EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MISS S LEWIS	**V**	**THE GOVERNING BODY OF TAI'RGWAITH PRIMARY SCHOOL**

HELD AT: **SWANSEA** **ON:** **HEARING**: 2, 3, 4,11,12,13,16,17,18, 19 & 20 DECEMBER 2019
CHAMBERS: 2 & 3 JANUARY 2020

BEFORE:

EMPLOYMENT JUDGE: N W BEARD **MEMBERS: MR W DAVIES**
MRS M HUMPHRIES

Representation:

For the claimant: Ms J Watson (Representative)

For the Respondent: MR J Walters (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claims of disability discrimination pursuant to section 20 and 21 of the Equality Act 2010 were presented outside the time limit for presentation of such claims and the tribunal has no jurisdiction to consider them.
2. The claimant's claims of disability discrimination pursuant to section 15 of the Equality Act 2010 were presented outside the time limit for presentation of such claims and the tribunal has no jurisdiction to consider them.
3. The claimant's claim of disability discrimination pursuant to section 13 of the Equality Act 2010 was presented outside the time limit for presentation of such claims and the tribunal has no jurisdiction to consider it.

4. The claimant's claims of disability discrimination pursuant to section 19 of the Equality Act 2010 were presented outside the time limit for presentation of such claims and the tribunal has no jurisdiction to consider them.
5. The claimant's claim of disability discrimination pursuant to section 26 of the Equality Act 2010 was presented outside the time limit for presentation of such claims and the tribunal has no jurisdiction to consider it.
6. The claimant's claim of victimisation pursuant to section 27 Equality Act 2010 is not well founded and is dismissed
7. The claimant's claim of unfair dismissal pursuant to section 98 of the Employment Rights act 1996 is well founded.
8. The claimant contributed to her dismissal to the extent of 100% pursuant to the provisions in sections 122(2) and 123(6) Employment Rights act 1996 the basic award and compensation is reduced by 100%.

REASONS

PRELIMINARIES

1. The claimant is represented by Ms J Watson, she is not a trained lawyer, however she has significant experience of representing claimants from the education sector at tribunal. The respondent is represented by Mr Walters (Counsel). The claimant was a teacher and deemed employee of the respondent but contractual employee of the Neath Port Talbot Local Education Authority. The respondent (hereafter "the school") is the Governing Body of Tairgwaith Primary School, a maintained school. Neath and Port Talbot Council has three roles, two statutory, by means of which it is involved in this case. First as the Local Education Authority (hereafter the LEA), secondly providing HR advice to the respondent and thirdly in respect of Social Services where it plays a role in safeguarding children.

2. The tribunal has been provided with a bundle of documents in excess of 1300 pages. The tribunal made it clear to the parties at the outset of the hearing that the tribunal would not consider or take account of any document which was not specifically referred to in a witness statement, during cross examination or in final submissions.

3. The tribunal heard oral evidence from the claimant; she called, as witnesses to give evidence on her behalf, Deborah Scott, a trade union officer and Roberto DeBenedictis, also a trade union officer. The claimant provided written evidence from Pixey Warner a parent of children at the school, Caroline Clark a grandparent of a child at the school, Bianca Roberts, also a parent of a child at the school and Jamie Lewis, the claimant's daughter who was at relevant times a teaching assistant at the school. The respondent did not wish to cross examine these witnesses and the tribunal take account of their evidence as part of its deliberations.

4. The respondent called to give oral evidence Nigel Thomas, the head teacher of the school, Emma Williams, a teacher at another school who sat on the disciplinary appeal, John Davies current Chair of the Governing body at another school who sat on the disciplinary panel, Tina Morris deputy head at the school, Arwyn Woolcock previous Chair of the Governing Body at the school, Dafydd Humphreys current Chair of the Governing Body at the school and who chaired the disciplinary panel, Heidi Morgan who was a teaching assistant at the school, Kathryn Pugh who was also a teaching assistant at the school, Sarah Poole, a governor who chaired the disciplinary appeal, Tudor Brent Parry, who carried out the disciplinary investigation (SERVOCA) and Janine Thomas a teacher at the school.

5. The claimant presented two claim forms. The first of which was presented on 12 December 2017 (the ACAS certificate demonstrating that early conciliation commenced and ended on 7 December 2017), the second was presented on 9 October 2018 and the ACAS certificate was issued on 1 October 2018. In the first claim form the claimant claims unfair dismissal pursuant to section 98 of the Employment Rights Act 1996, and she also claims that she has suffered detriment and dismissal because of making public interest disclosures. In the second claim form the claimant complains that she has been subject to disability discrimination and victimisation. The issues are set out in "Scott" style schedules which the parties prepared at the request of the tribunal when, at the outset of the hearing, it became clear that the issues the tribunal would be required to resolve were numerous and had not been fully identified in any written document. As a result, the claimant contended that there were no less than 62 occasions where she had made disclosures and suffered detriment in consequence and finally was dismissed because of the disclosures. The claimant raised 13 issues in respect of a failure to make reasonable adjustments and 6 complaints to discrimination arising from disability. The schedules did not deal with indirect discrimination or harassment both of which are claimed. The claimant complains of direct discrimination in January 2015.

THE FACTS

6. We shall begin by dealing with some general matters before moving to the specific facts relating to the claimant's complaints. The tribunal felt that it could have little confidence in any of the witnesses called by either party other than Kathleen Pugh, Heidi Morgan, Tudor Brent Parry and Emma Williams.

   6.1. Two of the respondent's witnesses Arwyn Woolcock and Tina Morris responded to most questions by indicating that they had no recollection, the tribunal did not accept that this was the case, in our judgment these were stock responses to avoid difficult questions. We do not consider that we can place any weight on their evidence save where its is supported by other evidence which we have accepted.

   6.2. Mr Nigel Thomas, the head teacher was obviously attempting to assist the tribunal and give useful evidence, however his evidence was vague

on times, it was rambling on occasion and was, in the main, unfocused. The tribunal again only generally rely on his evidence where it is supported.

6.3. As for the respondent's remaining witnesses we found that they were attempting to give a full picture of events but were hampered by the fact that they had not fully understood the roles they undertook in the processes.

6.4. The claimant called two union officers. The first, Mr DiBenedictis was desperate to support the claimant's position at all stages, even on occasion where logic pointed to a different answer, he was, as Mr Walters put to him, not answering factually but advancing an argument as if he were the claimant's advocate. Mr DiBenedictis would attempt to answer a question by anticipating what the question was leading to and attempting to defuse that issue with a long and deflecting answer.

6.5. Ms Scott, the second union officer to give evidence, was not in the same category. However, she was evasive in some of her answers to questions which might have caused difficulties for the claimant's case. An example of this was that she would not initially concede that the claimant had not instructed her to pursue, in the domestic hearing, discrimination on the grounds of disability. On the same basis she would not concede that the claimant had not advanced the argument that she was being "set up" by the Head Teacher. This was despite significant documentation, including her own note in preparation to represent the claimant, demonstrating that the argument was not made. That concession only came after equivocation where she attempted to say that the claimant had been speaking to other representatives previously and that she did not know what had been said to them.

