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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Gallant**

Respondent: **The Governing Body of Rushmore Primary School**

Heard at: **East London Hearing Centre**

On: **19, 20, 24 and 25 September 2019**

Before: **Employment Judge Ross**

Members: **Ms M Long**
Dr J Ukemenam

Representation

Claimant: In person (supported by Mrs M Gallant)

Respondent: Miss C Maclaren (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. Each complaint is dismissed, including:

1.1. disability discrimination pursuant to section 15 Equality Act 2010;

1.2. disability discrimination by breach of the reasonable adjustment duty under sections 20-21 Equality Act 2010;

1.3. complaints of detriments under section 47A Employment Rights Act 1996;

1.4. automatic unfair dismissal under section 103A Employment Rights Act 1996; and

1.5. unfair dismissal under section 98 Employment Rights Act 1996.

2. The Claim is dismissed.

REASONS

Introduction

1 By a Claim presented on 6 August 2018, after a period of early conciliation, the Claimant brought complaints of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 ("ERA"), unfair dismissal under section 98 ERA, disability discrimination and complaints of detriment under section 47A ERA 1996 for making public interest disclosures.

2 Prior to the commencement of the evidence, the Tribunal asked what, if any, reasonable adjustments were required for the Claimant to ensure that he could participate fully in this hearing.

3 The Claimant asked that his wife be permitted to support him and explained that he may suffer from the effects of stress. This was permitted. In addition, the Tribunal directed that the Respondent, if it was to rely on written submissions, serve these on the Claimant in advance (which did occur). The Tribunal suggested that the Claimant may wish to write out questions for witnesses and the Tribunal agreed to break slightly earlier on the first day because the Claimant stated that he had not had enough time to formulate questions, even though we found that he had had the trial bundle for approximately four months since it was served by the Respondent.

The issues

4 From the Claim and from the further and better particulars filed, it was not clear to either the Respondent or the Employment Tribunal what complaints of disability discrimination were being advanced. As a result, some time was spent at the start of the hearing working through the further and better particulars to establish what complaints of disability discrimination the Claimant wished to bring. Having completed this exercise, Counsel drew up a revised list of issues which was further revised at the suggestion of the Employment Tribunal and the Claimant. A final agreed list of issues was produced. The list of issues was a useful tool in this case and it did not restrict the Claimant in putting his case. Indeed, at the end of his evidence, he indicated that issue 6b was inaccurate and this was amended to that shown in Appendix A.

5 A copy of the final agreed list of issues is at Appendix A. Although the Tribunal had raised the question of jurisdiction and time limits, this did not form part of the final agreed list. Given that, as evidence unfolded from the Claimant, certain detriments were clearly out of time, the relevant jurisdictional issues have been added to the version of the issues at Appendix A because the Employment Tribunal had to consider whether it had jurisdiction for the complaints.

The evidence

6 The Employment Tribunal read witness statements for and heard oral evidence from the following witnesses:

6.1 Jim O'Shea, Head Teacher of Rushmore Primary School;

6.2 Michelle McLeod, Governor of Rushmore Primary School;

6.3 Simon Le Maistre, Governor of the School;

6.4 Nicole Schnappauf, Governor of the School;

6.5 Marilyn Smyth, Investigator with "Making a Difference";

For the Claimant

6.6 The Claimant;

6.7 Gloria Reid.

7 We also read a witness statement for Mandy Gallant, the Claimant's wife. The Respondent did not seek to cross-examine Mrs Gallant so we took her statement as read. In addition, we read and considered the impact statement provided by the Claimant at pages 39-43.

8 The Respondent had been late in being in a position to exchange its witness statements. The Claimant applied for the Respondent to be prevented from relying on that evidence. For reasons given at the time, the Tribunal allowed an extension of time for exchange of witness evidence.

9 There was a Bundle of documents (in three lever arch files) prepared by the Respondent. No objection was taken to it prior to the hearing; the Claimant sought to add a small number of documents after the start of the hearing, which was not opposed. Page references in this set of Reasons refer to pages in that Bundle.

10 This case was unusual, in that there were relatively few disputes of fact.

11 The Respondent did not dispute that the Claimant was an honest witness. However, the Tribunal found that the Claimant had convinced himself that he always knew better than the Head Teacher and that his opinion was always right, which meant that he tended to refuse to listen to any directions which he did not agree with, or consider outcomes which he could not accept. Moreover, the Claimant was stubborn and unable to take a balanced view of events. We found that these matters made his account of key events unreliable.

12 The Tribunal carefully considered the medical evidence and the impact statement evidence from the Claimant. In short, we concluded his actions were the result of his personality, not impairment arising from his brain injury. We considered the evidence that he may have had an altered ability to perceive matters (even though the impact statement only refers to an altered perception of danger), that his memory may have been impaired, and that he may have struggled to find the appropriate word, especially when under stress; but we found that none of the effects of his impairment explained, or formed part of, the conduct leading to his dismissal.

13 Mr O'Shea stated in evidence that the Claimant was articulate, cogent and had an in-depth knowledge, so he had no reason to think within the disputes that these were due to the Claimant's altered perception; Mr O'Shea was not cross-examined about this. Mr O'Shea had not been told to slow down or repeat questions or points,

nor had he been told at the material times that the Claimant had acted as he did because of an alleged altered perception.

14 For example, in the course of cross-examination of Mr O'Shea, the Claimant admitted that after his dismissal he had called the London Fire Brigade to complain about alleged fire risks at the school. This was nothing to do with his altered perception, but everything to do with his antagonism towards Mr O'Shea and his belief that he was right.

15 Although the Claimant's primary concern about Mr O'Shea was that the Head Teacher did not listen to him, the Tribunal preferred Mr O'Shea's evidence, which was that he did listen to the Claimant. From the evidence we heard, Mr O'Shea spent many hours trying to resolve matters with the Claimant informally and wanted him to bring concerns to him for resolution rather than making complaints and allegations to third parties who included high profile politicians and OFSTED. We accepted the Head Teacher's evidence that his relationship with the Claimant was not all negative and that, when the Claimant did work with him, successful results were achieved.

The Facts

16 The Claimant was employed as a site manager at Rushmore Primary School ("the School") from 29 July 2002. The evidence demonstrated that his job description, after his job evaluation meeting on 9 March 2017, was that at pages 57 to 60. This is the job description relied upon by Ms Smyth when she was carrying out her investigation.

17 The Claimant held a tenancy of a house on the School site.

18 In about 2014, the terms of the Claimant's employment were varied in part of a Borough-wide attempt to harmonise contractual arrangements for site managers at schools. This resulted in the Claimant being required to meet his own utility bills after this point. In an email to the former Head Teacher, Mr Mullaney, the Claimant stated that because of changes in his pay packet he would now claim overtime and charge for jobs outside his job description at overtime rates. We found that the Claimant's relationship with the School changed at this time, and that he was no longer willing to work with goodwill.

19 In September 2016, Mr O'Shea took over as Head Teacher of the School. Over time, Mr O'Shea became concerned about the amount of the Claimant's overtime and sought to reduce it. It is important to point out that there was a sound financial reason to do so; in the 2015 - 2016 financial year, the Claimant's overtime claims were about £18,000 (or about 50% of the Claimant's annual salary). Mr O'Shea reduced the overtime paid to the Claimant to around £8,000 in the following financial year. We found this upset the Claimant and led him to reject Mr O'Shea's management decisions more readily in respect of works or maintenance whenever he disagreed with Mr O'Shea's direction.

20 Mr O'Shea was aware of the Claimant's disability from shortly after commencement in his role. This was from reports on the personnel file including the neurologist report and the occupational health report from 2011, and the

correspondence at that time about when he would be fit to return to work. Mr O'Shea was aware that the occupational health report in September 2011 recommended that the Claimant was fit to return to work with no recommendation for reasonable adjustments. Mr O'Shea explained that adjustments were made subsequently due to the Claimant's vertigo, in that he was not required to work at heights, and that a lone worker alarm was put in place.

Events November 2016 – January 2017; the boundary wall

21 In December 2016, the School obtained a fire risk assessment. This was extended to include the School keeper's house on this occasion. Although the Claimant complained that Mr O'Shea had not acted on the assessment, and that his lack of sense of smell put him at a disadvantage when no fire gate was installed, we found that Mr O'Shea did arrange for works to be done after the fire risk assessment to the house, including smoke detectors and removal of window bars. Although no fire gate was installed at the time, one was installed in around May 2017. This is an example of where the Claimant's view of what the Head Teacher had done was unreasonable and demonstrated that he was unable to give any credit because what had been done did not accord with his view of what should have happened.

22 The Claimant had lived in the School house since commencing work. The Claimant had an ongoing dispute with his landlord (Hackney Learning Trust, "HLT") about the condition of the house, including complaints about cracking over several years. By 2016, the Claimant was in dispute with the London Borough of Hackney. One item that concerned him was the boundary wall between the house and the playground which he considered unsafe. In addition, the Claimant had a number of grievances over various matters which are evidenced in the email of 13 June 2016 to Mr Mullaney and the Chair of Governors (pgs.316-320). The Claimant noted repair works were due to commence on his house in the summer, but argued that bad decisions had been made without his input. He complained about the contractor appointed due to a history of a director of that company and his allegation that it was a rogue trader. He also complained about the cleaning company that had been appointed.

23 Mr Bretherick, the Interim Facilities Management Asset Management Group Leader, responded to concerns about the house. He explained £70,000 of work had been scheduled for the Summer and that the property had been surveyed on 14 April 2016, and that they would visit again. He assured the Claimant that the property was safe to live in. This response did not draw a line under matters. The Claimant continued to dispute with his landlord over various matters about the house. By the time Mr O'Shea started as Head Teacher, no works had been begun to the house.

