph 55 of ***Kaur***, Underhill LJ frames the five questions to be asked and answered by the Tribunal thus:-

"*(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? Has he or she affirmed the contract since that act?*

(ii) If not was that act (or omission) by itself a repudiatory breach of contract?

*(iii) If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju** [2004] EWCA Civ 1493) of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)*

(iv) Did the employer resign in response (or partly in response) to that breach?"

414. In the instant case, the Tribunal has found established in fact only one act or omission of the respondents capable of constituting a breach of contract. Thus there has not been established, on the evidence, "*a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term*" (see ***Kaur v Leeds Teaching Hospital***) paragraph 54(4).

415. As stated by Underhill LJ at paragraph 44 of ***Kaur***; the "last straw doctrine" is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach of the kind described in the passages which Dyson LJ quotes from Harvey on Industrial Relations and Employment Law – '(480) cases which – involve the employee leaving in response to a course of conduct carried on over a period of time – and from the judgment of Glidewell LJ in ***Lewis v Motorworld Garages Limited*** [1986] at page 169F – "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not of itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? – this is the "last straw situation"'. Underhill LJ continues "*It* [the last straw doctrine] *does not, obviously, have any application to a case where the repudiation consists of a one off serious breach of contract*" (see ***Kaur*** at page 42 per Underhill LJ).

416. Separately and in any event, while recognising that in order to amount to a last straw an act relied upon need not of itself be a breach of contract, the Tribunal considered that the act identified by the claimant was an act which was permissible under the Contract and was carried out by the respondents in good faith with reasonable and justifiable grounds, those being the requirement to imminently fill the full time teaching post for the term due to commence in late August/September of that year. The Tribunal considered that that conduct fell into the category identified by the Court of Appeal in ***Waltham Forest v Omilaju*** being that of conduct which, even if genuinely, but mistakenly, interpreted by the claimant as hurtful and destructive of her trust and confidence in her employer, did not, in the circumstances, constitute a final straw.

Summary of Disposal – Constructive Dismissal

417. In summary the Tribunal held on the evidence presented:-

(a) That only one act capable of constituting a breach of contract on the part of the respondent had been established in fact, the same being the failure to apply an aspect of the requirements of paragraph 29 of the LNCT 06 policy in the decision making process which identified the claimant, on or about 3 March 2016, as a member of staff to be declared surplus and liable to transfer;

(b) That that act in so far as it fell to be regarded as a breach of contract was a single act constituting a one off breach of contract and was not "a part of a course of conduct comprising several acts and omissions which, viewed cumulatively amounted to a repudiatory breach of the implied term …" (***Kaur v Leeds Teaching Hospital NHS Trust***).

(c) That the last straw doctrine had no application on that basis of fact (***Kaur*** paragraph 42).

(d) That the claimant had affirmed the Contract in the face of that breach by remaining in employment, actively engaging with the respondents on various matters and not resigning until 13 September 17, some 18 months after the occurrence of the relied upon alleged breach.

(e) Separately and in any event, let it be assumed that the act had formed part of a course of conduct comprising several acts and omissions … such as to bring into play the last straw doctrine, which the Tribunal has not found in fact to be the case, the act of the respondents identified by the claimant in her oral evidence and relied upon as the "last straw", did not, in the circumstances, amount to a last straw for the purposes of entitling the claimant to rely upon the March 2017 alleged breach notwithstanding her prior affirmation.

418. On the above basis the Tribunal held that the claimant had not established, on the balance of probabilities and on the preponderance of the evidence, facts

which constituted her constructive unfair dismissal in terms of section 95(1)(c) of the Employment Rights Act 1996 and accordingly, the Tribunal dismisses the complaint of constructive dismissal.

419. The evidence regarding whether the claimant had resigned in response to, or at least partly in response to, the proponed last straw, as opposed to in consequence of failing to achieve an acceptable resolution of her disputes at mediation, was inconclusive. While, standing its disposal of the constructive dismissal claim on the above grounds it is not necessary for the Tribunal to determine that latter issue and it has not done so, the Tribunal observe that the evidence on the issue, viewed objectively, was far from clear and may have been insufficient to determine that issue in favour of the claimant.