6.6. In respect of both Union witnesses we concluded that their evidence could only be relied upon when supported by other evidence which we had accepted.

6.7. The claimant's evidence started off forthright, however, when closely cross examined on specific aspects of her account the claimant began to deflect in her answers, we deal with the claimant's accounts specifically as necessary below.

6.8. We found Kathleen Pugh to be a compelling witness, who gave an account which included a physical demonstration, she was not thrown by cross examination.

6.9. Heidi Morgan was straightforward, conceded points where necessary and had a verity to her answers.

6.10. Emma Williams was professional in her answers confining herself to the questions asked.

6.11. Tudor Brent Parry was clear and concise in his answers and came across as a professional carrying out a specific function without any side to his evidence. We considered that the evidence of these four witnesses was generally reliable and credible, we deal with specific aspects of conflict and our preferences below.

7. The second of the general issues relates to evidence of detriment. The claimant has alleged several detriments for which she has not adduced evidence that these are connected with the disclosures she made. The claimant asks us to infer that the disclosures led to the detriments.

7.1. However, the evidence we heard, not least from the claimant herself, was that this was a school in disarray due to the leadership of the previous headteacher and the constant placement of temporary headteachers.

7.2. It is obvious that the school's standards, on inspection, were falling during this period.

7.3. Further during the era where Mr Thomas was headteacher as we found, set out below, his own abilities with regard to HR issues was limited as was his understanding of his powers vis a vis the powers of the governing body. In addition to this Mr Thomas approach to dealing with staffing (and indeed general management of the school) issues was hampered in qualitative terms because of this lack of understanding. In our judgment that general malaise continued in his era, at least to the extent of handling matters related to HR and management of staff.

7.4. Amongst those matters which the claimant complains as detriments are:

7.4.1. That she was denied training opportunities;

7.4.2. That her teaching standards were not monitored;

7.4.3. That she had to undertake extra work;

7.4.4. That she was placed in vulnerable situations:

7.4.5. That she was made anxious because of the vulnerability of pupils, staff and property;

7.4.6. That her morale (along with other staff) suffered;

7.4.7. That expectations of the claimant constantly differed;

7.4.8. That she was pressured by what she was being told by staff which as a union representative she had to report to the senior management team;

7.4.9. That she became stressed because of guilt at requiring teaching assistants to work through lunch;

7.4.10. That she suffered work related stress and occupational health recommendations were not followed.

7.5. In respect of these claimed detriments we consider that the evidence points to these issues, even if correct (we do not make that finding), as being part of the general malaise at the school. What is being described are the generalised effects of a poorly run school not consciously or unconsciously directed actions against the claimant.

7.6. In any event the detriments, even as described by the claimant, are not focused actions or omissions but a description of an environment.

7.7. In our judgment we cannot infer that those matters were caused, to any extent whatsoever, by the fact that the claimant had raised issues. Firstly, not all the matters relied upon affect only the claimant. Secondly, there is lack of particularity about the detriments which militates against a finding that they connect to the cause relied upon.

7.8. We consider therefore that even if we accept (without making a finding) that the claimant's alleged disclosures were qualifying protected disclosures, we do not consider that she has established any link between the matters she raised and the detriments set out.

8. The respondent is the governing body of a maintained primary school. The claimant was employed as a teacher at the school. The claimant's employment commenced on 1 September 2001. The claimant was dismissed on 22 September 2017. The claimant was subject of a disciplinary procedure involving allegations of mishandling a child, the tribunal shall refer to this child as Child B throughout the judgment.

9. The claimant contends that she has, over a long period of time, from at least December 2012 been raising various concerns about numerous aspects of school life, she relies on various aspects of these as disclosures.

9.1. What is clear is that this was a school with significant problems, and that it had moved into red status during the period of Mr Nigel Thomas' predecessor's time as head teacher. That former headteacher had long periods of absence. This meant that a series of interim short-term stand-in headteachers acted during her absence.

9.2. This was something the claimant was concerned about and in her roles as a trade union representative and school governor she voiced those concerns. The claimant was raising issues about various matters relating to the reduction in the school's standing down to red status.

9.3. In cross examination the claimant conceded that she had been made aware by Mr DiBenedictis that raising these various concerns might be considered "whistleblowing". Despite this knowledge the claimant did not present a claim to the tribunal about those matters which she relies upon as detriments until her dismissal. Even at that stage those detriments were not specifically identified and indeed not finally identified in detail until the outset of this hearing.

10. The claimant contends that Mr Thomas was affected by those matters which she alleges are disclosures.

    10.1. Firstly, there is no evidence that Mr Thomas was aware that the claimant used the words, or the gist of them, as set out in the schedule. The evidence that he was aware of problems at the school prior to his arrival is clear. What the tribunal cannot accept, without evidence from the claimant, her witnesses, in documents or alternatively acceptance by Mr Thomas, that he knew the claimant had communicated the words (or gist) as set out in the schedule.

    10.2. Further, the claimant's contention is that, even though the statements she relies on as disclosures were communicated prior to Mr Thomas' appointment as Head Teacher, he resented that and treated her to her detriment because of it. The tribunal consider this to be inherently improbable even if Mr Thomas had been aware of them.

    10.3. The purpose for which Mr Thomas had been appointed was to put right those matters which were considered failings prior to his appointment. In those circumstances there is no logical reason why he should take umbrage that the claimant had raised complaints about the matters which he had been appointed to correct.

    10.4. It is of course possible that when the claimant made further complaints that Mr Thomas saw her as a troublemaker and took account of the earlier complaints.

    10.5. In support of the first contention (but logically undermining the second argument) the claimant complains that Mr Thomas, immediately on his appointment, changed her role as SENCO depriving her of time specifically devoted to that role.

    10.6. The tribunal do not consider that the matters raised by the claimant underpinned Mr Thomas' decision. This is for two reasons: the first that there is no evidence that Mr Thomas was aware of the claimant's earlier complaints, the second that he had done precisely the same thing (removed non-teaching time) to the Deputy head teacher at the same time. Mr Thomas was acting *ultra-vires* in doing this, but we accept his explanation that he was trying to control financial problems.

11. The complaints relied upon as disclosures and that Mr Thomas is alleged to have been aware of after his appointment were made in January, February, October and November 2015.

    11.1. The first in time is alleged to be in a medical report dated 12 January 2015. The disclosure alleged is "impaired staff well-being causes a problem for the school".

        11.1.1. We shall leave aside, for the present, that the document does not contain the words (or even the gist) of the words alleged by the claimant to amount to a disclosure and that, in any event, if the

words were said, any disclosure was made to an independent occupational health professional and not the employer.