24 When Mr O'Shea commenced as Head Teacher, he met with the Claimant almost every week for the first three to four months. He became aware that the Claimant was very concerned and upset about his home, believing that it was unsafe and unsound.

25 On 15 November 2016, as Mr O'Shea was going around the School on a site tour, the Claimant stated to him that a boundary wall between the house and the playground was dangerous. In addition, on 15 November 2016, Mr Gallant sent an email stating there were:

> "*some serious health & safety issues within the school that are directly related to the house repairs that are being ignored*" (p.341).

This referred to a "*leaning wall from my garden into the playground with loose capping*". At the time the Claimant had instructed a solicitor. This email was copied into a number of people, as well as Mr O'Shea, including the Chief Executive for the London Borough of Hackney (Tim Shields), Anne Canning (HLT), and Jeremy Corbyn MP, Leader of the Opposition. The letter also complained that the Claimant had not been sent the schedule of works or the structural engineer's report for the house.

26 After this, on 17 November 2016, the Claimant sent an email to Ms Brown, his line manager, stating that the decision in respect of the appointment of the cleaning contractor was a bad one and making various allegations about their effectiveness and compliance and that complaints about them were continuous. He demanded to see contracts and the qualifications and new insurance certificates. We found that this demand and its subject matter were not part of his duties.

27 On 21 November 2016, the Claimant sent a further email alleging:

> "*very serious Health & Safety problem with an 8ft + wall in the children's playground that I can move with one hand*".

This email was sent to a wider distribution, including Philip Hammond, Chancellor of the Exchequer, Justine Greening, a Government Minister, Nigel Farage MEP, and Gavin Barwell, also a Government Minister. The Claimant's language in this email was inappropriate, describing persons involved in HLT and the London Borough of Hackney as "*overpaid fools*" and suggesting some suspicious behaviour over procurement went on in the London Borough of Hackney.

28 On 7 December 2016, the Claimant was asked by Mr O'Shea to remove his personal belongings from an office in the School. The Claimant had placed his possessions within his office at the School because works to his home had been planned during the Summer of 2016, which did not take place.

29 Mr O'Shea made this request because the office was so full that it could not be used as an office. The request had nothing to do with the Claimant's statements about the wall on 15 November 2016. In any event, after the Claimant argued that there was nowhere else to put his things, Mr O'Shea allowed him to keep his items in the office.

30 We accepted that the relationship between Mr O'Shea and the Claimant was not all negative, although this was the impression given by the Claimant in evidence. After the emails and the incidents above, including that involving where a furniture could be stored, Mr O'Shea took the positive step of arranging a meeting between the Claimant, Mr Bretherick, Mr Walter, Ms Brown and a HR representative and himself, because he believed what upset the Claimant was the state of his home and that he had been aggrieved that he had not received any documents from the Trust (such as the survey) and that no work had taken place. This is corroborated by the documents: see the email at 383 from Mr O'Shea to Mr Bretherick with questions for the meeting.

31 The meeting about the house took place on 13 January 2017. The contents of the meeting are evidenced in the meeting notes at page 386a. These are not comprehensive; and, at some point, the Claimant left the meeting. We found that the notes are accurate insofar as they record that Mr O'Shea wanted to get the parties to agree a way forward and agree a schedule of works. Mr Bretherick explained that he was prepared to bring works forward to April 2017 on the basis that the subsidence had ended.

32 This meeting led to a works schedule being prepared and work commencing in April 2017, and the Claimant received documents requested from the local authority. It also led to an agreement for the Claimant's furniture to continue to be stored in his office at the School and in other places around the School as a compromise to the Claimant in view of the cost of storage off-site.

33 In particular, on 13 January 2017, it was agreed that the boundary wall be taken down: this is reflected in part in the meeting notes, although it appears that the decision to remove it immediately was taken after the Claimant had left the meeting, probably as an additional compromise given the Claimant's level of complaint.

34 We find Mr O'Shea did not ignore the Claimant's complaints about the risk posed by the wall. He did listen to the Claimant and did look at the complaint. He understood from the Claimant that the shed was put in that area to protect the wall and prevent children being at risk. At the meeting of 13 January 2017, we found that Mr Bretherick did tell Mr O'Shea that the wall was safe enough in the short term.

35 The Tribunal found no basis for the complaint that, as a result of his complaint about the wall, Mr O'Shea turned on the Claimant. Mr O'Shea had only just started work at the School. It was inevitable that, as a new Head Teacher, he would be working on a number of matters.

36 Despite the agreements reached at the meeting and its purpose being to resolve issues, the Claimant was not satisfied with the decision to inspect and safely remove the wall, considering this task more urgent. On or about the same day, he instructed a structural engineer purporting to act with the authority of the School. This was outside his duties and he had no authority to do such a thing.

37 An inspection by the structural engineer instructed by the Claimant took place on 17 January 2017. The report is at page 389 to 390, and it does not state that the removal of the wall is very urgent due to structural instability; it is only the Claimant's instruction that the children tried to climb on the wall that the engineer states makes it very dangerous. There was no mention of that at the meeting on 13 January 2017, according to the Claimant's notes of that meeting (pgs.391-393).

6 January 2017

38 Due to the number of issues raised by the Claimant and his emails to various officials and MPs, Mr O'Shea decided to formally meet with the Claimant on 6 January 2017. The meeting took place with Mr O'Shea and a Human Resources Officer from HLT.

39 In respect of the new cleaning contract provider the Claimant's concerns were addressed. A meeting was arranged with the contractor's Regional Operations Manager and Ms Brown and Mr O'Shea to address any concerns.

40 In a letter to the Claimant after the meeting sent on 11 January 2017, Mr O'Shea warned the Claimant as follows:

> "*However, the practice of escalating matters outside of the school when the headteacher has not had a reasonable chance to deal with them is neither appropriate nor expected under the procedures governing schools or indeed whistleblowing legislation in general. Going forward the expectation is that matters of safety, health and well-being at the school must be raised with myself as the headteacher. Thereafter the expectation is that I be given time to deal with them appropriately. If you then felt that they were not being dealt with in a suitable manner in school then it would be appropriate to take any issues further*."

41 Despite this management direction, on 1 February 2017, the Claimant sent an email to various individuals including Anne Canning, Mr Shields, and Justine Greening. The email stated that: the London Borough of Hackney now admit the wall is unsafe; the dangerous nature of the wall was known about all along, and could have created a dangerous situation at the school; and he had intervened to save lives even though governors and senior staff were warned about using various contractors.

42 Mr O'Shea was very upset that the Claimant had escalated his concerns to external bodies and a Government Minister, when he could have had a discussion with himself or senior management, and in spite of the meeting on 13 January 2017 when the issue had been addressed.

43 On 2 February 2017, Mr O'Shea invited the Claimant to a further meeting on 7 February 2017. At this meeting the Claimant was reminded not to malign, slander, libel, or abuse colleagues, and that his conduct should not risk undermining his headship or bringing the School into disrepute (p.399).

44 The meeting took place on 7 February 2017. Following the meeting the Claimant sent a letter setting out what was discussed and agreed (pgs.407 to 408). The Claimant was reminded that he could raise concerns with Mr O'Shea in weekly meetings, or contact his trade union. The Claimant was warned that if he escalated matters externally without following procedures (such as the complaints policy or the grievance procedure), Mr O'Shea would consider formal disciplinary action.

45 In that letter Mr O'Shea also gave three examples of where the Claimant had worked with Mr O'Shea together and found solutions. We found that these examples clearly corroborated Mr O'Shea's oral evidence that he did listen to and did take account of what the Claimant told him.

46 The Claimant sent a further email to external officers and MPs about the alleged dangerous wall, and seeking repayment of the cost of the report that he had obtained, despite the fact that he had no authority to instruct a structural engineer on behalf of the School and that this had been outside the terms of his duties.

47 Mr O'Shea arranged for a further meeting about this email to take place on 7 March 2017. By this point, the Claimant's conduct and behaviour, and his responses, were taking about 10 hours per week of Mr O'Shea's time. The Claimant was informed that any further actions of this nature would be considered serious insubordination and a failure to comply with reasonable management requests, which would result in disciplinary action (see p.418).

48 It is notable that a schedule of works for the Claimant's home was sent to him on 18 April 2017. Although the Claimant accepted that subsequent investigation could have led to delay, he complained that this delay was too long and that some works could have been done. He agreed that most works were completed in the Summer of 2017. Contrary to the Claimant's case that Mr O'Shea failed to listen to him, even the Claimant had to admit that Mr O'Shea's actions in regard to his house showed that he had listened and appeared to try to help the Claimant in this respect. We found that Mr O'Shea had gone beyond what was necessary in terms of an employment relationship in this matter.

Issue 4b – Fire panel

49 In about January 2017, the Claimant informed Mr O'Shea that there was a fault in a fire alarm panel for the infant school. The Claimant obtained two quotes for replacement of the panel. In his witness statement the Claimant did not particularise when he made the disclosure to Mr O'Shea nor precisely what was said to him. In oral evidence, the Claimant's evidence was that he saw that the fire panel was faulty in January 2017, then he entered this into the fire book, and told Mr O'Shea the panel was faulty and that he would need to get some quotes. We accepted Mr O'Shea's evidence that this item was raised in the fire risk assessment in December 2016; but we accepted, also, that the Claimant orally made this statement to Mr O'Shea in or about January 2017.

50 Subsequent to this disclosure, quotes were obtained by the Claimant in early February 2017. Mr O'Shea did not ignore what the Claimant reported, but he decided not to follow up on the quotes. This was because he understood that the panel replacement was not urgent, because it was functional, and for budgetary reasons (the work to the fire alarm system was completed in the summer of 2018).

51 As the year progressed, the Claimant's evidence was that he discussed it a few times with Mr O'Shea and told him that he was risking multiple casualties if the panel failed and there was a fire.