Remedy (Issue Ninth)

Summary of Submissions for the Claimant - Remedy

420. The claimant's Schedule of Loss (page 673 of the Bundle) as updated at 5 February 2019 contained written submissions on remedy in respect of both the complaint of unfair dismissal and the time of causation and damages for injury to feeling in respect of the complaints of discrimination because of the protected characteristic of disability. The claimant's representative referred to and adopted those written submissions in his oral submissions made at the hearing. The Tribunal has not found the complaint of constructive dismissal to have been established and has dismissed that claim. Parties' submissions on remedy in relation to that complaint are accordingly not summarised here.

Submissions for the Claimant

Damages for Hurt to Feelings

421. Under reference to the updated Schedule of Loss, the claimant's representative submitted as follows in respect of the remedy sought of damages for hurt to feelings arising from disability discrimination;

(a) The Tribunal's assessment of the appropriate award of injury to feelings should depend upon the Findings in Fact made. Many of the factual allegations brought out by the claimant were multifaceted and fall under more than one of the Heads of Claim brought.

(b) The claimant sought damages for injury to feelings in the following amounts attributable to the following Heads, assuming the same to be made out,

Direct discrimination	£3,000
Discrimination arising from disability and harassment re para 2.4(b) (false statements)	£5,000
Discrimination arising from disability (appeal time limit)	
Failure to make reasonable adjustments (cumulative)	£12,000
Harassment (2.4(a) – return to work meeting)	£1,000
Victimisation (cumulative)	£6,000
Total injury to feelings	**£27,000**

(c) It was accepted that the Tribunal should carry out an overall analysis of the injury to feelings, but the starting point should be the Tribunal awarding the discrete compensation which is appropriate with reference to each Head of Claim which is made out.

(d) That in reaching and proposing that quantification the claimant's representative had taken and the Tribunal should take, account of:

(i) That the disability discrimination involved conduct which ultimately led or materially contributed to the claimant's resignation and, therefore, involved the

claimant's employment being brought to an end. As a general rule, conduct of that character will fall within the medium (Vento) band.

(ii) That although there is some overlap, the failures to make reasonable adjustments are discrete in that the claimant suffered freestanding disadvantage, irrespective of the ultimate outcome. The overall consequence is to some extent bound up with the other discrimination, hence why this compensation has been put in the lower band (albeit at the higher level)

(iii) That the conduct in relation to harassment and victimisation is freestanding from the other conduct, albeit there is some overlap. The conduct has been grouped together because both arise from the management of the grievances and conduct in relation to the grievances. In particular, the claimant relies (with reference to the victimisation claim) upon the decision not to offer her or make her aware of the role advertised in August 2017, or part of it, or to offer her the other 0.6 FTE available prior to that.

- For the avoidance of doubt, the level of compensation had been pitched at the above, on the assumption that the decision to make the claimant surplus (which ultimately materially contributes to her dismissal) will be captured within the dismissal claim. If, for any reason, those Heads of Claim fail, then that falls under the victimisation claim and compensation may require to be operated accordingly.

(e) The claimant's representative confirmed that the above quantification reflected the application of a **Simmons v Castle** 10% uplift.

Interest on Injury to Feelings (assuming awards as above)

422. The claimant's representative further submitted, on the basis that all financial loss was attributed to the constructive dismissal, that interest should accrue in relation to damages for injury to feelings at the judicial rate of 8%, from the date of the discriminatory conduct until the date of judgment.

Summary of Submissions for the Respondent - Remedy

423. The respondent's representative confirmed that it was a matter of agreement between the parties, in the event that the claimant's complaints of disability discrimination were to succeed in all their elements, that the financial assessment detailed by the claimant in respect of damages for injury to feeling and set out in the Schedule of Loss (page 673), as updated as at 5 February 2019, was accepted by the respondent as being a fair and reasonable quantification subject to parties' competing contentions and submissions as to whether the claims were made out in whole or in part and, if made out only in part, as to proportionate adjustment and reduction to reflect that partial success and or contribution. The respondent's representative accepted that it was appropriate that the quantification of damages should reflect a **Simmons v Castle** 10% uplift.