11.1.2. The medical report raises issues of the claimant's complaints about workload and how that impacts on her health. It also refers to a lack of leadership and support at the school.

11.1.3. There was a report made by the former headteacher to the governing body about staff well-being during her tenure. That report sets out this was a major concern. The claimant's contention is that this report connects to the information provided to the school via the occupational health report.

11.1.4. It is clear that the context in which an alleged disclosure is made may mean that it is understood as the provision of information by the recipient. The tribunal do not accept that to be the case here. This report does not differ from the general run of such occupational health reports. It deals with the claimant's current state of health and offers, albeit in a limited way, a prognosis and diagnoses. The report does not carry within it an implication that the claimant is making a complaint about well-being of staff other than that related to the circumstances of her own health.

11.1.5. The implied connection that we are asked to make is inappropriate on that basis alone. Additionally, there is no evidence that Mr Thomas was aware that the information on leadership and support reported by occupational health reflected the claimant's comments on anything other than her own health condition.

11.1.6. We did not consider that this report would impact in any significant way on Mr Thomas' view of the claimant, other than it being related to her specific circumstances. In fact, he appeared to rely, almost entirely, on HR support and guidance in his approach to this report.

11.2. The second allegation of disclosure relates to the meeting on 25 February 2015.

11.2.1. The claimant did not give evidence that the words (or their gist) set out in the schedule as a disclosure were said at that meeting (see paragraph 40 witness statement).

11.2.2. The letter recording the meeting (pp. 586-588) does not indicate that the claimant said anything that resembles the disclosure "staff well being causes a problem for the school".

11.2.3. Because of that absence we cannot see the connection between the disclosure alleged and the meeting.

11.2.4. In any event, were we wrong about that, in our judgment, that meeting was about the claimant's personal health and work circumstances and the way in which the claimant might be assisted in

terms of recovery. We do not find that Mr Thomas would react to that by considering the claimant a troublemaker, what was recorded as discussed is standard fare for an absence meeting.

11.2.5. In our judgment Mr Thomas did not act to the claimant's detriment because of anything said by the claimant at that meeting. The claimant complains that her workload was not reviewed nor were support mechanisms put in place. In respect of that the question of the claimant carrying out the SENCO role was discussed which clearly would have had some impact on workload. Further, the respondent intended to carry out a risk assessment on her return to work. These discussions point to a consideration of the recommendations by the respondent. When the claimant returned to work she wrote to the respondent and resigned the role of SENCO.

11.2.6. There was some evidence that the claimant should have had the SENCO position removed rather than her relinquishing it as this would have pay implications. On the evidence this appeared to arise by accident rather than design. We do not consider that Mr Thomas or the HR advisers arranged that the claimant resign that position because of her having made a disclosure. If anything, Mr Thomas was writing to HR on 1 May 2015 asking that the claimant be informed of this demonstrates that he was attempting to ensure that the claimant was clear on the position. It appears to have been overlooked by HR.

11.3. The third matter in time is the disclosure alleged on 22 October 2015. The claimant is alleged to have said that "there is no performance management happening".

11.3.1. The claimant did not give evidence that she said this or anything like this at that meeting. Her evidence instead appears to be critical of the standard of appraisal carried by Mr Thomas.

11.3.2. We concluded that this was not said at that meeting. It appears inherently unlikely that a person would allege there was no performance management being undertaken at a meeting dedicated to performance management.

11.3.3. The report of the meeting is not signed and does not help. However, we consider that the claimant would certainly have included her use of this phrase in her witness statement had it been a matter of importance.

11.3.4. In any event we accept the evidence of Mr Thomas that this was an ordinary meeting with the claimant where he discussed matters of the claimant's practice. We do not consider that any of the matters alleged against him as detriments arose as a result of anything said or done at this meeting.

11.4. The next element of disclosure related to workplace temperatures because of a faulty boiler.

11.4.1. If we analyse this as a disclosure, without making that specific finding, and that the claimant had raised this with Mr Thomas, we do not consider that it would be seen as anything other than a normal everyday domestic complaint.

11.4.2. We heard from Mr Thomas, who appeared to us to be just as frustrated with the boiler problem as the claimant. He was required to obtain maintenance support on a number of occasions.

11.4.3. We do not consider that Mr Thomas would see this as anything other than a teacher bringing to his attention a problem which needed rectification.

11.4.4. We reject entirely the contention that reporting this made Mr Thomas view the claimant as a troublemaker. In any event appears that the claimant alleges that the failure to repair was the cause of detriment. Mr Thomas did not deliberately fail to have the boiler repaired, he attempted to arrange repairs which were not always successful.

11.4.5. What is clear is that Mr Thomas did not attempt to arrange that this same state of affairs, of a faulty boiler, should continue because the claimant had complained. No detriment alleged by the claimant came about because the claimant had discussed this with Mr Thomas.

11.5. Looking at all of those matters in the round we consider that none of the actions of Mr Thomas, the HR support or the school were because the claimant had raised complaints either before or after Mr Thomas' appointment. As set out below we reject the contention that the disciplinary process had any connection with any of the alleged disclosures.

12. The claimant contends that in September 2015 she reported safeguarding issues to the deputy headteacher. The claimant did not, in evidence, indicate that she had used the words alleged in the schedule nor the gist of those words. What she describes is the respondent's failure to do anything in response to those complaints causing her anxiety. Nothing in the evidence supports a proposition that the reason why nothing was done in response was because the claimant raised the complaints. Overall, again, it appears to us the absence of any action relates to the poor running of the school.

13. The claimant contends that she made a disclosure of "flawed management remains a problem for the school under the new head" to several persons from the end of 2015 to the early months of 2016. The claimant does not give evidence of using these words, or anything would amount to the gist of those words to Mr Woolcock, Mr Daley or to the school inspector. The claimant contends that she made a number of disclosures of a similar nature during the

disciplinary processes, again there is no specific evidence of those words or their gist being used. The claimant contended that her treatment in respect of the removal of the SENCO position was because of these disclosures as was the public announcement of the same. This is obviously incorrect because these events happened before the disclosure. Our factual findings set out below demonstrate that none of the treatment of the claimant by Mr Thomas or the respondent more generally during the PASM and disciplinary processes was connected with anything other than the allegations made and the later findings about the claimant's conduct.

14. The respondent concedes that the claimant is disabled. The medical evidence of that disability comes in the form of occupational health reports, fitness for work statements and a computer printout medical history from the claimant's GP records.

    14.1. The combination of reports and records indicate that the claimant suffered from stress and depressive illness and hypothyroidism.

    14.2. The claimant's impact statement indicates that an aspect of her condition is irritability, she told the tribunal that she was intolerant of others and impatient of ineptitude and failure to observe rules in others.