52 The Tribunal found that these statements to Mr O'Shea after January 2017 were not disclosures of information. They were allegations about what might happen in the future. Moreover, the Claimant's belief when making these statements were not reasonable; the statements tended to catastrophise the risks. Further, as the Claimant admitted in evidence, it was for the Head Teacher to decide what expenditure the School should make, but, when employed at the School, the Claimant had believed that his opinion in this regard was more important than that of Mr O'Shea.

Issue 4c – Disclosure in February 2017 about works in the kitchen

53 It was admitted that the Claimant made the oral statement at issue 4c to Mr O'Shea. In evidence, the Claimant corrected paragraph 9 of his witness statement to state February 2017 (but no precise date was specified by the Claimant) in cross-examination. This is an example of where the Claimant's evidence was vague, which suggested he was less reliable than the Respondent's witnesses.

54 We found, however, that the Claimant did make a disclosure of information in February 2017 to Mr O'Shea. We found that he had a reasonable belief that the statement was made in the public interest and a reasonable belief that it tended to show the health and safety of children was being or was likely to be endangered.

Issue 4d – Statements about "rogue builders"

55 Mr O'Shea admitted that the Claimant did refer to certain contractors employed by the School as being "rogue builders". The Claimant made those statements referring to three contractors in particular: Ensigna, Birkins, and SMB. The Claimant did not specify which particular statements he relied on as protected disclosures and the Tribunal was unable to infer the dates that he relied upon or the specific words used, nor the precise context in which those words were used (save as we set out later in this set of Reasons).

56 In any event, we found the statement that certain contractors were "rogue builders" was one of allegation when used by the Claimant. It was not a disclosure of information and it did not tend to show health and safety was likely to be endangered nor did it tend to show breach of any legal obligation. The Claimant did not have a reasonable belief that such statements were made in the public interest. They were made in the course of his ordinary duties and he believed that they were made for good of the School.

57 We found that these statements demonstrated the Claimant's unshakable personal opinion, in a scenario where it was in his interest to demonstrate that his work was better than that of certain contractors, given that he benefited in financial terms if he was instructed to do works instead of those contractors.

Incident at the school gates 16 March 2017

58 Children were allowed on to school premises from 08:45 when the gates were opened. Until then, there was no member of staff to supervise them. On 16 March 2017, the Claimant opened the School gates early to let some children in. Mr O'Shea noticed that at 08:41 there were children inside the School and they had been left unsupervised. The Claimant was required to be at the gates until 09:15. Mr O'Shea had noticed the Claimant walking into the staff room on a phone. The policy is that members of staff may not use a mobile phone when supervising children. A discussion ensued between the Claimant and Mr O'Shea in which the Head Teacher pointed out to the Claimant what he had done wrong in opening the gates early and then leaving the gates and the children unsupervised. Mr O'Shea followed this up in writing explaining what the Claimant must do in future (p.43).

59 The Employment Tribunal found the actions of Mr O'Shea could not have amounted to detriment to the Claimant. It was a normal type of management action which he would have taken with any member of staff. As the note at page 423 indicates, Mr O'Shea was upholding the School's standards, and not communicating with the Claimant for any other reason. No worker could reasonably perceive it as a detriment because it was not even any kind of formal standard setting letter (which is proposed by Mr O'Shea in his notes at page 423, if there was breach of the standards in future).

60 In any event, the actions and the letter from Mr O'Shea had no connection with the alleged disclosures. Apart from the fact that we accepted Mr O'Shea's evidence, there was not a shred of oral or written evidence connecting the alleged acts of detriment by Mr O'Shea with the four alleged disclosures. He was genuinely concerned that the children were left unsupervised and could have been at risk of harm.

61 From our understanding of the Claimant's evidence, issue 6c also related to the incident on 16 March 2017. From the evidence, we found that the Claimant was not prevented from talking to contractors, either on or after 16 March 2017; numerous pieces of evidence demonstrated that he did talk to contractors and could use his phone on school premises when he was not supervising children. Like all staff engaged in supervising children, however, he was not to use his telephone during periods of supervision. The events on 16 March 2017 demonstrate the reason for this rule, because those children were left unsupervised.

62 The Claimant's justification for the events on 16 March 2017 was that he allowed the children into school because workmen were doing work outside the gates, near where they had been standing. We preferred Mr O'Shea's evidence that there was no work being done so close to the School gates which could have endangered the children. In any event, we find Mr O'Shea was entitled to treat the Claimant as he did in seeking to uphold standards and ensure the safety of children on the School premises.

63 On 16 March 2017, after Mr O'Shea's note to the Claimant, the Claimant responded in a confrontational manner. Having sought to justify his actions and stated that he would do the same again "*if I see fit*" where there was a safeguarding issue, he concluded (p.422):

> "*Having said that and following my mention of safeguarding I am going to report you to the chair of governors for what I feel is irrational behaviour*."

64 In respect of issue 6d, in the course of his evidence, the Claimant amended this to state that he was restricted from working by being required to supervise the School gates for 30 minutes each day. This was not a complaint made in any of his previous dealings with the School. We found in any event that the requirement to supervise at school gates was part of his ordinary duties, and not any detriment.

31 March 2017: Breach of confidentiality allegation

65 The Claimant wrote a letter on 31 March 2017 and placed it on a notice board referring to a teaching colleague having a breakdown. This upset the colleague in question.

66 The Claimant was also told off in an email from the Chair of Governors (p.432) because he tried to discuss the same teacher and the alleged breakdown in the playground. This attempt by the Claimant was made as the Chair of Governors was arriving at school with her children.

67 The Claimant was unrepentant in response claiming that he had done his job and referred to an alleged health and safety risk (see p.431). In oral evidence, the Claimant accepted that he had done these acts but believed that he was doing his job. The Tribunal found that raising this alleged breakdown, and publicising the matter as he had done, was no part of his role.

Issue 6e – After the Claimant was suspended, three doors and an oak plank belonging to him were left outside

68 The Respondent admitted that at some point after the Claimant's suspension, which was on 9 October 2017, three doors and a plank belonging to the Claimant were removed from inside the School buildings and left outside (albeit within the School's premises). The Claimant complained that these items were damaged by weather.

69 Whilst on suspension, the acting site manager/caretaker had removed these items from the gas cupboard, in an attempt to clear and tidy. Unfortunately, he did not realise these items belonged to the Claimant, and they were not marked or labelled as the Claimant's property. Mr O'Shea's evidence about this is corroborated by the email of 30 April 2018 from the Deputy Head Teacher (p.760). We heard no reason why she would lie in such an email.

70 We found that the acting site manager had acted independently of Mr O'Shea and independently of any manager, in the course of his duties. There was no evidence that the acting site manager knew of the alleged protected disclosures in any event.

71 We heard no evidence about when this detriment occurred nor when the Claimant learned of it. From the documents (see the email on 27 April 2018 p.757) we infer that the Claimant made the discovery that his property had been left outside on or about 16 March 2018.

72 In oral evidence, the Claimant admitted this alleged detriment had nothing to do with the alleged protected disclosures but was part of a "*general undermining*" of him by Mr O'Shea. We found that there was no such undermining of the Claimant by Mr O'Shea.

Issue 6f – 11 May 2018: Contents of a cupboard which belonged to the Claimant were removed

73 The Respondent admitted that the Claimant had personal items stored around the School. There was no inventory or list, nor any plan of what was stored where. We found that any personal items removed from the cupboard on or about 11 May

2018 were removed innocently, without the knowledge of Mr O'Shea or the management team.

74 In oral evidence, the Claimant accepted that this act was not done because he had made the alleged protected disclosures but was part of the alleged "*general undermining*" of him by Mr O'Shea.

75 The Tribunal found that there was no general undermining of the Claimant by Mr O'Shea, who had merely tried to manage the Claimant.

Issue 6g – Unspecified date, the Claimant no longer called out in emergencies

76 The Claimant estimated that the date of this decision was about October 2016, which we accepted.

77 We accepted Mr O'Shea's evidence about this alleged detriment. In order to control the maintenance budget after becoming Head Teacher, Mr O'Shea had directed that the Claimant could only be called out after senior management team authorisation. Previously, teachers had been calling out the Claimant for any maintenance matters during the school day, even where they were minor, and the School had been paying two hours overtime for each call-out, following an arrangement reached between the Claimant and Mr Mullaney, the previous Head Teacher.

78 Although the ending of that arrangement was a detriment to the Claimant, it cannot have had anything to do with the alleged disclosures, the first of which was not until 15 November 2016. In any event, we found there was no causal link between anything said by the Claimant and this decision in October 2016. Mr O'Shea wanted to control the School budget. We have found that in the financial year 2015 to 2016 the Claimant had earned in the region of £18,000 in overtime. In the experience of the Employment Tribunal, such a level of overtime is unusual, in that it amounts to about 50% of the gross annual salary of the Claimant as site manager. We found that such a level of overtime was bound to impact on the School budget and any Head Teacher would look to reduce such costs.

The Claimant's disability

79 The Claimant was injured in an accident in 2010. Prior to his return to work, an occupational health report was obtained on 8 August 2011. This concluded that he was fit for work and that there were no modifications to his duties or his hours of work required, but also that he had vertigo and an impaired sense of smell. The Claimant summarised his impairment in an email to Mr O'Shea of 17 November 2016 (p.124). A later OH report of 6 February 2015 explains that he is restricted from working on ladders. There is nothing in either the medical evidence in the bundle nor in the OH report of 8 August 2011 to suggest that his refusal to accept decisions and instructions from Mr O'Shea were caused by his disability. From what we saw and heard in evidence and from the evidence of the officers at his disciplinary hearing, the disciplinary appeal and the grievance appeal, insofar as the Claimant had any degree of impairment of the ability to perceive, this was very minor, because he had no difficulty in understanding questions and answers, nor any of the evidence. Before the

Tribunal, in oral evidence, the Claimant agreed that the Head Teacher could decide certain things (such as expenditure on the fire panel) but then went on to insist that his view on what should be done should have carried more weight than that of the Head Teacher; we found that the opinion of the Claimant had nothing to do with his ability in terms of perception.