Applicable Law

424. The remedy sought by the claimant in respect of the asserted discrimination claims is one of compensation (*solatium* – damages for injury to feelings).

425. The Tribunal's power to make such an award is contained within section 124 of the Equality Act 2010 which provides variously at sub-section (2)(b) and sub-section 6 as follows:-

"**124 Remedies: General**

(1) This section applies if an Employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The Tribunal may –

(a) …

(b) Order the respondent to pay compensation to the claimant; ….

(6) The amount of compensation which may be awarded under section (2)(b) corresponds to the amount which could be awarded by [the County Court] or the Sheriff under section 119."

426. Section 129 of the 2010 Act provides, at sub-paragraphs (3) and (4) as follows:-

"***119 Remedies***

(1) This section applies if [the County Court] or the Sheriff finds that there has been a contravention of a provision …..

(3) The Sheriff has power to make any order which could be made by the Court of Session -

(a) In proceedings for reparation; …..

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)."

427. The principles of the Scots law of reparation, including that of causation, regulate the award of damages to be made; that is to say, that the damages awarded for injured feelings should relate to the injury which properly falls to be regarded as having been caused by the delictual (in this case discriminatory) act.

"The Vento Guidelines"

428. In 2002, the English Court of Appeal attempted to set out guidelines, in relation to the quantification of damages for injury to feeling in unlawful discrimination cases, in the case of **Vento v Chief Constable of West Yorkshire Police**. The Court set out three bands for compensation dependent on the seriousness of the claim. Although Tribunals have discretion as to what they award, Employment Tribunals have had regard to the Vento guidelines in subsequent cases on the basis that they provide a useful yardstick against which to measure quantification made through application principles of the law of reparation. Those bands have been periodically increased with inflation;

(a) firstly in the case of "**Da'Bell**" in September 2009 and applicable for the purposes of the instant case where the claims which have succeeded were first presented to the Employment Tribunal in Case Number 4104090/16,

(b) on 26 July 2016, in the case of **Simmons v Castle** where an increase of 10% on the September 2009 band levels became applicable to cases raised from April 2013 onwards.

(c) Presidential guidance has been subsequently issued in both the Employment Tribunal (Scotland) and the Employment Tribunal (England and Wales) respectively:-

(i) in relation to claims presented in the period 11 September 2017 to 6 April 2018, then;

(ii) in relation to claims presented on or after 6 April 2018 and most recently in relation to claims presented on or after 6 April 2019.

(d) The claims which have succeed in the instant case predate the operative dates set out in that Presidential guidance and fall outwith its scope.

429. The updated Vento bands (reflecting the **Simmons v Castle** 10% uplift) which are applicable, by way of yardstick, to awards which have succeeded in the instant case are as follows:

Band	From April 2013 reflecting the **Simmons v Castle** 10% uplift
Top Band For the most serious cases such as where there has been a lengthy campaign of harassment. Awards should exceed this only in the most exceptional cases.	£19,800 - £33,000
Middle Band For serious cases which do not merit an award in the highest band	£6,600 - £19,800
Lower Band	

For less serious cases, such as a one off incident or an isolated event	£600 - £6,000

Discussion and Disposal - Remedy

430. In the instant case the Tribunal has upheld and found established only, complaints of section 21(2) EqA 2010 Discrimination (Failure in a Duty to make Adjustments) and in respect of only five out of a total of ten instances of alleged discriminatory conduct (for the avoidance of doubt the five instances found to be established and to constitute discriminatory conduct being those set out at paragraphs 2.2(a)(i) and 2.2(b)(i), (ii), (iii), (iv) of Issues above. The quantification and methodology which, on an *esto* basis, was the subject of agreement between the parties identifies a starting cumulative figure of £12,000 in respect of all ten alleged instances which were founded upon under this Head. Halving that figure, to reflect broadly proportionate success in respect of half of the total number of instances, would produce a Vento yardstick award of £6,600 that is at or about the top of the **Simmons v Castle** uplifted lower band just below the commencement of the middle band.

431. Approaching the matter by application of the principles of reparation including causation, the Tribunal considered that the first failure in the duty, that is the failure to take account of the claimant's disability in the initial decision making process which identified her as a member of staff surplus to requirement, was the more serious of the two failures which the Tribunal has found established. That failure was one which although occurring on or about 3 March 2016 persisted between that date and the date of the claimant's resignation on 13 September 2017 in the sense that while, in that period the respondents could and should have become aware of their omission and failure and, standing the claimant's absence on sick leave and the fact that she had not yet been transferred, could have revisited the decision making process this time making the adjustment required by the policy, they did not. While noting the respondent's explanation that the combination of circumstances had resulted in the matter having been, to some extent lost sight of, the Tribunal considered that the discriminatory act

involved conduct which ultimately led to the claimant's resignation, albeit not in circumstances which constituted her constructive dismissal and informed by upon a misperception, on her part, of the motivation of the respondents in so selecting her. The Tribunal considered that the conduct being conduct that attracted that character would typically indicate an award in the medium band albeit at or about the centre indicating an undiscounted award of £12,500. That assessment, however, fell to be tempered with;

(a) the fact that the claimant had not established in fact that the Rector's omission in this regard had been wilful,

(b) by the fact that the claimant herself, as at or about 26 April had imposed upon the possibility of her return to work, a condition which would have precluded her doing so, and thus, not avoided her resignation even had she been deselected on a reconsideration and proper making of the adjustment, that condition being the prior condition that the Rector be removed from post and made the subject of disciplinary process; and,

(c) the fact that the proper application of the adjustment and thus the avoidance by the respondents of the discriminatory conduct in question, would only have brought with it the possibility that the claimant who, absent that adjustment was the person who should in terms of the policy have been selected, would not have been so selected, a risk which the Tribunal has assessed, on the evidence and in the circumstances presented, at 50% and, taking all of the above into account, indicating a discounted award of £6,250.

432. In respect of the second breach of duty, that is the failure to make adjustments in relation to the meeting of 26 April 2019, the Tribunal considered that that was a one off incident which would fall within the lower band of the applicable revised scale. The breach was one which was characterised by a persistence on the part of the respondent to encourage the claimant to attend the meeting; without

communication of its purpose, without notice and the opportunity to prepare and without the opportunity to be accompanied by her Trade Union representative. The same circumstances where the claimant had proposed what the Tribunal considered to be a reasonable alternative date of the following day in respect of which, the respondents presented no evidence to suggest would have been impossible or even impracticable. For those reasons the Tribunal considered that undiscounted damages for the breach would be properly located in the bottom third of the upper half of the lower applicable band indicating an undiscounted award of £4,600.

433. In relation to causation and as the Tribunal has found in fact, it considered that any hurt to feelings experienced by the claimant had resulted as much from her own conduct at the meeting, as from the Rector's, contributing to causation to the extent of 50%. Applying that discount indicates a figure for damages under this Head of £2,300.

434. Bringing together the discounted awards under each Head in respect of which there has been success, (£6,250 plus £2,300) produces a total award of damages for hurt to feelings in respect of section 21(2) EqA 2010 Discrimination of £8,550 which sum the respondent is directed to pay to the claimant together with interest at the judicial rate of 8% per annum from the dates of the discriminatory conduct under each Head, and on each award, respectively 3 March 2016 in respect of the award of £6,250 and from 26 April 2016 in respect of the award of £2,300 until the date of judgment hereof.

435. Although the total sum awarded is greater than the application of the Vento guidelines, using the £12,000 starting figure which parties identified as reasonable, would appear to indicate, standing back and or making an overall analysis of the injury to feelings and for the Reasons set out, the Tribunal were satisfied that the award made represented appropriate compensation in the circumstances.

436. The claimant's claims are otherwise dismissed.

437. The Tribunal thanks parties' representatives for the diligent and professional manner in which the evidential enquiry was conducted and for their detailed and helpful submissions on the evidence and the law.

Date of Judgement: 12th September 2019

Employment Judge: J d'Inverno

Date Entered in Register: 13th September 2019

And Copied to Parties