    14.3. However, the evidence of the claimant's relationships, as she accepted in cross examination, is that she was able to work appropriately with some people without irritability whereas she had difficulties interacting with some individuals.

    14.4. There is no medical evidence which demonstrates that irritability is a specific symptom of any of impairments relied on as disabilities by the claimant. The only reference to irritability within the medical information is included in an occupational health report from 2010 (pp. 1243/4). That report relates irritability to pressure at work and sleepless nights, it does not demonstrate that it is a specific symptom of either stress or hypothyroidism.

    14.5. In any event the claimant was specific in indicating that irritability was not a reason for her approach to child B.

    14.6. The tribunal rejects the claimant's account of events of that day. It appears to the tribunal that, based on the accounts given by Heidi Morgan and Kathryn Pugh, the claimant did suffer a loss of temper on that day. That said we are unable to conclude that the loss of temper was a consequence of the claimant's disability, we have insufficient evidence to permit us to do so.

15. In early 2016 a complaint was made about the claimant hitting a pupil hereafter "Child A" on the head with a book.

    15.1. The head teacher did not believe the account of events to be true, but had no specific evidence to contradict the account. As such he was

required to pass it to a Professional Abuse Strategy Meeting (PASM) on the instruction of the Local Authority Designated Officer (LADO).

15.2. However, because he was convinced of the claimant's innocence Mr Thomas did not suspend the claimant. Instead he decided to undertake a risk assessment.

15.3. It is clear to the tribunal that Mr Thomas had no inkling as to the correct approach to be taken to a risk assessment. Instead of assessing the risk of a child being struck, he assessed the risk of a further complaint being made against the claimant.

15.4. This led to him placing a further person in the class as a teaching assistant so that the "risk" of an unfounded complaint being made was reduced by the number of witnesses available.

15.5. The tribunal consider that this decision arose out of incompetence rather than any malice. It was clear, even at the stage of giving evidence, that Mr Thomas was unable to see any fault in his approach.

15.6. The approach he took, in turn, led directly to the suspension of the claimant when, on 17 March 2016, a complaint was received about the treatment of Child B.

15.7. Mr Thomas felt that there were no further steps he could take to alleviate the risk. This was, at least in part, because he had identified the wrong risk. No proper consideration was given to alternatives to suspension because of this. However, none of this was motivated because the claimant had made complaints, the problem began because Mr Thomas approached the risk assessment on the basis that the claimant had not struck Child A.

15.8. This initial view infected the whole process thereafter. The tribunal is unable to say whether anything could have been put in place to avoid suspension, but the school never explored that option appropriately when the Child B complaint was made.

16. On 15 March 2016 the claimant spoke to the mother of Child B and spoke to her about a specific event with child B that had taken place that day.

16.1. The claimant has given differing accounts of what she said at different times. At tribunal the claimant told us that she told the mother of Child B that the child was busy and that she had grabbed the child.

16.2. The mother of Child B approached one of the teaching assistants about her concerns as to what she had been told by the claimant. Her account of what the claimant said is later recorded as being "(Child B) been busy today. I had to pull (Child B) down to the floor". The teaching assistant indicated that mother should speak to someone more senior.

16.3. On 16 March 2016 the mother of Child B approached Janine Thomas, the other teacher involved with Child B. Janine Thomas' advice

was to speak to the head teacher. The claimant contends that the head teacher approached mother because of concerns told to him by Janine Thomas. However, the head teacher indicates mother came to him at 9am on 17 March 2016 in his chronology (p 797) created nearer the time of events. What is clear is that mother reported to Mr Thomas that she had been told by the claimant that the claimant had pulled Child B to the floor.

16.4. In our judgment there is no evidence to support the claimant's contention that Mr Thomas approached mother and essentially, induced, the mother of Child B to make a complaint.

16.5. From the evidence, in approaching the teaching assistant and then Janine Thomas, it is clear mother was, at the very least, concerned about what she had been told by the claimant.

16.6. In those circumstances we do not consider that the head teacher was behind mother making the complaint. It appeared to us that at this point of complaint Mr Thomas was completely out of his depth and immediately sought the comfort of advice from the LADO.

17. The PASM process had begun with the issue involving Child A. The question of Child B was raised at that first PASM meeting and thereafter PASM dealt with both complaints.

17.1. The PASM involved, because of what was essentially an allegation of assault, an element of police investigation. Based on the material we have seen, it would appear that it was the slowness of the police investigation that took up much of the time between PASM meetings.

17.2. The police took a statement from the mother of Child B, interviewed the claimant under caution, and spoke to Lisa Thomas, Heidi Morgan and Kathleen Pugh (three of the four teaching assistants working with the claimant on 15 March 2016). However, these events were spread over a significant period with the three teaching assistants not spoken to until the October of 2016.

17.3. The PASM process was not concluded until 10 January 2017. At that stage the conclusion was that the incident involving Child A was not substantiated but the incident with Child B was. It was considered that, as the police did not consider the incident with Child B should be pursued as a criminal offence the school should be advised consider whether any disciplinary issues arose.

18. The respondent appears to have adopted a disciplinary process which follows the Welsh Government guidance.

18.1. That process requires that when a disciplinary matter is initially considered there should be a meeting involving the chair of governors and the head teacher. The evidence as to this meeting, if there was one, is scant. There is no documentation that we have been shown which

indicates when and how the decision to pursue to an independent investigation was made.

18.2. What the tribunal have seen is two versions of the document which would instigate an investigation by SERVOCA (a specialist child protection investigation organisation). They differ considerably in content.

18.3. What we are able to conclude is that, the allegation, as it then emerged was of the claimant pulling Child B to the floor in order to prevent him from wandering within a classroom. Child B was a child with clear difficulties in communication and with specific needs. The school were aware that the claimant's defence was that she was protecting the child from risk.

18.4. The correct procedure, where there is a child protection issue, is for the governing body to appoint an investigator. There is no evidence that this was done by the governing body.

18.5. The PASM having found the complaint substantiated there was a knee jerk response to appoint SERVOCA. This was made by Mr Thomas and we believe, accepting his evidence, made in conjunction with Mr Woolcock on the advice of HR.

18.6. That meant there was a clear dispute as to events between the claimant and the complaint made; the complaint which, if accepted, would mean that the claimant had potentially used inappropriate force. In the circumstances it is obvious that, had a correct approach to procedure been followed, the result would have not differed, there would have been a reference to an independent investigation (although not necessarily the same investigator). There was an allegation of inappropriate force, this clearly could, potentially, result in harm to a child and therefore the Welsh Government procedures would require the governing body to appoint an independent investigator (pp.176-178).

19. SERVOCA was approached to carry out an investigation on 16 January 2017 and Mr Parry was appointed as the investigator.

19.1. His evidence was that he attended a meeting where there was a discussion as to what was to be investigated, his terms of reference he told us were those allegations set out at page 835 in his report.