80 Moreover, there was no medical evidence which corroborated the Claimant's evidence of his altered perception, which we found pointed to this symptom or effect of the impairment being no more than very minor or trivial on his ability to perceive events accurately. If his altered perception did have more than a very minor or trivial effect on his day-to-day activities, we are satisfied that the occupational health doctor would have raised that. In fact, in the most recent occupational health report of 22 August 2017 (p.131), the Claimant's complaint was that his working relationship with Mr 'Shea has broken down and that this caused him work-related stress. Despite this, the Claimant refused mediation.

Issue 9a – Alleged unfavourable treatment

81 The Respondent admitted that the Claimant was treated unfavourably by failing to install a fire gate in a perimeter fence around the Claimant's home. The fire gate was put in place in about May 2017, some six months after the fire risk assessment of 6 December 2016.

82 We preferred Mr O'Shea's evidence to that of the Claimant in respect of whether this work was urgent: it was not urgently needed. The delay to implementation of the fire risk assessment was entirely due to budgetary considerations and because Mr 'Shea was advised that those works concerning the house exceeded the School's statutory obligations (see pages 44 to 45).

Issue 9b

83 On this issue of fact, the Tribunal preferred the oral evidence of Michelle McLeod whom we found to be honest and reliable as a witness, who gave consistent and clear evidence. Her evidence was corroborated by the notes of the grievance appeal meeting, which do not show the alleged refusal to repeat questions to Mr Bretherick. Moreover, Ms McLeod explained clearly how the hearing proceeded, how she repeatedly sought to bring the Claimant back to the issues (there being five grounds of appeal), and that she was an experienced trade union representative who would have been alive to any risk that a disability affected the Claimant's ability to put his case. In fact, Ms McLeod had no difficulty understanding the Claimant and did not experience that he had any difficulty understanding her nor any part of the process.

84 Our relevant findings of fact in respect of issues 9c to d and in respect of issues 11 to 14 (failure to make reasonable adjustments) are addressed in the following section.

What was the reason for dismissal? Was it a potentially fair reason?

85 The Employment Tribunal has set out above its findings that the Claimant was warned about not communicating with persons outside the School in respect of the wall and other internal School matters.

86 When cross-examined about the email of 2 February 2017, the Claimant stated that when stressed he might use inappropriate words like "*idiot*" rather than "*fool*". The Tribunal asked him whether either word was appropriate if speaking to the Head Teacher, and the Claimant accepted that they were not.

87 The email of 2 February 2017 was followed by an email from the Claimant on 17 March 2017, threatening to report Mr O'Shea to the governors for being irrational (see page 422).

88 The Claimant's language in his emails continued to be insulting and contained innuendo against the Head Teacher. This correspondence included:

88.1 Describing Mr O'Shea as having a "*totally irrational and devious nature*" (21 July 2017, p.496) and suggesting the Head Teacher had some pecuniary interest.

88.2 Describing Mr O'Shea as "*total idiotic running of the school*" (21 July 2017, p.503).

88.3 In a return to work meeting of September 2017 alleging Mr O'Shea had "*mental health issues*" (p.510).

88.4 In an email of 30 September 2017 (page 525), copied to external people including Justine Greening MP and Angela Rayner MP, alleging dangers in the play area and bad planning at the School. This was sent contrary to the specific directions of the Head Teacher prior to his sickness absence. This email complains that the playground is not dangerous and should not have been shut off, and that there was no justification for this. The Claimant unreasonably believed that he had been treated unfairly, demonstrated in cross-examination where he stated: "*within one day of my return the knives were out for me*". He stated in cross-examination that no-wanted to listen to him which was why he had contravened the management instruction in the letter of March 2017 (at p. 417).

88.5 By email to Ms Brown on 2 October 2017, copied to many external persons including Jeremy Corby and Justine Greening MPs, he complained of a total absence of any discipline concerning Mr O'Shea. This includes the following (525a):
"I will pursue every avenue to bring everyone to book, when I eventually retire in 7 years you can safely bet that I will involve the world to include parents of what I have had to endure covering up these conspiracies and fraud whilst just trying to ensure the safety and wellbeing of the staff, parents and their safeguarding children.

There, it's in writing! Bring it on!"

89 A meeting was arranged with the Claimant by Mr O'Shea to take place on 4 October 2017. This invitation included the following warning (pp539-540):

> "*I am also serving one last reminder that you have been formally asked on a number of occasions not to bring the school into disrepute by including external senior officers, MPs and the Head of Ofsted in operational matters about the school premises. We discussed three of your recent emails that highlighted this issue. The emails were on Saturday 30th September 2017 titled safeguarding and child welfare, Monday 2nd October titled extra hours and finally, Tuesday 3rd October 2017 again on the theme of the closure of the back playground in the lower phase…*
>
> *On guidance from HR you are asked to please refrain from any correspondence that can be perceived as threatening, insubordinate or slanderous. There are formal routes to be used for complaints but none of these encourage or condone the type of unprofessional statements that are once again becoming commonplace*."

90 After this email, the Claimant immediately sent another email (p.537) which was copied into OFSTED. The Claimant informed Mr O'Shea that this was no mistake.

91 In oral evidence, when it was put to the Claimant that this response was nothing to do with his disability, at first, he said it was, but then he said: "*I believe I could get it done cheaper and save the School a load of money*".

92 We found that the action in sending the email at page 537 to OFSTED had nothing whatsoever to do with the Claimant's disability or the symptoms of his impairment.

93 On 6 October 2017, the Claimant sent a further email to OFSTED making various allegations and raising allegations about safety at the School. He alleged he was being victimised and undermined at the School. Given the previous warnings from Mr. O'Shea, we found that this email was likely to trigger a confrontation with the School's management.

The Claimant's refusal to work with contractors

94 The Claimant refused to deal with the following contractors selected by the School, but he also had complaints about almost every contractor when their names were raised in respect of work:

94.1 SMB. The refusal is evidenced by the email of 5 January 2017 (p.381). This was an example of Mr O'Shea listening to the Claimant's complaints because the works to the IT server room proceeded with another contractor.

94.2 Birkins (a cleaning contractor). The Claimant's view at the material times is evidenced by the email of 28 June 2017 (p.459 to 460). At the meeting on 29 June 2017 arranged by the Head Teacher, the Claimant refused to work with either Birkins or Ensigna.

94.3 Ensigna. The Claimant's refusal is evidenced by the email of 3 October 2017 (p.536) describing them (and Birkins and SMB) as "*rogue traders*".

95 One of Mr O'Shea's concerns was that some of the Claimant's actions were being motivated by personal gain, such as his tendency not to do minor works within contractual hours and then to perform such works in overtime. In particular, over one weekend in July 2017, the Claimant claimed 14 hours of overtime. Of these, five hours were for supervision of a boiler installation within his home, which the Head Teacher refused to authorise; and this claim also involved several hours in respect of the erection and removal of scaffolding on the School (which was done by scaffolders, not the Claimant).

The suspension of the Claimant

96 On 9 October 2017, the Claimant was suspended pending disciplinary investigation. The suspension letter at page 458a - b sets out the allegations including a failure to comply with written and oral instructions including questioning the Head Teacher's actions, bringing the School into disrepute by copying correspondence to high profile figures, including the head of OFSTED, failure to main confidentiality and refusing to work with particular contractors.

97 The Respondent appointed Marilyn Smyth to investigate the allegations. She was an independent consultant working for a company specialising in investigations and dispute resolution. We found her to be a credible and reliable witness. Ms Smyth interviewed all relevant witnesses, including the Claimant, as part of the investigation. The Claimant was interviewed on 20 November 2017 over four hours, with Ms Smyth finding that it was hard to keep the Claimant focused on the questions. Prior to this interview, the Claimant knew that the investigation was into the alleged misconduct.

98 The Respondent had never told the Claimant that this interview with Ms Smyth was part of a mediation; there was no reason for him to think this, not least because he had refused the prospect of mediation. Gloria Reid was appointed his trade union representative late in the day. We find it likely the Claimant had told her that the meeting was part of a mediation; but it should have been clear to her within a short time that the interview was into misconduct allegations.

99 The Claimant's interview statement was sent to him on 24 November 2017, consisting of 10 sides of A4. Although the Claimant significantly expanded its content to 15 sides, prior to returning it, Ms Smyth decided to accept it. The Claimant then sent a signed statement consisting of 24 pages which Ms Smyth refused to accept.

100 In the circumstances, where the procedure had been explained to the Claimant at the outset, Ms. Smyth's decision was within the band of reasonableness.

101 In short, the Claimant generally admitted the factual allegations, as explained in Ms Smyth's evidence. Ms Smyth recommended that the case proceed to a disciplinary hearing on the grounds of gross misconduct for the reasons summarised in her report at pages 203 to 204.

102 We accepted that the Claimant was able to express his case to Ms Smyth, and that he could understand the allegations. This is clear from the interview notes. We concluded his impairment, or impairments, did not affect his evidence given at the interview with Ms Smyth, nor her recommendation.

The Claimant's grievance

103 On 8 December 2017, the Claimant filed a grievance (pp 846a to 847). Subsequently, with the input of a trade union representative, the grievance was condensed into eight complaints (at p.846c).

104 Simon Le Maistre was appointed to investigate the grievance. We found him to be a credible and reliable witness; it was never suggested that he was anything other by the Claimant.

105 On 8 February 2018, the Claimant was interviewed by Mr Le Maistre. Mr Le Maistre interviewed all relevant witnesses. He partly upheld one of the allegations (allegation 4, because Mr O'Shea had called the Claimant when he was off sick not realising that the Claimant had sent a sick note to Ms Brown).