19.2. That meeting was with Mr Thomas and Mr Woolcock on 18 January 2017, the LEA had a HR adviser present also.

19.3. Mr Parry those allegations on page 835 and on page 836 under the heading "brief circumstances of the allegation".

19.4. Mr Parry obtained some information from the police about their investigation, he had obtained the permission of Child B's mother and the claimant to have access to the police information.

19.5. Mr Parry told us that in SERVOCA it was not considered, generally, appropriate to obtain PASM minutes for an investigation of this nature. He gave two reasons for this: the first that such minutes could include private information as to the child and their family; second that the minutes were not a complete record and were often reporting what was essentially third hand information.

19.6. Mr Parry interviewed the three teaching assistants named above. He then interviewed the claimant. On interviewing the claimant, he became aware of the fourth teaching assistant and as a result arranged to interview her.

20. Mr Thomas had met with the fourth assistant briefly at a training event prior to the occasion when Mr Parry interviewed her.

20.1. Mr Thomas had asked her about the incident, she told him that she had seen nothing untoward in the claimant's conduct. Mr Thomas did not make Mr Parry aware of this.

20.2. It was put to Mr Thomas that he was deliberately keeping supportive evidence from the investigation. He said that he thought, given her answer, that the teaching assistant did not prove or disprove anything.

20.3. The tribunal were concerned that this individual's name had not been passed on. Had we concluded that Mr Thomas was, independently, capable of conducting these processes correctly we could have concluded that malice played a part in the failure to disclose. However, in his evidence before us Mr Thomas proved himself to be anything but capable of dealing with these processes. His consistent reliance and slavish following of HR advice demonstrates his lack of confidence. Additionally, when left to deal with matters without such support the evidence pointed to him constantly taking the wrong approach.

20.4. This appears to be consistent with Mr Thomas not making appropriate decisions on many aspects of his role. To take one example, on taking up his role, his immediate alteration of the claimant and the deputy head teacher's existing roles without recourse to the governing body as was required. On this occasion he got it wrong, the tribunal believed his sincerity when he said that he was glad that Mr Parry had found the witness.

21. Mr Parry produced a report setting out the evidence he had gathered and the various Welsh Government guidance which applied to the facts and the disputes involved.

21.1. The investigation and the report produced is thorough and well balanced in our judgment. Mr Parry comes to no conclusions and simply sets out the evidence gathered, with pointers as to strengths and weaknesses that might be considered in respect of that evidence.

21.2. The claimant's complaint is that Mr Parry should have interviewed the teaching assistants further to establish if there were two different events. The argument runs that once had realised that the claimant's account was so different from the accounts given by the teaching assistants this was a necessary step.

21.3. In our judgment this flies in the face of the evidence gathered. The claimant was referring to one event. That event she related to the conversation she had with the mother of Child B, she was made aware by Mr Parry of the teaching assistants' accounts and simply denied they were true. The claimant did not e.g. describe a different occasion where the teaching assistants might have made a mistake or misunderstood her conduct.

21.4. In those circumstances it is obvious that the investigation did not need to return to the teaching assistants as what was in issue. What would have been obvious to anyone reading the report and its appendices was that the claimant was being accused of mishandling the child in the way described by the teaching assistants. The issue for resolution in the disciplinary process would be who was giving a truthful account.

22. The final disciplinary hearing was held on 7 June 2017 and the appeal hearing on 22 September 2017.

22.1. The claimant sought the attendance of the two teaching assistants that had given evidence of her mishandling of Child B at the disciplinary hearing and the appeal.

22.2. The witnesses did not attend. Heidi Morgan told the tribunal she would have had no difficulty in attending. The impression the tribunal gained from her evidence was that, essentially, she was being discouraged from attending by being told that she did not have to.

22.3. The respondent relies on the fact that witnesses cannot be forced to attend. We do not consider that any real effort was made to ask them to attend, see Carla Davies email to Mr Thomas p. 862.

22.4. This was a case where there was a stark difference of evidence as to a specific event. The hearing was to take place before a panel who had no evidence other than written documentation and whatever evidence the claimant chose to give.

22.5. In our judgment, in the specific circumstances, where a decision was likely to be career ending, and there was such a difference in testimony, a reasonable employer would have made efforts to ensure witness attendance after the claimant had requested it.

22.6. The respondent's approach to place reliance solely on the report, in our judgment, fell outside what a reasonable employer would do in these specific circumstances. It is instructive that when questioned members of

the disciplinary and appeal panels indicated that they would have been assisted by hearing such evidence.

23. In both the disciplinary and the appeal the claimant was found to have manhandled Child B by pulling him to the ground and of failing to report that she had done this. The claimant argued that this did not amount to gross misconduct.

23.1. The tribunal heard Mr DiBenedictis, Ms Scott and Ms Emma Williams, all who have a professional connection with teaching give evidence that such an assault would potentially amount to gross misconduct, as would failing to report such an action.

23.2. Leaving that aside, in the tribunal's judgment, the lawful use of force by a teacher is limited to occasions of preventing danger or disorder in the classroom.

23.3. The facts accepted by disciplinary and appeal panels, which were based on the accounts given by the teaching assistants did, not point to any such disorder or danger and as such the use of force clearly fell within the category of gross misconduct.

23.4. It was not the claimant's contention that the two panels held any animus toward the claimant. Rather her position was that they had been manipulated by the headteacher and the evidence he had arranged to be gathered into dismissing the claimant.

23.5. Having viewed the evidence of Heidi Morgan and Kathryn Pugh the tribunal find that there is no substance in an argument that they were suborned into giving false evidence by Mr Thomas. In our judgment both the disciplinary and the appeal panels had rejected the claimant's account of events.

23.6. In the case of the disciplinary panel this was on the basis that the claimant's account did not match the classroom circumstances. Mr Humphries told us that the description of the computer table by the claimant did not accord with reality, there were no hanging cables for instance.

23.7. That was a logical basis to reject the claimant's account and prefer the written evidence of the teaching assistants who they considered, on the evidence that they were aware, of had no reason to lie. The claimant complains that the panel were not near the classroom to view it. Mr Humphrey's evidence was that he was very familiar with the classroom, the tribunal accepted that to be the case.

23.8. The appeal panel rejected the claimant's evidence because they could not reconcile the version in her evidence before them with the description of what she had done that the claimant gave to the mother. They considered that if the claimant was "guiding" Child B as she contended, she would not have described this as pulling to the floor to the

mother. This again was a perfectly rational reason for rejecting the claimant's account.

24. The tribunal having heard evidence from the claimant and from Heidi Morgan and Kathryn Pugh about the events of 15 March 2016 prefer the evidence of the teaching assistants and reject the claimant's account.

24.1. Kathryn Pugh gave a compelling account, including a physical demonstration, of the actions of the claimant.

24.2. Heidi Morgan gave an account which was more reserved but as compelling.

24.3. The claimant argued that the accounts given by these two individuals were inconsistent. She compared those used in the disciplinary process with accounts they reportedly gave to the police and were reported in the PASM process, and with those they gave to the tribunal. The claimant also argues that Kathryn Pugh and Heidi Morgan demonstrate an attitude towards the claimant which is hostile.

24.3.1. In respect of the PASM minutes the tribunal recognise that no police statement was taken from these individuals and signed and approved by them.

24.3.2. What was reported to PASM was a police officer's discussion with these individuals. The tribunal do not consider that to be sufficient to allow us to conclude that inconsistent statements were made by the two witnesses.

24.3.3. The lack of formality in gathering that evidence, the lack of clarity as to whether the police officer reporting at PASM was the officer who had gathered their accounts, causes doubt as to accuracy.

24.3.4. We add to this that the witnesses did not confirm the accuracy of those reported words in evidence before us.

24.3.5. In particular, in respect of Kathryn Pugh, it was argued that she indicated that in oral evidence of Child B's interest in chicks across the room. It was argued that this not only supports the claimant's account but was inconsistent with her statement for the disciplinary process.

24.3.6. We do not consider the addition of that information to be inconsistent but to be more information. We agree that it is information which might have had an impact at the disciplinary or appeal hearings (and adds to our concerns about failing to call the witnesses). However, in terms of its cogency it did not alter the core of Kathryn Pugh's evidence.

24.3.7. We found no important inconsistency between the accounts given by Heidi Morgan to the tribunal and in her statement in the disciplinary process.

24.3.8. We were not persuaded that either witness had an axe to grind against the claimant. The evidence of disagreements was nothing more than everyday its character. Kathryn Pugh's concerns about the claimant's instructions as to how to act as her classroom assistant were not of a nature to lead us to doubt her evidence. In respect of Heidi Morgan, we saw no substance in allegations of a hostile attitude any disagreement was at a trivial level.

25. In contrast to our view of those witnesses the claimant was inconsistent in a much more telling way.

25.1. The word grabbed, used by the claimant before us and we find to Child B's mother, being replaced with the word guided is a fundamental change in our judgment.

25.2. The description of the child being pulled to the ground as given by the teaching assistants matches the word grabbed much more naturally.

25.3. In addition to this the mother's description of what she was told matches more naturally the description of events given by the teaching assistants.

25.4. The claimant also changed the position of Child B in the various accounts she gave. In our judgment the claimant was attempting to minimise her actions when she described events.

25.5. The claimant saw Child B move. Having previously verbally instructed him not to on at least two occasions when he continued to move she lost her temper. The claimant then stepped into the group of children and pulled Child B by the arm to the ground. That was in our judgment, an inappropriate, and in the circumstances an unnecessary, use of force.

26. The claimant was dismissed following the appeal hearing on 22 September 2017.

27. During the course of the disciplinary process the claimant raised a grievance on 13 June 2017. The claimant wished that her grievance should be dealt with before the continuation of the disciplinary process, which by that stage meant her appeal.

27.1. The claimant's written grievance was voluminous covering allegations spanning many years and set out over 7 pages.

27.2. The claimant was asked what outcome she sought from the grievance process; her response was:

27.2.1. That an investigation into school's procedures and policies should be undertaken to address failings.

27.2.2. The claimant also asked for an apology on the basis that her dignity at work had been breached.

27.2.3. She also sought a transfer to a different school.

27.3. The respondent considered that some of the issues related to the claimant's disciplinary process, but most did not.

27.4. Steve Jones who was appointed to investigate wrote to the claimant on 21 July 2017 indicating that he would not deal with any of the complaints which related to the disciplinary process.

27.5. He specifically pointed to the child protection issue from 2015, which had been concluded on the basis that there was insufficient evidence to prove or disprove misconduct but recommended that support on communication skills should be given to the claimant.

27.6. There were in addition complaints about the process adopted in dealing with preparation toward the disciplinary hearing and the hearing itself.

27.7. The claimant contends that only five matters were dealt with and argues that the respondent has a habit of drawing procedures to a close.

27.8. We have already indicated that the respondent's approach to various procedures was inadequate and not in line with the written procedures we have seen (although the tribunal are not convinced that the governing body has necessarily formally adopted all of the procedures in question). However, those actions appear to arise out of a lack of competence.

27.9. Drawing the grievance process to a conclusion was a decision specifically based on the claimant's involvement in a case management conference before the tribunal in respect of the first of her claim form, and the fact she was to pursue that claim. In our judgment that is not an example of a general approach but is specific to the circumstances.

27.10. We cannot see from the evidence that there is a disadvantage to the claimant which arises out of her disability over and above any disadvantage that were to be caused to any person bringing a grievance in such circumstances.

27.11. The claimant contends she was distressed by this but there is no medical evidence that there was a specific consequence. The GP records set out that on 5 July 2018 (the day after the claimant contends she became aware of the grievance being curtailed) she is reported as indicating that she was feeling happier and that symptoms appeared to be improving.

THE LAW

28. Section 98 of the Employment Rights Act 1996 provides:

(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, the Tribunal shall have regard to—

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

(b) that it is ---- a reason falling within subsection (2)".

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

(b) relates to the conduct of an employee

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(4) where the employer has fulfilled the requirements of subsection (1) the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

29. *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

31. We now outline the general approach to be taken unfair dismissal, particularly related to conduct. What is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition was set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107***. The Judge in Turner said:

> *"For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with the equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the Wednesbury mast".*

32. Guidance has been given to Tribunals in dealing with conduct cases, beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379***. This requires us to consider the following: firstly, whether the respondent has a genuine belief in the misconduct; then whether that belief is sustainable on the basis of the evidence that was before the respondent at

the time; thereafter, whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case; finally, we must consider whether the punishment fits the crime, in other words, whether dismissal was a reasonable decision to take given the conduct itself and the evidence upon which it was based. ***Sainsbury's Supermarket v Hitt [2003] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also one of applying the band of reasonable responses.

33. Where there has been a protected disclosure within the meaning of the law there must be a link between any detrimental treatment and/or the dismissal and the disclosure. This must be "deliberate" in the sense of a conscious or unconscious motivation on the part of the respondent because of the disclosure and not for some other reason ***London Borough of Harrow v Knight [2003] IRLR 140.*** There are also burden of proof considerations to be taken account of when dealing with protected disclosures. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure. The tribunal must answer these questions when considering the burden of proof in a PID dismissal case. Has the claimant shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal? If so, has the respondent proved his reason for dismissal? If not, has the employer disproved the section 103A reason advanced by the claimant? If not the dismissal is for the section 103A reason. This is set out in ***Kuzel v Roche [2008] IRLR 530*** on that approach it is possible to find that an employer has disproved the section 103A reason without establishing its own reason (i.e. both reasons advanced are not the real reason for dismissal).