106 Mr Le Maistre knew nothing of the Claimant's disability. The Claimant never raised it with him, whether to explain his actions nor in any other way. In the grievance Mr Le Maistre learned of two impairments: the Claimant's lack of a sense of smell and that he was unable to work at heights because of vertigo. The Claimant was perfectly able to follow the grievance procedure. The Claimant had no problem in orally communicating his case. Mr Le Maistre checked at the end of each point if the Claimant had anything to add.

107 We found that the way he was interviewed, and the grievance procedure itself, put the Claimant at no disadvantage at all. He was able to follow and take part in the grievance process. Mr Le Maistre would have made adjustments if asked to do so or if he had known of any substantial disadvantage experienced by the Claimant.

108 On 12 April 2018, the Claimant was sent a detailed grievance outcome decision (pp.895 to 913). This makes it obvious that the grievance was fully investigated. There is no credible evidence that the grievance procedure put the Claimant at any substantial disadvantage. The fact was that Mr Le Maistre collated a lot of evidence and accepted the accounts of the Respondent's witnesses.

109 The Claimant appealed the grievance decision.

Disciplinary hearing and grievance appeal

110 Due to the difficulty in obtaining a panel of governors (given the governors were all volunteers), the grievance appeal and the disciplinary hearing were listed for the same day before the same panel on 4 May 2018.

111 The Claimant was invited to the disciplinary hearing on 20 April 2018. The letter warned him of the allegations and that they could constitute gross misconduct, and that this could lead to dismissal.

112 The Claimant did not request an adjournment in advance of the grievance appeal and disciplinary hearing nor request that they be held on separate days. In the light of his complaint at the grievance appeal, on the morning of 4 May 2018, of his

difficulties in preparing for both hearings, the Claimant was offered an adjournment. The Claimant declined to apply for an adjournment.

113 The Claimant felt stressed by having both hearings listed on the same day and that stress exacerbated symptoms such as his choice of words. We found, however, that listing both on the same day did not put the Claimant at more than a minor disadvantage.

114 Moreover, in circumstances where he was offered an adjournment and declined (evidenced by the notes at page 777), the Tribunal were unable to understand what else the Respondent could have offered by way of an adjustment.

115 The grievance appeal was heard by Michelle McLeod, a school governor with experience as a trade union representative. We accepted Ms McLeod's evidence in its entirety.

116 The Claimant was able to follow the grievance appeal hearing, which is evidenced by the notes of it. He was able to hear and understand what was discussed. The grievance appeal was focused on five grounds of appeal of the Claimant. Ms McLeod took steps to ensure that these remained in focus. She explained to Mr Bretherick that he could only speak about the grievance matters. She did not refuse to repeat questions asked of Mr Bretherick (as alleged by the Claimant, and forming issue 9b). This allegation is inconsistent with the whole thrust of her evidence and the care taken to ensure that the Claimant had a fair hearing.

117 At the grievance appeal hearing the panel learned from Mrs Gallant about the Claimant's brain injury, but the Claimant did not rely on it as an explanation for the conduct relied on. The information provided by Mrs Gallant is set out in the grievance appeal hearing notes at page 784. She explained:

> "*The trauma he has been left with is partial deafness and no sense of smell. His brain doesn't perceive things as we do and it affects his personality as he can be quite erratic and he can substitute words. This doesn't happen all the time, but if he is stressed or under pressure his brain reacts in a slightly different way.*"

118 From the evidence we heard, Ms McLeod accepted that the Claimant had the impaired ability referred to, even if she did not know that it amounted to a disability in law. Subsequently, the disciplinary hearing panel clearly took into account that Mrs Gallant had contended that the Claimant had an "*altered perspective*".

119 From the evidence before Ms McLeod, there was nothing to indicate that the Claimant was put at any disadvantage by the grievance procedure. It was apparent that he was offered breaks during the grievance appeal meeting.

120 As we have explained, the Claimant did not rely on his disability in either the grievance appeal or the disciplinary hearing as an explanation for the alleged conduct which he admitted. His summing up before Ms McLeod was that she had been duped by lies; when asked if Mr Le Maistre's grievance decision was inaccurate the Claimant replied that if the information was read properly all the decision would be reversed (p.790).

121 Due to lack of time, the disciplinary hearing was postponed to 11 May 2018. The panel appreciated the effect of the Claimant's disability as explained by Mrs Gallant at the grievance appeal.

122 We accepted all Ms McLeod's evidence about the nature of the disciplinary hearing. The hearing was fair; the Claimant had the opportunity to present evidence and cross-examine witnesses. Ms McLeod explained in her witness statement how and why each finding of gross misconduct was arrived at. We found the Claimant had no difficulty understanding, hearing, or participating in the disciplinary hearing. His case was not that the alleged events were because of his disability. His case was that he was justified in acting as he did.

123 The Claimant was represented throughout each of the grievance hearing, the grievance appeal hearing and the disciplinary hearing and the disciplinary appeal by a trade union officer. At no time did his trade union representatives raise that the Claimant had any difficulty in hearing or understanding the process, nor that he had any problem with his perception of the events in question nor events at the hearing itself.

124 The Claimant had a reasonable time to provide documentary evidence before the hearing and all documentary evidence presented by him was considered. Ms McLeod did refuse an application to adjourn (see page 762c), but we accepted her rationale for this and found that it had no effect on the fairness of the process, nor did it place the Claimant at any disadvantage. The Claimant had had plenty of warning about the disciplinary hearing and had expected it to be on 4 May 2018 in any event.

125 The panel at both the grievance appeal hearing and the disciplinary hearing found the Claimant to be an honest witness. But it was not his honesty but the content of his evidence and submissions which led to the decision to dismiss. At the disciplinary hearing, the Claimant challenged the allegations of gross misconduct but he did not dispute the facts; his case was that he had justification for what he had done.

126 We have no doubt Ms McLeod and the panel had an honest belief that the Claimant was guilty of gross misconduct. She was not cross-examined about her evidence as to why the panel reached its decision that the Claimant was guilty of such misconduct. We accepted her evidence that the Claimant's case was not that there was any connection between the gross misconduct found and his disability, and he adduced no evidence about this. Moreover, Ms McLeod had been a trade union representative for several years; she understood the disciplinary procedure, she provided prompts and guidance to the Claimant as the hearing progressed. She did not do so for the management side. She checked the Claimant understood questions.

127 We concluded that the panel had a substantial amount of evidence for its conclusions set out in the dismissal letter at pages 791 to 796, including the investigation report of Ms Smyth, the evidence heard at the disciplinary hearing, documentary evidence (including emails from the Claimant sent to third parties as set out above), and the Claimant's own evidence.

128 The disciplinary panel received evidence that the Claimant both admitted the acts alleged and that he would do the same in future; he made no apology except in respect to the breach of confidence by putting the notice on the notice board in the staff room. When asked about his expectations on completion of the disciplinary process, the Claimant stated Mr O'Shea should be disciplined; the panel reminded the Claimant that the disciplinary process was about his acts, but he repeated his complaints about the School's management.

129 Before the Tribunal, the Claimant did not deny that he had committed the acts alleged. As Counsel pointed out, there were very few issues of relevant fact.

130 The Claimant was dismissed with effect from 21 May 2018, confirmed in the dismissal letter which gave reasons for the dismissal. We found that those stated reasons were the Respondent's genuine reasons for dismissal.

Disciplinary appeal hearing

131 The Claimant appealed against his dismissal. His grounds of appeal were set out in writing (at page 799). The disciplinary appeal hearing was chaired by school governor Nicole Schnappauf. We accepted her evidence. There were very few questions in cross-examination and she was not challenged on the thrust of her evidence. In particular, her evidence that the Claimant did not suffer any disadvantage by the appeal procedure, nor the appeal hearing, was unchallenged by the Claimant; and her evidence that the Claimant did not produce any up-to-date medical evidence was not disputed.

132 At the appeal hearing, the Claimant was represented by the Regional Officer of Unison, Mr Kasab, who made most representations at the appeal. He had advised the Claimant to admit that the allegations were gross misconduct, but seek to appeal on sanction.

133 The Claimant's case at the appeal hearing was that boundaries should have been maintained, but that his long service should have been considered and that he should not have been dismissed.

134 The panel were referred to the fact that the Claimant had a brain injury and that could impact on decision-making and some of his language when under stress (see page 803). The panel questioned how he could work with the Head Teacher in the future in the light of what he had done. The Claimant's evidence to the panel was that he did not believe he had done anything wrong and that he was just asking governors to look at issues he regarded as safeguarding. In respect of his symptoms, the Claimant was questioned about why he had not told the School that his health had changed. He stated that he had had no time off due to his head injury in the first nine years, and had only had time off in 2017 when he became stressed.

135 When questioned why he had not referred to his injury during the disciplinary investigation, he replied that it was known about, but he referred only to being off work with stress.

136 The appeal panel questioned how the Claimant's brain injury affected his judgment. The Claimant stated to the panel that the seizures had returned and sometimes he would use the wrong words and, if not listened to, he could act irrationally. When asked if his condition prevented him working with contractors, he described the contractors as "rogue traders" and that his job description stopped him working with the contractors involved. In respect of overcharging for works to his home, the Claimant stated that the work was claimed as overtime and it was nothing to do with his condition.

137 The Claimant expressed that his comments about the Head Teacher were a joke.

138 The Claimant's evidence at the appeal was that his breach of confidentiality was due to his safeguarding concerns; but the panel found it doubtful that he would have acted any differently in this respect, or in his dealings with the contractor whom he considered to be rogue traders.

139 The Claimant presented no medical evidence to support his appeal that his disability played a role in his actions. He relied on an Occupational Health report from 8 August 2011.

140 The appeal panel did consider the Claimant's impairment and medical records on file. They found that there was no evidence before them to suggest that the brain injury impairment had deteriorated.

141 Moreover, an Occupational Health report dated 22 August 2017 did not refer to the brain injury at all, nor to any symptoms attributable to it. At the appeal, the Claimant's case was that it was his job description that made it difficult to work with contractors, not his disability.

142 The panel concluded there was a breakdown in trust and confidence between the Claimant and the School. This was evidenced by documentary evidence (such as the letter of 6 October 2017 from the Head Teacher which the Claimant subsequently ignored), the comments in the OH report of 22 August 2017 that his working relationship with the Head Teacher had broken down, that the Claimant had informed Ms Smyth that the School was in disrepute caused by Mr O'Shea and HLT (p.178); and Ms McLeod's submissions that the Claimant was perceived Mr O'Shea to be incapable as a manager and that he wanted him to be disciplined.

143 The appeal panel considered all the evidence. Given the little medical evidence and its content, the panel did not believe that the brain injury had any impact on the Claimant's actions. The panel considered his prior work record.

144 The panel decided to uphold the decision to dismiss finding there was a breakdown of trust and confidence. It viewed the Head Teacher's lack of earlier formal action as lenient in the circumstances.

145 The appeal decision was sent out by letter dated 29 June 2018 at pages 811-813.

146 The original decision to dismiss was upheld for reasons which had nothing to do with the Claimant's disability nor with the earlier alleged protected disclosures.

The Law

Disability Discrimination

147 In this case, two types of disability discrimination were alleged: failure to make reasonable adjustments (section 20-21 EA 2010) and unfavourable treatment in consequence of something arising from the Claimant's disability (section 15 EA 2010). The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

148 We have considered the carefully drawn statutory duty to make reasonable adjustments set out in sections 20-21 EA 2010.

149 A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("The Code"). The Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

149.1 The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. It may include one-off decisions and actions. (paragraphs 4.5 and 6.10)

149.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

149.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

150 The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice": *Carrera v United First Partners Research*.

151 An Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

151.1 the relevant provision, criterion or practice made by the employer; and/or

151.2 the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

151.3 the identity of non-disabled comparators (where appropriate); and

151.4 the nature and extent of the substantial disadvantage suffered by the Claimant.

The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.

152 Substantial disadvantage is such disadvantage as is more than minor or trivial. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "*no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same*" as those of the disabled person.

Discrimination arising from disability

153 Section 15 EA provides:

"*(1) A person (A) discriminates against a disabled person (B) if –*

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

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

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

154 In the case of section 15(1) discrimination, it is the treatment, rather than the PCP, which has to be justified.

155 The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

Detriment

156 The Tribunal applied the established definition of detriment, which is set out in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, ICR 337 at paragraphs 34-35. In short:

"*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"*."

Employment Rights Act 1996 Part IVA

Protected disclosures: statutory definition

157 The Tribunal directed itself to the relevant statutory provisions of the ERA 1996, and considered the statutory wording. We were conscious of the importance of not adding any form of gloss to the statutory wording. We also considered guidance from the appellate courts in a number of cases.

158 For a qualifying disclosure to be protected, it must be made in accordance with any of sections 43C – 43H: section 43A ERA. These subsections set out various categories of person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

159 Section 43B(1) includes, where relevant:

> "*In this Part, a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *…*
>
> *b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
>
> *…*
>
> d) *that the health or safety of any individual has been, is being or is likely to be endangered;"*

160 We recognised that "disclosure" for the purpose of Section 43B means more than mere communication. It requires a revelation or disclosure of facts: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325 at paragraph 27.

161 Section 43B(1) does recognise a distinction between "information" and "an allegation": see *Geduld* at paragraph 20. But we were cautious about approaching *Geduld* as if there was a clear dichotomy between information and allegation. As explained by Mr. Justice Langstaff in *Kilraine v Wandsworth LBC* [2016] IRLR 422 at paragraph 30:

> *"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."*

Detriment complaints under section 47B ERA and the test of causation

162 Under section 47B ERA:

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

163 Under section 48(2) ERA 1996 where a claim under section 47B is made, "*it is for the employer to show the ground on which the act or deliberate failure to act was done*".

164 It was common ground that section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: see *Fecitt v NHS Manchester [2012] IRLR 64*.

165 In a detriment claim under section 47B, the test of detriment is that set out in *Shamoon*, explained above.

166 Section 47B(2) ERA precludes a claim of detriment where it amounts to dismissal.

Automatic unfair dismissal: section 103A ERA

167 On a claim of unfair dismissal for making a protected disclosure under section 103A ERA, a tribunal must identify whether the making of the disclosure had been the reason, or principal reason, for the dismissal: *Kuzel v Roche Products ltd* [2008] IRLR 530. What was the set of facts or beliefs operating on the mind of the employer causing it to dismiss is a question of direct evidence or inference from the primary facts.

Jurisdictional points

168 Section 48 (3) ERA provides that an employment tribunal shall not consider a complaint under section 48 unless it is presented –

"*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

169 Section 48(4) provides that –

"*For the purposes of subsection (3) –*

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated a done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

170 In *Arthur v London Eastern Railway* [2007] ICR 193, the following guidance was provided on the application of section 48(3) ERA:

170.1 The aim of s.48(3) was to exclude from the jurisdiction of tribunals any complaints that were not made timeously.

170.2 In general, a complaint to a tribunal had to be made within three months of the act complained of. However, Parliament considered it necessary to make exceptions to the general rule where an act or failure in the three-month period was not an isolated incident.

170.3 An act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred.

170.4 The provisions in s.48(3) regarding the complaint of an act that was part of a series of similar acts was also aimed at allowing employees to complain about acts of detriment that were outside the three-month period. However, there had to be a necessary connection between the acts in the three-month period and the acts outside it. The acts had to be part of a series and had to be similar to one another. The last act or failure within the three months might be treated as part of a series of similar acts or failures occurring outside the period and, if it was, a complaint about the whole series of similar acts or failures would be treated as being in time.

170.5 It was not a particularly enlightening exercise to ask what made acts part of a series, or what made one act similar to another. It was preferable to find the facts before attempting to apply the law. In order to determine whether the acts were part of a series, some evidence was needed to determine what link, if any, there was between the acts in the three-month period and the acts outside the three-month period. Even if it was decided that there was no continuing act or series of similar acts, that would not prevent the complainant from relying evidentially on the pre-limitation period acts to prove the acts or failures that established liability. It would in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions.

170.6 It is possible that a series of apparently unconnected acts could be shown to be part of a series or to be similar in a relevant way by reason of them all being done to the claimant on the ground that he had made a protected disclosure (post, paras 39, 41).

171 The burden is on the Claimant to show that it was not reasonably practicable to present the complaints in time. Reasonably practicable does not mean "reasonable"

nor "physically possible". It means "reasonably feasible": *Palmer v Southend on Sea BC* [1984] ICR 372.

Submissions

172 Counsel prepared written submissions which were served on Tuesday 24 September 2019, before the Claimant had finished his evidence. This was a reasonable adjustment to the normal procedure which took account of any disadvantage that the normal procedure (which is usually that submissions be exchanged at the conclusion of the evidence) would place the Claimant under. Moreover, at the end of hearing on Tuesday 24 September, the Claimant was released from his oath even though cross-examination was not completed, so that he could go through the Respondent's written submissions overnight with his wife.

173 On Wednesday 25 September, the Claimant produced a short written submission marked C1.

174 At the conclusion of the evidence each party made oral submissions.

175 The Tribunal took all submissions into account. It is neither necessary nor proportionate to list them here.

Conclusions

Issues 1 to 3

176 The reason or principal reason for dismissal was a reason relating to the conduct of the Claimant. We repeat our findings of fact at paragraphs 122-130 above. The Respondent had an honest belief based on reasonable grounds that the Claimant was guilty of gross misconduct. We concluded that the panel's findings were well within the band of reasonableness open to this employer in the circumstances.

177 The alleged protected disclosures were entirely irrelevant to the decision to dismiss. Moreover, the complaint under section 103A ERA (automatic unfair dismissal allegedly for making a protected disclosure) was wholly inconsistent with his case on appeal before Ms. Schnappauf: in that appeal, the Claimant acknowledged in his grounds of appeal that gross misconduct was proved and that he sought to appeal only sanction. This inconsistency was a further factor which indicated to the Tribunal that the alleged causal link did not exist.

178 The Tribunal, having accepted the evidence of the Respondent's witnesses, found that the investigation carried out by the Respondent was reasonable in the circumstances of this case. In particular, the Respondent instructed an independent contractor to carry out the investigation. She interviewed all relevant witnesses, including the Claimant. The interview of the Claimant lasted around four hours. Ms Smyth also considered all relevant documents, especially emails from the Claimant and the informal warnings that he had received.

179 Part of the Claimant's case was that details of his disability should have been passed on to Ms Smyth by the Respondent. However, the Tribunal rejected this

argument given that the Claimant never once mentioned any impairment as a reason why his actions had led to the investigation into his conduct, and in circumstances in which he could have told Ms Smyth about his disability had he wanted to rely on it. The Claimant was represented at this interview; and his representative, Ms Reid, never raised his impairment as being relevant.

180 Given that the Claimant's medical records are private and confidential, it would have been unrealistic and probably unlawful for the Respondent to send this information to Ms Smyth, where the Claimant gave no indication that his disability was relevant.

181 The Tribunal concluded that the Respondent adopted a reasonable and fair procedure in the circumstances. The Claimant had every opportunity to put his case and to adduce what medical evidence or factual evidence that he wished to.

182 The Tribunal concluded the decision to dismiss was well within the range of reasonable responses open to it. We repeat our findings at paragraphs 125 – 130 above. The Tribunal considered that, where there was a substantial risk that gross misconduct would be repeated by the Claimant and where the Claimant stubbornly maintained his view that the Head Teacher should be disciplined, dismissal was almost an inevitable sanction.

Issues 4 to 5 – Alleged protected disclosures
Issue 4a

183 The Tribunal concluded that the Claimant had made the disclosures set out at paragraph 25 above on 15 November 2018. The disclosure that a boundary wall between the house and the playground was dangerous, together with the words in the email on the same date, were each a disclosure of information.

184 We concluded that the Claimant had made this disclosure (or disclosures) in the reasonable belief that the health and safety of an individual was endangered or likely to be endangered, and in a reasonable belief that the disclosure or disclosures were made in the public interest.

Issue 4b – Disclosure January 2017

185 The Tribunal found that the Claimant made a disclosure of information to Mr O'Shea in or about January 2017 as set out in paragraph 49 above, specifically that there was a fault in a fire alarm panel for the infant school.

186 The Tribunal concluded that the Claimant honestly believed when he made the statement that the fault in the fire panel did mean that the health and safety of pupils was endangered or likely to be endangered.

187 However, the Tribunal found that this belief was not reasonable in the circumstances. The fire panel was functional, albeit not compliant with the latest fire regulations. Mr O'Shea did not refuse to do the works in respect of the panel at all, but only intended to do so when the School was financially able to budget for it.

188 Moreover, we concluded that the Claimant did not hold a reasonable belief that the disclosure was being made in the public interest. The Claimant was making the statement during the course of his ordinary working day about a school maintenance matter. It was being made as part of his ordinary duties as a site manager.

Issue 4c – February 2017

189 There was no evidence for a disclosure on 1 February 2017 (as stated in the list of issues), but we found the alleged disclosure of information was made orally by the Claimant to Mr O'Shea on a day in February 2017 as set out in paragraph 9 of the Claimant's witness statement. We concluded that this was a protected disclosure because the Claimant had a reasonable belief it was made in the public interest and that it tended to show a risk of health and safety to children and other users of the dining hall.

Issue 4d – On various dates, allegation that certain contractors were "rogue builders

190 The Claimant certainly made such statements on more than one occasion, about various contractors. We found that on each such occasion this was not a disclosure of information but an allegation. We found that it was his personal view conveyed in an exaggerated fashion. No breach of any legal obligation was identified by these alleged disclosures.

Issues 6 to 7: Detriment and causation

Issue 6a

191 This alleged detriment complaint was presented substantially outside the three-month time limit provided by section 48 ERA 1996, unless it was found to be part of a continuing act or part of a series of similar acts. We found that this was a one-off incident, not part of any series of similar acts. The Claimant did not suggest that it was part of a series of similar acts.

192 Further, the Tribunal concluded that it was reasonably practicable for the Claimant to present this complaint in time, not least because the Claimant had been considering legal action about the state of repair of his home and had contacted solicitors about this, and because as a trade union member, he had been able to obtain representation for all hearings and interviews. In short, the Tribunal concluded that it had been feasible for the Claimant to present this complaint in time, and the Tribunal had no jurisdiction to hear this complaint.

193 If we are wrong about this, and the Tribunal did have jurisdiction to hear this complaint, the only disclosure that this alleged detriment could be linked to was the disclosure of 15 November 2016 about the boundary wall. But there was no direct evidence of any causative link between this disclosure and the alleged detriment, and none could be inferred.

194 In any event, a request to move items followed by a resolution that they remain in situ, did not amount to a detriment in law on these facts.

Issue 6b – 16 March 2017 criticism for opening the School gates early and allowing children into school

195 This complaint was presented out of time. For the same reason set out at paragraphs 191 - 192 above, the Tribunal concluded that it had no jurisdiction to hear this complaint.

196 In any event, the Tribunal concluded that there was no causal link between any of the disclosures and the Claimant being told off by Mr O'Shea for allowing children into the School early and then leaving them unsupervised. Mr O'Shea acted in order to uphold the School's normal standards and policy about not opening the gate early and which required children not to be left unsupervised on school premises.

Issues 6c to 6d – Claimant allegedly prevented from talking to contractors; the Claimant restricted by working on school gates

197 The Tribunal found that these allegations were allegations of continuing acts. The Claimant appeared to allege a policy or practice. Therefore, this complaint was brought in time and the Tribunal had jurisdiction to determine it.

198 The Tribunal concluded, however, that the Claimant was not subjected to the alleged detriment. It was obvious from the thrust of the evidence that he did speak to contractors. There was a policy that no-one supervising children could use a mobile phone. The Claimant could not use his phone while supervising the gate from 08:45 until 9:15 each morning, but this had nothing to do with any disclosure and was a product of normal school policy.

199 It was apparent from the evidence that the Claimant was not restricted by working on the School gates. This was a very small part of his normal duties.

Issue 6e – after suspension on 9 October 2017 property belonging to the Claimant was left outside

200 The Tribunal found that this complaint was presented out of time. For the same reason set out at paragraphs 191 – 192 above, the Tribunal concluded that it had no jurisdiction to hear this complaint.

201 If we are wrong about this, the Tribunal accepted that this incident occurred and that it amounted to a detriment to the Claimant. However, we found that the person responsible for this detriment had no knowledge of the alleged disclosures and that this incident was not caused, nor influenced in any way, by any of the alleged protected disclosures.

Issue 6f

202 For the same reasons set out under issue 6e above, there was no link between this detriment alleged and the alleged disclosures. Mr O'Shea was not responsible for the movement of these items; none of the items were identified or labelled as belonging to the Claimant, and his possessions were spread around the School. This alleged detriment was the result of an accident.

Issue 6g – the Claimant no longer called out in emergencies

203 In respect of this alleged detriment, we found that in October 2016 Mr O'Shea made the decision that any call-outs of the Claimant outside of his normal working hours could not be made without the authority of the senior management team of the School.

204 We concluded that this alleged detriment (the decision in October 2016, which was a one-off act which had continuing consequences) occurred well outside the three-month primary limitation period. For the reasons set out at paragraphs 191 - 192 above, the Tribunal has no jurisdiction to hear this complaint.

205 In any event, for the avoidance of doubt, we concluded the Claimant suffered no such detriment. The Claimant was still called out in emergencies, but the senior management team assessed what amounted to an emergency in order to justify the call-out charge.

206 Further, and in any event, this decision had nothing to do with any of the alleged disclosures. Mr O'Shea's decision was made entirely because he wished to control expenditure on overtime.

Disability discrimination

207 The Respondent admitted that at all material times the Claimant was a disabled person due to the brain injury and that it was aware that the Claimant was disabled by that impairment.

Issues 9 to 10 – discrimination because of something arising in consequence of disability

Issue 9a

208 It is admitted that the Respondent acted unfavourably by delaying the installation of a fire gate in the perimeter fence of the house until May 2017.

209 The Tribunal accepted Mr O'Shea's evidence and concluded that this delay was due to budgetary constraints; the works that were done to the house after the fire risk assessment in December 2016 meant that the School exceeded the statutory obligations in respect of fire precautions from that date.

Issue 9b

210 We repeat our findings of fact set out at paragraphs 115-116 above. We concluded that there was no such unfavourable treatment as alleged in issue 9a.

211 In any event, any treatment of the Claimant in the grievance appeal had nothing to do with anything arising in consequence of the Claimant's disability.

Issue 9c – on 11 May 2018 finding allegations of misconduct proved

212 We concluded that the findings of gross misconduct do amount to unfavourable treatment. However, the Tribunal concluded that the findings of the disciplinary hearing panel and the disciplinary appeal panel were made on the basis of oral and documentary evidence presented to them. The findings were not because of something arising in consequence of the Claimant's disability.

213 We agree with the Respondent's submissions: the Claimant did not suggest in evidence that he acted as he did because of something arising in consequence of disability. He did not make this argument during his investigatory interview nor did he make such an argument within the disciplinary hearing.

214 Although the Claimant's disability produced an impaired ability to perceive matters, the instances of misconduct in this case were found to be deliberate acts, not connected to an impaired perception, and the Claimant's approach was to seek to justify actions and blame Mr O'Shea at least until his disciplinary appeal.

215 The Tribunal concluded that the instances of misconduct relied upon by the employer were not something arising in consequence of his disability. We repeat the findings of fact set out at paragraphs 125 - 146 above.

Issue 9d – Ms McLeod and Ms Schnappauf failed to take proper account of the Claimant's mitigating circumstances

216 The Tribunal found as a fact that both panel chairs took account of the Claimant's mitigating circumstances when deciding on disciplinary sanction. However, the context is important. Before Ms McLeod the Claimant did not accept that he committed any misconduct and sought to blame Mr O'Shea. Before Ms Schnappauf the Claimant had been advised (by his trade union representative) to admit gross misconduct and did so, and he challenged sanction; but he showed no remorse and his evidence to the panel suggested he would not co-operate with Mr O'Shea going forward.

Issues 11 to 14 – the alleged failure to make reasonable adjustments

Issue 11a

217 The PCP at issue 11a (requiring staff to carry out the full duties of their posts) was admitted.

218 The Tribunal concluded that this PCP did not put the Claimant at any disadvantage, other than in respect of any requirement to work at heights. In respect of that disadvantage, there was no complaint that the Respondent had failed to make a reasonable adjustment.

219 The Claimant's misconduct was not due to an altered perception that Mr O'Shea did not listen to him. It was because the Claimant stubbornly refused to comply with the instructions of Mr O'Shea and considered Mr O'Shea lacking in capability in various areas.

220 In any event, the Tribunal found that Mr O'Shea did make adjustments for the Claimant. He spent a large part of the week listening to the Claimant and he held both formal and informal meetings with the Claimant to explain his instructions and why they were to be followed.

Issue 11b – PCP: applying the disciplinary procedure

221 The Respondent's disciplinary procedure was a PCP.

222 Applying the disciplinary procedure did not put the Claimant at a substantial disadvantage compared to a non-disabled hypothetical comparator.

223 The Claimant's stubborn refusal to accept the Head Teacher's decision and instructions, coupled with his belief that contractors were not giving value for money and that he could do the job better as well as earning overtime, led to the majority of the allegations.

224 The Claimant's dismissal was for the reasons set out above.

Issue 11c – applying the grievance procedure

225 The Respondent's grievance procedure was a PCP.

226 Applying the grievance procedure did not put the Claimant at any disadvantage. The Claimant made a grievance and participated fully in the grievance process setting out grounds, condensing them, and then raising a grievance appeal.

227 As explained in our findings of fact, the Tribunal concluded that the Claimant was able to follow the grievance and disciplinary processes. He suffered no disadvantage by their application. The Claimant was assisted by a trade union representative at each meeting and hearing; even if they were not prepared for the hearing, the representatives could have assisted the Claimant with understanding during the hearing had he required this.

228 In any event, the Claimant was assisted by the procedures in that he was able to call evidence and cross-examine witnesses and adduce documentary evidence at both the disciplinary hearing and the grievance appeal hearing.

229 Throughout both processes, there was no evidence that the Claimant was disadvantaged at all in putting his case. The Tribunal concluded that the Claimant did not suffer any substantial disadvantage by the application of the grievance or disciplinary procedures or by the hearings referred to. We accepted the evidence of Ms Smyth, Mr Le Maistre, Ms McLeod and Ms Schnappauf in this regard.

Issue 12a PCP: failure to pass on information about employee's disability

230 The Tribunal concluded that such a PCP did exist. However, this PCP did not put the Claimant at a substantial or any disadvantage because:

230.1 The Claimant had every opportunity to raise his disability as a defence or mitigation to the gross misconduct charges.

230.2 There could be no disadvantage at the disciplinary hearing, in the circumstances of this case, because the Claimant did not rely on his disability as causing his conduct but rather sought to justify his acts by claiming he was entitled to act as he did.

230.3 When the Claimant did raise his disability and its effects, it was taken into account. When it was raised as mitigation for what he had done at the disciplinary appeal, it was taken into account but the panel decided not to change the decision to dismiss because the disability did not explain the gross misconduct and the Respondent's trust and confidence in the Claimant was broken.

Issue 12b PCP: listing the grievance and disciplinary proceedings on the same day

231 The Tribunal concluded that this did not put the Claimant at a substantial disadvantage compared to a non-disabled worker in circumstances in which the Claimant had over two weeks' notice of the hearings and where the findings show that the Claimant had no difficulty in following or understanding hearings of this nature. Having two hearings on the same day would have been stressful for any employee.

232 Moreover, Ms McLeod offered an adjournment on that day, and the Claimant declined in any event. No other reasonable adjustment would have been effective so there could be no breach of the duty in any event. Furthermore, the Respondent would have considered a reasonable adjustment of adjournment if the Claimant had asked for it.

233 The Tribunal concluded that all necessary adjustments were made in this case, if the duty did arise, by the Respondent postponing the disciplinary hearing. This meant that the disciplinary hearing did not take place until 11 May 2018.

The Claimant's written submissions

234 The Tribunal considered the Claimant's written submissions. We concluded that the additional sections of Part IVA ERA relied upon, which were not referred to in the list of issues (section 43c, section 43e, section 43f, section 43g, section 43h and section 43j ERA 1996), do not affect our conclusions. In addition, the Tribunal concluded that insofar as the refusal of the adjournment on 9 May 2018 went, this was not because of something arising in consequence of the disability nor was it a failure to make a reasonable adjustment.

Summary

235 Each complaint fails. The Claim is dismissed.

236 The Tribunal would like to pay tribute to the patience and diligence of Mrs Gallant. She was a real support to the Claimant both in moral and practical terms.

Employment Judge Ross

29 October 2019

IN THE EMPLOYMENT TRIBUNAL
BETWEEN

JAMES GALLANT

Claimant

- and -

GOVERNING BODY OF RUSHMORE PRIMARY SCHOOL

Respondent

AGREED LIST OF ISSUES

Unfair Dismissal

1. What was the reason for C's dismissal (R asserting it to be conduct and C asserting it to be by reason of his public interest disclosures)?

2. Was that reason potentially fair?

3. Was the dismissal actually fair?

    a. Did R genuinely believe that C was guilty of the misconduct alleged?

    b. Did R have reasonable grounds for that belief?

    c. Had R conducted a reasonable investigation into the circumstances?

    d. Did R adopt a reasonable procedure?

    e. Did the sanction of dismissal fall within the range of responses open to a reasonable employer (C asserting that R failed to give adequate consideration to mitigating factors)?

Public Interest Disclosure

4. R admits that the following disclosures were made –

    a. On 15.11.16, C informed the head teacher, Jim O'Shea, that a wall adjoining a school playground was dangerous;

    b. In or around January 2017, C informed Mr O'Shea that there was a fault with the fire panel for the infants' school;

    c. In or around 1.2.17, C informed Mr O'Shea that there were workmen working in the school kitchens; and

d. At various times, C informed Mr O'Shea that certain contractors engaged by R were "*rogue builders*".

5. Do any of these disclosures amount to protected disclosures within the meaning of the Employment Rights Act 1996?

6. Do any of the following amount to detriments –

a. On or around 7.12.16, C being asked by Mr O'Shea to remove personal belongings from an office on the school premises (R asserting that following his objection, C was not actually required to remove these items);

b. On or around C 16.3.17, C being criticised for opening the school gates early so as to allow children to move away from a worker (R asserting that C walked away from the gate to take a telephone call without first ensuring adequate supervision for the children);

c. C being prevented from talking to contractors (R asserting that he was not prevented from talking to contractors);\C being prevented from using his telephone (R admitting that staff engaged in supervising children were not to use their telephone);

d. C being prevented from working on the school gates (R asserting that C was not prevented from working on the gates);

e. After his suspension on 9.10.17, 3 doors and an oak plank belonging to C being removed from the school premises and left outside (R admitting that this happened but asserting that it was not known that the items belonged to C);

f. On 11.5.18, the contents of a cupboard which belonged to C were removed but not provided to him (R having no knowledge of such belongings);

g. From an unspecified date, C was no longer called out in emergencies (R asserting that, in order to control its maintenance budget, outside his working hours, call outs to C were subject to authorisation by members of the senior management team); and

7. Was C subjected to any such detriment because of his protected disclosures?

Disability Discrimination

8. R admits both that C is disabled within the meaning of the Equality Act 2010 by reason of a brain injury sustained in 2010 and that it was at all material times aware of C injury.

9. Did R treat C unfavourably by –

a. Failing to install a fire gate in the perimeter fence around C's home;

b. Refusing to repeat questions asked of a witness, Mr. Bretherick, during the grievance appeal hearing;

c. Finding the allegations of misconduct proved against C; and/or

d. Failing to take proper account of C's mitigating circumstances when deciding the appropriate disciplinary sanction?

10. Was any such unfavourable treatment because of something arising in consequence of C's disability, namely his lack of a sense of smell, his impaired memory and/or his altered perception?

11. It is admitted that R had the following provisions, criteria and practices -

a. Requiring staff to carry out the full duties of their posts;

b. Applying its disciplinary procedure; and

c. Applying its grievance procedure.

12. Did R have a provision, criterion or practice of –

a. Failing to pass on information about employees' disabilities to relevant parties; and/or

b. Listing grievance and disciplinary proceedings on the same day?

13. Did any of R's provisions, criteria or practices put C at a substantial disadvantage compared to persons who are not disabled? C asserts the following disadvantages –

a. Disadvantage (unspecified) by being required to carry out the full duties of the post;

b. Being accused of misconduct, subjected to disciplinary proceedings and dismissed;

c. Being unable fully to follow the disciplinary and grievance proceedings;

d. Being misunderstood by reason of information about his disabilities not being passed on to Michelle McLeod (chair of the grievance appeal and disciplinary hearing panels) or Nicole Schnappauf (chair of the disciplinary appeal panel); and

e. Being caused stress by having the grievance appeal and disciplinary hearings listed on the same day?

14. Did R fail to make reasonable adjustments by –

a. Holding regular meetings with C;

b. Listening to C;

c. Listing the grievance appeal and disciplinary hearings on separate days;

d. During disciplinary and/or grievance hearings –

i. Offering C regular breaks;

ii. Checking that C had heard and understood everything that was said; and

iii. Repeating questions asked of a witness, Mr Bretherick, at C's request?

Jurisdiction

15. Were each of the Claimant's detriment complaints in Part IVA Employment Rights Act 1996 presented within three months of the date of the act or failure to act to which the complaint relates, or where that act is part of a series of similar acts or failures, the last of them? (section 48(3)(a) ERA) Dealing with this issue involves consideration of the following issues under section 48(3)(b) ERA:

(a) whether there was an act extending over a period;

(b) when a deliberate failure to act was decided on.

16. If not presented within that period of three months, was it reasonably practicable to present the complaint within that period?

17. If not, was it presented within such further period as the Tribunal considers reasonable?

18. Were each of the Claimant's discrimination complaints presented within the three month time limit set out in section 123(1)(a) Equality Act 2010 ("EQA")? If not, was each complaint presented within such further time as was just and equitable? Dealing with this issue may involve consideration of whether there was an act extending over a period.

Remedy

19. Is C entitled to a declaration that he was discriminated against?

20. What level of compensation would it be just and equitable for C to recover?

21. If C is found to have been unfairly dismissed –

a. What remedy does he seek?

b. What is the appropriate level of the basic and compensatory awards?

c. Is it appropriate to make any Polkey reduction?

d. Did C's conduct contribute to his dismissal in such a way as to warrant a reduction in his awards?

e. Has there been any failure by C to mitigate his loss?