34. We set out below the relevant sections of the Equality Act raised by the claimant:

    34.1. Section 13 of the Act provides:

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

    34.2. Section 15 provides:

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

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

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

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

34.3. S. 19 of the Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

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

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

(2) The duty comprises the following three requirements.

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

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

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

34.6. Section 26 provides:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

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

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(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

34.7. Section 27 provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

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

34.8. Section 123 deals with Time limits

(1)---------- on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

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(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

35. Section 136 deals with the Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

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(6)A reference to the court includes a reference to—

(a)an employment tribunal;

36. In a case involving direct disability discrimination the tribunal must identify an almost identical comparator (real; or hypothetical) save that the comparator is someone who does not have the claimant's particular disability. In **High *Quality Lifestyles Ltd V. Watts*** [2006] IRLR 850, HHJ McMullen QC dealing with the Disability Discrimination Act 1995 said in respect of direct discrimination:

> *Treatment of a person 'on the ground' of his or her disability is more exact and narrower in scope than treatment 'for a reason which relates' to the disability. The treatment here is diagnosed as the dismissal. The first question is the identity of a comparator----------.The comparator may be, but need not be, the same comparator as is envisaged for the purpose of disability-related discrimination. For example, for direct discrimination, the comparator may be a person who does not have the claimant's disability, and may not have a disability at all. The comparator might have a condition which falls short of the kind of impairment required to satisfy s.1 of the Act. This is because s.3A(5) focuses upon a person who does not have 'that particular disability'.*

The wording of section 3A(5) differs to that in section 13. However, it is well recognised that the 2010 Act was not intended to change the law. On that basis we consider this decision binding.

37. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to

discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***

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

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

40. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

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

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

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

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

    43.2. Then there is the proviso in Sub Section 2 such that the Respondent should not be held liable merely because his conduct has had the effect of producing the proscribed consequence. It should be reasonable that the consequence has occurred and that the alleged

victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

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

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

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

ANALYSIS

45. The claimant complains about treatment before and after the appointment of Mr Thomas based on the disclosures made before his appointment. In respect of the detriments relied upon there is the question of whether they amount to an act extended over a period.

45.1. These issues were raised as part of the first claim, and, taking account of the ordinary time limits and the extension given through the ACAS conciliation period, this means that any treatment which occurred prior to 8 September 2017 is ostensibly out of time.

45.2. In order to establish that her claims of detriment are in time the claimant must either show that there was an act extending over a period which did not finish before the above date or that it was not reasonably

practicable for her to present her claim and it was presented in a reasonable time thereafter.

45.3. The argument that the detriments are connected appears to be based on the principle that there was an ongoing state of affairs or culture at the school, nothing further has been advanced. That would need the claimant to show that, despite the change of headteacher, the culture of the school relating to the issues she was raising remained the same before and after.

45.4. In respect of matters which are alleged as detriments prior to the appointment of Mr Thomas we have concluded that factually he was not acting in response to any issues raised by the claimant at any stage.

45.5. Given this, even if we are to accept (without making the finding) that the claimant suffered the alleged detriments prior to Mr Thomas' appointment, the evidence establishes no nexus with events which took place afterwards.

45.6. Therefore, the alleged detriments before and after are not part of the same act or a sequence of connected circumstances extending over a period.

45.7. Mr Thomas was appointed to his post from 4 January 2015, at the very least, on that basis, any events prior to that date are prima facie out of time.

45.8. The claimant has not shown any reason why it would not have been reasonably practicable for her to bring a complaint before she did. In fact, the evidence points the other way. The claimant was an intelligent individual who was made aware of her potential rights by Mr DiBenedictis. She was not prevented from making a complaint at that because of lack of knowledge or the ability to gain that knowledge. Whilst the claimant was disabled there is no indication that any consequence of that disability or other illnesses she was unable to make a claim.

45.9. On that basis we cannot say that it was not reasonably practicable for the claimant to present these claims. To that extent the tribunal has no jurisdiction to deal with the complaints prior to 4 January 2015.

46. The claimant has not contended as a matter of fact that Mr Thomas was aware of all the disclosures she has raised. This is important because the alleged detriments, and in particular the dismissal of the claimant are said to be either directly applied by Mr Thomas or that Mr Thomas exercised his influence so as to cause others to apply the detriment. On that basis we need only be concerned with those disclosures that Mr Thomas was aware of when examining the questions posed.

47. We have concluded, as a matter of fact, that the respondent has established that none of the treatment alleged by the claimant as arising from her having made disclosures, was in response to the claimant raising issues. We

consider that in those circumstances if we approach the matter by assuming, but not finding, that each of the claimant's alleged disclosures were made and were protected, she nonetheless fails to establish her case.

47.1. There must be a link between the disclosures made and the detriment relied upon. Mr Thomas did not, on our findings, have any concerns about the issues raised by the claimant so as to cause him to react by treating her poorly.

47.2. Mr Thomas decision to remove the SENCO time was based on his view of the budget. His decision to do so without recourse to the governing body was because he did not properly understand his powers.

47.3. No matters raised by the claimant and of which Mr Thomas was aware were connected with any decisions about training.

47.4. No matters raised by the claimant and of which Mr Thomas was aware had any connection with the frequency and quality of performance management.

47.5. The claimant's sense of guilt when raising matters with Mr Woolcock is unconnected with Mr Thomas. Even if that disclosure was made then the detriment is somewhat recursive. The complaint is about there being a lack of clarity about roles and positions, the detriment is that there were lunchtime meetings which the claimant felt guilty about. The connections are not clear. The lack of clarity about roles and any meetings held by the claimant were the choice of the claimant and not imposed by the respondent but by the claimant. Finally, this aspect about the lack of clarity was simply a function of the poorly performing school, the general environment, not a result of any disclosure by the claimant.

47.6. In terms of the medical report issue we have factually concluded that Mr Thomas did not respond to that report by treating the claimant to her detriment, nor would he have been aware of the disclosure alleged. Again, what the claimant describes as detriment relates to the general malaise at the school, an environment which was caused by the poor quality of Mr Thomas' understanding of his role.

47.7. With regard to the February 2015 meeting, we consider that the words relied upon as a disclosure were not used, nor was anything like them used. In any event we have conclude that there was no act on the part of Mr Thomas or HR which connects anything said at that meeting and the detriments relied upon by the claimant. In particular we have not found that the detriment in question, a failure to ameliorate the claimant's condition by following recommendations, is an accurate description of the steps under discussion before the claimant's return to work.

47.8. There is no indication that Mr Thomas was aware of the alleged disclosure on safeguarding in September of 2015. The claimant's allegation is that she was left in a vulnerable position because nothing was done. Firstly, we are not persuaded on the evidence that there was a

disclosure in the form alleged by the claimant. Secondly and more importantly we find no link between a failure to act on any disclosure being because of the disclosure itself.

47.9. In terms of the Boiler issue in November 2015. Whilst this matter was raised by the claimant we found no connection with that and any treatment of the claimant relied upon as detriment.

47.10. In terms of other treatment relied upon as detriment arising from the disciplinary processes the tribunal has found that the reason for that treatment, where it departed from recognised procedure, such as Mr Thomas's decision to suspend the claimant, the reason for the departure was not any disclosure but a lack of competence. In the manner in which the disciplinary process was followed and the decision to dismiss the claimant the respondent has demonstrated that the reason for that treatment was the conduct of the claimant.

48. In respect of the claimant's claims of disability discrimination. Each of those claims was presented on 9 October 2018. That means that any event which is said to amount to discrimination which happened or ended prior to 30 June 2018 will, *prima facie*, be presented out of time.

49. The last act which the claimant relies upon as a failure to make reasonable adjustments is 4 July 2018. All others predate that by some margin.

49.1. The claimant makes 13 claims of failing to make adjustments. A different PCP is alleged in respect of each failure and a different disadvantage.

49.2. The claimant has not advanced a specific argument as to why these complaints should be considered as an act extending over a period.

49.3. In any event the final act relied upon by the claimant, whatever else is considered about PCP's or disadvantages cannot be a failure to make a reasonable adjustment within the meaning of the Act. The claimant could not have been returned to work with the respondent by means of any adjustment sought, the purpose of an adjustment is to allow a disabled employee to work were the disability causes disadvantage. On that basis alone the last complaint must fail.

49.4. If the last complaint fails then all other complaints are out of time. The tribunal do not consider it just and equitable to extend time. The claimant has not advanced a reason why she did not make such a claim when she presented her first complaints in 2017. The claimant was no longer involved in a disciplinary process from September 2017. The indication was that the grievance process would not deal with those matters that connected with the disciplinary process, so there was no impediment to bringing these complaints at the same time as the first claim with regard to those issues. There is considerable prejudice to the respondent in terms of the passage of time. That, in our judgment outweighs the prejudice to the claimant.

50. The claimant makes complaints pursuant to section 15 of the Equality Act 2010. Similar issues arise in respect of time limits.

    50.1. The claimant, again, is, *prima facie*, out of time on all complaints apart from that which relates to the decision to end the grievance process.

    50.2. This latter claim appears to be without any foundation at all under the section. Whilst the tribunal must accept that it would be unfavourable treatment to curtail a grievance process the other elements required by section 15 appear to be absent.

    50.3. The alleged consequence of the claimant's disability is an impatience with ineptitude and the failure of others to obey rules. Apart from the claimant's assertions, there is insufficient evidence to demonstrate that this is a consequence of the claimant's disability.

    50.4. Beyond that the second causation element required by the statute is that the respondent must treat the claimant unfavourably because of that consequence. The claimant contends that it is the respondent's annoyance at her whistleblowing, leaving aside our findings of fact on those issues, it is unclear how any disclosures relate to the "impatience" referred to. Finally, the reason for the respondent ending the process was not because the claimant had made disclosures but because she was intent on pursuing her first claim before the tribunal.

    50.5. That claim not being well founded it cannot form an act extended over a period with the earlier complaints. For the same reason we have given for reasonable adjustments claims we do not consider it just and equitable to extend time for the claimant to pursue complaints pursuant to section 15 EA 2010.

51. The claimant complains of direct discrimination pursuant to section 13 EA 2010. There is simply no basis on our findings to conclude that any of the respondent's treatment of the claimant was because of the specific disabilities either the physical impairment of hyperthyroidism or the mental impairment of depression and anxiety. Even if we consider the treatment of the claimant where policy has not been followed, to be less favourable, there is no factual connection with the disabilities themselves as opposed to the effects such as absence. In any event this complaint is out of time. For the same reasons advanced above in respect of reasonable adjustments we do not consider it just and equitable to extend time in respect of this claim.

52. The claimant complains of discrimination pursuant to section 19 Equality Act 2010. These complaints, in the main, relate to PCPs also identified in the reasonable adjustments claim. Save that it does not appear to be alleged that the ending of the grievance process amounts to indirect discrimination. In any event even if we include that as a complaint of indirect discrimination the nature of impact on a disabled group or indeed the claimant over and above the impact on non-disabled comparators is not established on the evidence.

The ending of a grievance would be likely to be as impactful on any individual. In any event the evidence does not establish that the claimant has suffered any disadvantage related to her disability when we take account of the medical records within a day of her being informed of this. On this basis the claimant cannot establishes that this is indirect discrimination. There being no act extending over a period which runs to July 2018 all other claims are out of time. Once again, for the reasons outlined above we do not consider it just and equitable to extend time for the presentation of these claims.

53. The claimant complains of harassment on the grounds of disability pursuant to section 26 EA 2010. The claimant complains of two occasions when Mr Thomas physically confronted her in September 2015 and February 2016. The claimant advanced no reason in evidence or submissions why these confrontations relate to her disability in any way whatsoever. In event both incidents are out of time and for the reasons given above we do not consider it just and equitable to extend time for the presentation of these claims.

54. The claimant complains that she has been victimised. The alleged protected act is the bringing of the first claim. No discrimination on any Equality Act grounds is alleged in that claim form. The claimant appears to ask the tribunal to infer that the respondent was aware from that claim that the claimant would bring disability claims. There is no evidence of the claimant making any indication that she would do so. We conclude that there was no protected act. On that basis this claim is not well founded.

55. The claimant complains of unfair dismissal. The tribunal consider this claim to be well founded. The respondent did not make reasonable attempts to ensure the attendance of the witnesses the claimant asked for. This was in circumstances where there was a significant issue over key facts which were in dispute. Essentially the claimant contended that she had not used unnecessary force on Child B whereas the other witnesses said that she had. There was nothing in the appeal hearing which would have overcome this failing. This was a situation where a finding that the claimant had used unnecessary force on the child was likely to be career ending for a teacher who had been in the profession for many years. Whilst it was not open to the respondent to force the attendance of witnesses which had left employment, it was not beyond it to encourage the attendance of those witnesses. It was outside the band of reasonable responses to approach the matter as the respondent had done. On that basis the claimant's claim of unfair dismissal is well founded.

56. However, the tribunal as also found that the claimant used unnecessary force in dealing with Child B. This led to the dismissal of the claimant. The use of unnecessary force is clearly blameworthy conduct, and in our judgment seriously blameworthy. It was that conduct for which the claimant was dismissed and we consider the claimant contributed to that dismissal to the extent of 100%. In respect of the basic award we consider that the claimant's

conduct prior to dismissal is of such a nature, it being in absolute conflict with her duties as a teacher, that it would be just and equitable to reduce any basic award to nil. In respect of any compensatory award we consider that given the level of culpability the claimant's award should again be reduced to nil.

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Employment Judge N W BEARD
Date: 3 February 2020

Order sent to Parties on 4 February 2020

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS