EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Gerald Neil Thomas **Berwick Academy**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 23 November – 3 December 2020
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant Ms Sally Cowen of Counsel
For Respondent Ms Claire Millns of Counsel

JUDGMENT

The judgment of the Tribunal is:

1. the claims of unfair dismissal (but not under s103A of the Employment Rights Act 1996 (the Act)), wrongful dismissal, compensation for untaken annual leave and breach of contract relating to missing property are well founded to the extent set out in the conclusions to the reasons. Remedy will, unless agreed, be decided on a date to be fixed.

2. the claims of unlawful deductions from wages are not well founded and are dismissed.

REASONS (bold is my emphasis and italics quotations from statements or documents)

1 Introduction and Issues

1.1. The claimant now pursues claims of:
(a) automatic unfair dismissal contrary to s 103A of the Act.
(b) in the alternative ordinary unfair dismissal contrary to sections 94/98 of the Act.
(c) wrongful dismissal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order").
(d) holiday pay under Part II of the Act and/or the Working Time Regulations 1998 (WTR).
(e) unlawful deductions from wages under Part II of the Act.
(f) breach of contract under the 1994 Order in respect loss of his personal possessions stored at the Academy engaging an implied term of the contract of employment that the respondent would keep safe possessions stored on Academy premises.

1.2. Actual dismissal under section 95(1)(a) of the Act is admitted. The respondent says the sole reason was gross misconduct. There is no claim of detriment short of dismissal.

1.3. On 21 February 2019 Employment Judge Buchanan recorded at the first preliminary Hearing (PH) the respondent will say the misconduct was making Facebook posts ("the posts"), on the platform of the Berwick Advertiser, critical of the respondent's Headteacher, Ms Alexis Widdowson, its School Leadership Team (SLT) and its governors, otherwise called "Trustees". The claimant says the posts were themselves protected disclosures. If they were not, he asserts other communications were and all were the principal reason for his dismissal. If not, he will say he was unfairly dismissed in any event. Employment Judge Buchanan explained the law as it was by reference to Royal Mail-v-Jhuti 2017 EWCA Civ 1632 , since changed by the Supreme Court.

1.4. The claimant believed the respondent was in breach of its legal obligation to deliver a good education to its pupils, to manage its finances, deal properly with health/safety/ safeguarding and treat its pupils, staff and parents in a reasonable way.

1.5. The claimant confirmed to Employment Judge Buchanan any confidential data of pupils would only be used as part of this litigation and he would copy to the respondent correspondence he had sent on 30 January 2018 to Ofsted, the Department for Education (DfE) and his local Member of Parliament (MP). Another PH was listed for 25 April to review the further pleadings he ordered.

1.6. On 25 April 2019 Employment Judge Arullendran identified more potential issues saying the parties were at liberty to request an amendment of them later. Further particulars the claimant provided on 21 March 2019 attached a document headed "Timeline of Public Interest Disclosure Act submissions" which set out 25 matters. She reiterated the Tribunal cannot make general findings about the performance of the Academy and evidence must relate to the dismissal and issues identified in her and Employment Judge Buchanan's Orders. She advised the claimant to obtain legal advice about the wisdom of calling witnesses not involved with his dismissal who had resigned or been dismissed in the past, saying he did not need to prove the accuracy of his concerns, rather whether his beliefs were reasonable. She listed for a further PH for 13 June 2019

1.7. That was conducted by Employment Judge Morris. Mr Shears, the respondent's solicitor, said only numbers 1 and 4 in the list of 25 were in the initial claim form (ET1). They were:

1 On 30 January 2018 detailed submissions of concerns to Ofsted during the inspection copied to the DfE, copied into the MP
*4 On 1 March 2018 Facebook posts responding to Barbara Henderson, **naively** posted on Berwick Advertiser Facebook page, but consistent with details of disclosure made to Ofsted, copied to DfE and the MP."*
The claimant told Employment Judge Morris the other 23 were relevant because they showed a continuous process and provided the context for the disclosures asserted in his ET1.The claimant agreed with the record Employment Judge Morris made and read back to him: **"***I am happy to proceed on the basis the disclosures identified in paragraphs 1 and 4 are the reasons, if more than one, the principal reason, for my dismissal and the other twenty-three sub-paragraphs in the further information I submitted are listed to provide context of what I say was a continuing process***".**

1.8. In Price-v-Surrey County Council Carnwath LJ (as he then was) observed
"*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented"*

1.9. The issues, somewhat rephrased from the parties list to be more concise, are:

Unfair dismissal

(a) What set of facts known to the respondent, or beliefs held by it, were the **principal reason** which **caused it to dismiss**?

(b) Was it the sending of information to Ofsted and others in January (now conceded to have been a protected disclosure)?

(c) Was it the posts, in which case did they constitute the making of a protected disclosure?

NB To be a protected disclosure each had to

(i) disclose information

(ii) which in the reasonable belief of the claimant tended to show a relevant failure, those relied upon being (a) the respondent had failed to comply with a legal obligation to which it was subject(b) the health or safety of any individual had been put at risk and (c) either were still happening or were likely to happen again or that information relating to them had been or was likely to be deliberately concealed

(iii) be made in the public interest

(iv) in a manner prescribed by any of sections 43C-43H.

(d) If not, was the principal reason related to the claimant's conduct?

(e) If so, having regard to that reason, did the employer act reasonably in all the circumstances:

(i) in having reasonable grounds after a reasonable investigation for its genuine beliefs

(ii) in following a fair procedure

(iii) in treating that reason as sufficient to warrant dismissal?

As for remedy the claimant seeks compensation not a re-employment order.

(f) If the claimant establishes his claim of automatic unfair dismissal, was the making of the protected disclosure in good faith? If not, should the Tribunal reduce any award of compensation by up to 25% pursuant to section 123(6A) of the Act?

(g) If the dismissal was unfair would the claimant have faced a fair dismissal at some point in the future for some reason and, if so, when?

(h) Did the respondent fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, should any award be increased by up to 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992? (TULRCA)

(i) If the dismissal was unfair, did the claimant contribute to his dismissal by any culpable or blameworthy conduct? The respondent will say he did and his compensation should be reduced.

Wrongful dismissal

(j) Does the respondent prove on the balance of probabilities the claimant was guilty of gross misconduct such that it had the right to terminate his contract without notice or pay in lieu?

Holiday Pay

(k) Was the claimant entitled to full pay for school closure periods during which he was in receipt of less than full pay? The respondent's position is if he was receiving nil pay on the final day of term, having exhausted his sick pay, he is not entitled to any payment during the holiday. The claimant's position is he should have been in receipt of full pay mainly because his absence was due to injury

caused in the workplace and, as a result, he should have been in receipt of wages on the last day of term and therefore during the holiday.
(l) How much holiday was accrued and untaken at the time the claimant's employment ended, and to what compensation for that is he entitled?

Unpaid wages
(m) Was the respondent obliged to pay wages whilst it dealt with the claimant's grievance?
(n) Did the respondent fail to make the properly due payment to the claimant when his sickness absence had arisen out of his employment? The terms relating to sick pay, as set out in the Conditions of Service for School Teachers in England and Wales ("the Burgundy book"), state teachers are entitled to full pay where sickness absence is attested by a medical practitioner to have arisen out of and in the course employment. The respondent's position is no medical practitioner made such an attestation at the time of the claimant's sickness absence.

Breach of contract
(o) Was there an express or implied term in the claimant's contract the respondent would safely store his personal belongings and return them to him on termination? The respondent's says there is an express term in the Burgundy book it is **not** liable for any loss or damage but where it is **not** due to a teacher's negligence, it would be reasonable to consider a compensatory payment.
(p) If there is such an express or implied term, has there been a breach of that term by the respondent which entitles the claimant to claim compensation?

2 Findings of Fact

2.1. I heard for the respondent Mr Stephen William Griffiths, dismissing officer, and Ms Donna Louise Goddard appeal panel member. I then heard the claimant and Ms Jackie Brothwood. I read the statements of Mr Nick Allen and Ms Georgina Emma Rowley Hill for whom Ms Millns had no questions. I had a document bundle exceeding 900 pages and a 190 page "core" bundle. I will set out the evidence in some detail because, due to the pandemic, arrangements for the public to apply to view by video link from outside the hearing room were made but no-one did apply.

2.2. The claimant moved to the Berwick area in October 2000. He and his wife became aware of poor performance of some schools including Berwick Community High School ("BCHS"), now Berwick Academy. Other parents shared their concerns. He decided to engage with local organisations to raise standards. Improvements took place at BCHS and resulted in growing community confidence. Their children both attended BCHS and were still as the school transitioned to an Academy despite concerns and objections raised in the community. The school's performance by this stage had improved and it was producing results in the top half of secondary schools in Northumberland for GCSE, A 'level and BTECs.

2.3. The claimant trained as a General Primary Teacher in 2007/08 following careers in semi-professional sport, Waste Management, Transport and Local Government. He was appointed as a Teaching Assistant at BCHS in September 2008. He was appointed on a full time teaching contract in September 2010 to teach Core PE and GCSE Mathematics to lower ability maths groups. He engaged in a range of community based roles including as Governor and Chair of Governors at local schools and as coach/ team manager with local football, rugby, cricket and

gymnastic clubs The then Head Teacher, Mr Quinlan, was supportive and encouraged his involvement due to the potential benefits to be gained from such links. The School Leadership Team (SLT) recognised his abilities to teach/ motivate pupils, improve behaviour and performance. Neither I, nor any of the respondent's witnesses, question his dedication or ability.

2.4. The traditional model is of state schools maintained by a local authority which employs the staff, owns the buildings, makes decisions, provides support services such as HR advice and can discipline even a Headteacher. In contrast an Academy, receives funding directly from DfE and has a great degree of autonomy. They are commonly part of a multi-academy trust, where two or more share senior leadership and functions such as HR and finance. Schools may voluntarily convert to Academies, or DfE may order them to if it feels the local authority is not running the school well. Berwick Academy is not part of a multi-academy trust. It is in a rural area where the nearest state secondary school is 30 miles away. Ofsted is responsible for periodically inspecting, rating and regulating the quality of education, including in Academies.

2.5. The role of the governing body at an Academy is broadly to oversee financial performance and hold the Headteacher (who has responsibility for its day-to-day running) to account. Ms Goddard described it as "*Eyes on, Hands off*". Governing bodies are volunteers from a range of backgrounds, typically including at least one parent. The term "governor" is interchangeable with "Trustee". BCHS as a state-funded school was maintained by Northumberland County Council (NCC) until 1 November 2011, when it became an Academy. The local education authority (LEA) has very limited responsibility for an Academy which as a stand-alone legal entity employs its staff. The Regional Schools Commissioner (RSC), part of the DfE, has some powers over an Academy. The Headteacher sits in on Trustee's meetings and is the paid Head of the school. As such, it is a powerful position. The Trustees used to meet only twice a term, but had sub-committees.

2.6. Ms Widdowson was appointed in April 2013 taking up her first Headship. She had come into education from an accountancy background which was perceived as attractive by the Trustees due to the financial regulations on Academies. This evidence came from the claimant and, along with some of the posts shows his view is Headteachers with limited background in education can be good **but need to listen to people involved daily in teaching.** It quickly became clear she would take a different approach to Mr Quinlan and his SLT who had a detailed understanding of education. The claimant says she undermined and eroded the stability, performance and structure of the school using "*a very dubious, manipulative and cynical approach, which distanced staff, students and the community at such a key time of change"* He adds " *When the structure and culture of a school is undermined to the extent staff become fearful of speaking and collaborating with each other, when responsibilities for addressing and controlling behaviour management are unclear and there is a very tangible sense that colleagues are being targeted to unsettle, undermine and push them out of their roles there is clearly a problem. That was the culture created at Berwick Academy by Ms Widdowson*" He raised concerns within the Academy both as a parent and a teacher. At first, Ms Widdowson said she was happy for him to raise concerns directly with her, however it became clear this was not the case as time progressed.

2.7. At the end of Academic Year 2012/13 he was informed by Ms Widdowson she would like him to become part of her Middle Leaders Group. On the day before its first meeting of the term, Ms Widdowson came to the rear yard where he was dealing with a behaviour matter. For no apparent reason she intervened and informed him in front of the pupils he would not be required in future

meetings. This was the first of many incidents indicating there was a problem brewing with his relationship with her. Within a couple of weeks, she called a staff meeting, at half an hour's notice at the end of the school day, to discuss the Academy's self-evaluation form and generate a School Improvement Plan. Staff were asked to agree and commit to some significant actions without notice or sufficient information to consider. After making her presentation, she requested questions and he suggested they ought to have had an agenda, information and time to consider a response. She took objection and proceeded to humiliate him in front of the meeting, to such an extent there was an audible intake of breath. Some staff spoke to him at the end of the meeting to check he was alright, while agreeing with the points he had made. When he attempted to discuss this matter privately with Ms Widdowson she was dismissive. She made clear he would not be considered for leadership roles in the school even if he was suitable.

2.8. This sets the scene for what was to come. The claimant and Ms Widdowson were at loggerheads. He may be right in his condemnation or her and her "approach" to education. As a lawyer not a teacher, I would not know. However, my function is not to comment or adjudicate on their differences. The claimant says he "*identified the detail of events that transpired in my bundle of evidence through my Grievance, Grievance appeal letter, my statements to my dismissal hearing and the subsequent appeal hearing, as well as correspondence with Northumberland County Council (NCC), Berwick MP Anne Marie Trevelyan and her offices, Ofsted, the Department for Education(DfE) in its various guises including the Regional School Commissioner's (RSC) North office and in submissions and disclosures to the Tribunal Service.* He lists many pages and seems to expect readers to trawl through them to find what is relevant. Apart from one incident to which I will come shortly, there are no specifics mentioned in the next 3 years.

2.9. The claimant looked after his mother in her final days and was absent from work from 9 November 2016 following her death as he felt unable to teach if he could not give of his best. He says *To have received no contact or support from my employer at such a moment and then be required to attend an Occupational Health appointment, in the week between Christmas 2016 and New Year 2017 and have that appointment used in a health management process to attempt to engineer an agreement to leave my employment is* ***beneath contempt****."* He was signed off work first with "*stress at home/bereavement*". This was changed to "*work related stress"* on subsequent sick notes. During a meeting about his absence, Ms Widdowson suggested he leave in an "off the record" conversation she instigated. He says she and her SLT were "*attempting to manoeuvre, pressure and force me out of my role*" when he was struggling with home and work pressures. That he was unwell was confirmed by reports from his GP, Occupational Health (OH), specialist health professionals and psychologists. The school had initiated these health requests.

2.10. Ms Jackie Brothwood has known the claimant as a colleague since 2008. In her opinion, he was *held in contempt* by Ms Widdowson **and her deputy Mr Steve Wilkes**. Whenever he applied for roles he was qualified to undertake, he was unsuccessful, with less qualified people being given them. He was treated badly by Ms Widdowson for taking compassionate leave when his mother was dying and time off after her death. She had paperwork personally delivered to his home around 6pm on a Friday evening of an investigation led by the current head teacher, Ms Tracy Hush, and recommended he be 'let go' due to ill health.

2.11. The claimant says he had been working long hours to learn and attempt to teach courses without enough resources and training. He had been put in this position by Ms Widdowson and

Trustees following a “reorganisation”. He had not received any handover, schemes of work were not in place and he had insufficient experience and training to effectively deliver a new designated role so was likely to fail. Ms Brothwood says Ms Widdowson would frequently change job roles and her own , as Head of English, was changed without prior negotiation to Head of English, French and German, which proved untenable. She does not speak French or German to a standard needed to teach such subjects but said she maybe could have acted in a managerial role over people who did. When Ms Brothwood asked for support from **Mr Wilkes he said it was ‘*more than his job was worth*’** and ‘*you know what she is like*’. She often voiced concerns to Fiona Hall (Business Manager) who did not take her seriously.

2.12. The claimant says the reorganisation was **“***manipulated in order to ‘part company’ with a struggling Head of PE, and to cover up a serious safeguarding incident in which a pupil in his care lost sight in one eye.*” A child losing the sight of one eye in a classroom incident would almost certainly give rise to information which tends to show health and safety were at risk. Ms Brothwood recalls the incident and says it was *brushed under the carpet*, the classroom teacher ‘let go’ and asked to sign a non-disclosure agreement in return for a payout. A worker has to do more than hold a belief in a relevant failure, he must communicate it. In colloquial terms, it is not enough he has a whistle to blow, he must actually blow it. This happened in 2016 and, at the time, no-one did. Ms Brothwood says she witnessed Ms Widdowson the SLT and Trustees isolate teachers who challenged their decisions , force some out or into retirement, including herself. Ms Brothwood took her case to Tribunal, settled before hearing and signed a non-disclosure agreement.

2.13. Mr Nick Allen who has known the claimant as a colleague and teacher of his daughter, who is disabled as a result of brain damage, describes him as a *passionate educator,* a man of integrity who has a strong sense of justice. Mr Allen resigned, after nearly 20 years, to escape “*the toxic environment that prevailed under Ms Widdowson”*. He says Berwick Academy declined massively under her leadership and she lost the support of the local community, many members of which voiced their opinions via social media. Mr Allen says there appears to have been an underlying ethos of closing ranks, avoiding issues and scapegoating. He says the claimant was *scapegoated and victimised* by Ms Widdowson. The claimant’s and his witnesses’ statements refer to reprisals without saying what exactly was done , when, by which members of the SLT or which Trustees. Mr Allen says the claimant “*highlighted the mismanagement of the school by whistleblowing through the press and social media*”. The first time anyone went outside the school was in the second half of 2017 but a policy enabling them to do so to regulatory authorities had been in place much earlier. Neither the claimant nor any other member of staff appears to have used it.

2.14. The claimant raised a grievance on 1 July 2017 against Ms Widdowson. There was an initial fact finding meeting on 4 August 2017 with a written outcome on 29 September 2017. His grievances were partially upheld. He appealed on 9 October 2017, his appeal was heard on 8 December 2017 and an outcome letter dated 12 December 2017 broadly upheld the first decision. I accept his grievance contained concerns he reasonably believed should be raised in the public interest about her management of the school **but alongside personal concerns**. I also accept his view was, and remains, the grievance process was badly handled and a “cover-up”. People who understand education may have different views on how best to deliver it, but only bodies like Ofsted and the DfE have the knowledge to decide which is the better view. If there are concerns about an autocratic management style people other than educators, eg an MP or Councillor, may be able to resolve them if they have power to do so and are given specifics of allegations rather

than generalised opinions. For several years discontent had been building, but no member of staff had taken any steps to address that outside the school through official channels .

2.15. Ms Georgina Hill was a Councillor on Berwick Town Council between May 2008 and May 2017 then elected to NCC. In the lead up to the elections in 2017 residents opinions were shared via social media, directly to Councillors or through other channels. There were **serious concerns** relating to discipline, bullying, academic performance, and every aspect of Berwick Academy. NCC's education department shared these concerns and had written to the Academy stating if the school had still been in local authority control they would be looking at taking action. She says Ms Widdowson was *highly manipulative*. Ms Hill heard from a member of staff about the *cover up* of a pupil losing sight in one eye (in fact there was an investigation into this but it was not publicised). Ms Hill says the member of staff was accused by Ms Widdowson of speaking to Ms Hill, put in fear of her job and her emails gone through. Ms Hill noticed certain staff made comments criticising whistleblowers as "trouble makers" for making unhelpful comments about where the solution lay. Ms Hill weighed up the potential downsides of going public (**which she accepts would add to the reputational damage**) but was content it was in the public interest to do so, as, without exposure, it could take several years until the school improved. She says the claimant shared her views and had greater understanding of the issues as a member of staff.

2.16. At some point a whole Staff meeting, presented by Ms Widdowson and the then Chair of Governors Mr David Cairns,outlined plans to join the 3 Rivers Multi-Academy Trust This generated a number of concerns which were discussed by current and former members of staff with Ms Hill about pupil behaviour, performance, results, falling pupil numbers, and the overall culture at the Academy. Ms Hill too says staff felt fearful of raising their concerns with Ms Widdowson, SLT or Trustees as they had seen colleagues leave or be forced out, so felt if someone spoke up they would be next. At that meeting, staff resolved to monitor the situation and seek to gauge public opinion about the school.

2.17. Ms Hill hosted a public meeting with the NUT and ATL trade unions at Berwick Sports Centre on 16 December 2017 attended by other County and Town Councillors, parents, students, members of staff, both staff trustees, and local press. The claimant spoke openly and was interviewed by the local reporters having identified himself as a teacher at the school. Fiona Hall's husband was there. The claimant's comments were reported to the SLT. No-one contacted him saying he had acted inappropriately. **The respondent does not say there is anything wrong with "going public" in itself, and I find do not find there is in the right circumstances.**

2.18. I have not heard from Ms Widdowson, Mr Wilkes or Ms Hall. I have set out evidence in some detail because if what is said about them is true, it would show the claimant had every cause to dislike them on a personal as well as a professional level. Therefore later, when people not involved at the time came to consider his motivation in attacking those three people, it would be a perfectly natural deduction he had, rightly or wrongly, reason to **seek revenge**. Ms Hill says he was "*passionate **and angry** about how the school was failing the community and countless pupils"*. I accept he was truly concerned about pupils and other staff rather than only his own interests. I have read and listened to evidence over many days and have over 20 years experience of separating wheat from chaff. The claimant does not seem to appreciate that , to many, the way he expresses his views would come across as generalised, personalised and opinionated .

2.19. A full Ofsted inspection took place on 30-31 January 2018. On the evening of 30 January, the claimant had taken his daughter to Newcastle Airport. Whilst there, he received text messages from a colleague and parents saying certain pupils, who were known for misbehaving , had been removed from lessons to the squash courts out of sight of the inspection team. Hiding children from Ofsted inspectors would almost certainly amount to concealment of information which tends to show relevant failures**.** That for him was the last straw. He formally raised his concerns to Ofsted through their online school teachers portal, whilst sitting in his car. These clearly were protected disclosures. He later received requests for further information from Ofsted and the DfE. The children being held in the squash courts *and the way in which the school had dealt with the issues I had raised*, led him to conclude trying to get the school to act was a waste of effort and his only option was to follow "*an external whistleblowing route and trust the system to support me*". What he sent to Ofsted he relayed to DfE, his trade union and the MP for Berwick, Ms Anne-Marie Trevelyan, a former Trustee of the Academy. The respondent initially denied this was a qualifying disclosure but at the hearing accepted it was. It always accepted if it was "qualifying", it was "protected " by being made to people or bodies listed in its whistleblowing policy.

2.20. The claimant says:
At the very moment I made the decision to formally speak out and make protected disclosures to NCC, Ofsted, DfE and my constituency MP Anne Marie Trevelyan about the actions of the HT, her SLT and the Trustees of Berwick Academy, I had exhausted all avenues available to me other than to leave the school. I did not want to leave my job and I felt I had been forced into an impossible position. I had accurately and honestly raised all matters, with evidence and support of colleagues through the recognised channels using published policies and procedures and yet the lack of willingness to listen, understand and investigate claims thoroughly was astonishing. Especially bearing in mind this was in the full knowledge that there had been a number of similar complaints, grievances and concerns raised by a significant range of colleagues, prior to my grievances, some of which were ongoing and had reached an advanced stage. I had been in regular contact with a number of colleagues, had met with Georgina Hill the County Councillor for the Ward in which Berwick Academy resides (Oct 2017), had raised concerns personally with Anne Marie Trevelyan MP and had attended and spoken at public meetings (Dec 2017). This situation generated multiple further contacts from parents, current and former students because I was known to them and perceived to be an honest, upstanding and trusted individual. Some of their concerns mirrored my own experiences, whilst others included some quite shocking safeguarding matters that were communicated with me by email trails showing direct communications and responses from Alexis Widdowson, her SLT, Heads of Year and form teachers indicating their unwillingness and inability to take appropriate actions. These issues were subsequently raised and formally dealt with by the Local Authority Designated Officer (LADO) on behalf of the individuals and parents concerned.
Again, it is hard to see specific facts . A LADO deals with safeguarding of children and I can think of no reason he or any staff member could not have gone to the LADO themselves much earlier. He adds "*It appeared to me the very serious issues I had raised were being 'swept under the carpet' and the school was in a state of total denial and* ***cognitive dissonance****, acting in a manner that suggested the HT and her SLT were prepared to take whatever actions they deemed necessary to preserve their positions and hide events that were taking place at the school."*

2.21. In over half a page set out in the last paragraph, there is a great deal of rhetoric, little or no fact and valid points are thereby obscured.

2.22. His reports on 30 January were acknowledged by Ofsted, the DfE , the MP via her office and NCC. Despite a conversation by telephone on 8 February when an un-named clerk at DfE denied it was dealing with matters, an email on 9 February confirmed it was. On or about 19 February Mr Wilkes visited the claimant's home to discuss his return to work and attending a training course in Manchester. On 24 February 2018 the claimant spoke to the MP, whom he now describes as close to Ms Widdowson, and Mr Peter Jackson, Leader of NCC, at a meeting in Belford following a complaint he had made to NCC. The MP indicated she would raise his concerns.

2.23. I accept a preliminary Ofsted report would have reached the SLT and Trustees in February. The final report was published on 26 March 2018, rating the respondent as '*inadequate*" and recommending it be placed in "*special measures*". The report, which was damning, in significant parts read virtually word for word with the disclosures the claimant had made and further information he had been requested to provide.

2.24. Ms Widdowson resigned at the end of February. It is most likely she metaphorically "jumped before she was pushed" by the awful Ofsted findings. At some point after that, the claimant copied initially Mr Cairns and then Mr Wilkes into various emails in which he had raised formal concerns with the regulatory agencies, NCC and the MP. **It is clear the claimant thought there was a risk of repetition of past failures if there was no decisive action taken, but there was a greater likelihood of action now than there had been for years.**

2.25. The Berwick Advertiser published an article on 28 February 2018 about Ms Widdowson 's departure and a link to it was posted on its Facebook page on the same day. It showed Ms Widdowson was thanked for her contribution to the Academy by Mr Cairns. The claimant's wife was told, by a work colleague who had children at the school, that evening. His wife accessed the article through his Facebook account as she does not have her own. On 1 March 2018 he received a Facebook Messenger alert from Dr Barbara Henderson, a parent at the school whose children were in the same groups as his own. She had attended meetings with the claimant's wife, some chaired by Mr Cairns, and had been an outspoken critic of Ms Widdowson and the Trustees. In her capacity as a local journalist and author, through the Berwick Advertiser, the Journal and Evening Chronicle, she had published articles critical of the school**, and strongly voicing her concerns over the conversion of BCHS to Berwick Academy and the lack of scrutiny and accountability to the community. Ms Henderson's post was damning of the Trustees but suggested Ms Widdowson had tried her best in difficult circumstances.**

2.26. Ms Widdowson would invite groups of pupils for tea and cakes in her office to mentor personally, as the claimant says "*much in the fashion of a Headteacher at a private school*". He thinks this had an undermining effect on many pupils and made some Ms Widdowson's " *little elite groups*". Many pupils and staff had raised this concern, **which I can see as valid** with a factual basis, with Ms Widdowson and her SLT but were dismissed out of hand. The claimant then continues "*Ms Henderson's daughter was part of this group, for her academic year leading up to taking her A' Levels, and there was a strong indication this had influenced Ms Henderson's view as she sought to protect her daughter. This flew in the face of her previous concerns and* ***smacked of hypocrisy***". This is unwarranted. Dr Henderson may have held her views for good reason, and

felt, as does the claimant, Ms Widdowson was not the only problem so her departure of was not a panacea for the school's problems if the present Trustees and SLT remained. **Also it is likely Dr Henderson, like others as seen later, held the view the "model" of Academies as stand alone entities, under the control of volunteer Trustees with no oversight by such bodies as an LEA which knows about education policy and methods, is intrinsically flawed.**

2.27. By this stage the claimant had been without income since October 2017.He had only just discussed a return to school and going for some training. He replied to Dr Henderson agreeing with some of her comments but asking her not to excuse Ms Widdowson as headteacher(which he abbreviates to HT) using blunt terms about her *eg " ability to manipulate, persuade, bully and lie" "absence of a clear educational direction for the school" "failed approach to behaviour management, teaching & learning, staff management & leadership" "dishonesty in dealings with pupil premium and SEN issues".* Pupil premium is funding from DfE targeted at specific pupils, including those with special educational need but he says used by Ms Widdowson as an addition to general funds. He added "*Governors role is to challenge and ensure accountability of the HT and ensure clarity in the educational direction of the school… the Governors have been abject".*

2.28. Some people, as the claimant agreed when I asked him, are opposed to "academisation" of state schools. He said he is not and believes a properly run Academy can be a good thing. Ms Brothwood explained the initial absence of an "Academy sponsor", meaning a body which could exercise control similar to an LEA, did not prevent the newly formed Academy doing well under Mr Quinlan's leadership but posed a major problem when Ms Widdowson, her deputy Mr Wilkes and Fiona Hall became the effective SLT. A post from a Mr Brian Bowden, known to the claimant, put forward his view the Academy should be taken back into LEA control. This shows the exchanges of posts are capable of being read and "used" by others who seek that outcome, which may do more to hinder than help a reversal of the Academy's performance . It became apparent the posts were seen by a wider audience when other comments were received. His later comments show no moderation of language eg "*methods used by the HT have been consistently ill judged, ineffective and at times* ***crass and completely unprofessional****", "Her approach in school completely undermines the school's organisational structure, teachers' ability to deliver their lessons effectively and* ***wreaked havoc in the key area of behaviour management****".* He accepts the Academy's performance *"Would have been massively improved… if the Governors had fulfilled their roles with* ***more courage*** *and considered action".* He reiterates *"It is essential…clear action . .. is taken ASAP"* and refers to *"the role of the HT in the disastrous decline in fortunes of BA*".

2.29. The claimant made clear in one post he had formally raised the matter with the appropriate authorities and agencies. Some time, maybe a day or two, later, a person he does not know, a Mr Patterson posted saying the claimant, as a current member of staff, should be cautious of posting such strong views publicly. The respondent asserts the posts, not anything said to any regulatory authority, in newspaper interviews or at public meetings were the sole reason for dismissal and asserts they were not protected disclosures in themselves.

2.30. These posts were reported to Mr Wilkes as Acting Headteacher by Mr Cairns, then still Chair of Trustees. The respondent commenced a disciplinary process. The Academy's disciplinary policy operates in conjunction with a 'Procedures for conducting hearings and appeals' document. They were drawn up by NCC and would normally be supplemented by a HR 'service legal agreement'

with NCC, which often involves the attendance of an NCC HR professional at meetings. At the time, the Academy was not signed up to such a package. There is also a "Social Media Policy", a "Whistleblowing Policy" and a "Code of Conduct" for teachers. The procedures were so many and complex it was inevitable there would be disagreement on whether they were complied with fully.

2.31. Mr Wilkes asked Mr Griffiths to act as "Nominated Officer". Mr Griffiths had been in teaching since September 1994. He was Headteacher at a secondary school in Northumberland from January 2013 until December 2017. He joined Berwick Academy in January 2018 just before the Ofsted inspection as Acting Deputy Headteacher and left when his extended contract expired in August 2019. His brief was to deal with problems of behaviour and "safeguarding". When he joined, the Academy's behaviour problems are described by Mr Griffiths in graphic terms saying it took him 20 minutes to get through a corridor in which pupils were misbehaving.

2.32. Mr Griffiths had been a trade union representative for the National Union of Teachers earlier in his career and has significant experience of disciplinary processes in the education sector. His previous school used the same NCC disciplinary policy, but **did have** NCC HR support. An Investigating Officer and Nominated Officer are said at page 29 to have to look at "*relevant **facts surrounding** the alleged misconduct*". He had no prior knowledge of the claimant and did not even recognise his name. Mr Wilkes did not provide any particulars of previous processes relating to the claimant (other than saying he was currently on sick leave) so Mr Griffiths was not aware he had put in a grievance against the SLT, predominantly Ms Widdowson. **Being "new", may well have prevented "bias", but it also meant he was not aware of relevant past events.** Mr Wilkes told him if on reviewing the initial evidence he decided to commission an investigation Ms Lynda Dalkin would be the most suitable person to do one. Mr Wilkes said the potential offence related the posts so Mr Griffiths read them, formed the view they warranted an investigation and saw no problem with Ms Dalkin doing it. If he had not considered the initial evidence warranted one then he would not have commissioned an investigation. Mr Griffiths statement says "*.. it was clear they had been made on a very public forum. My concern was whether the comments objectively breached the Academy's policies (including the Code of Conduct) and constituted misconduct or gross misconduct...*" **It is obvious he should have gone this far, and fair he did**.

2.33. Ms Dalkin was effectively appointed by Mr Wilkes. The Disciplinary Procedure says "*The investigatory officer will be provided with a brief by the nominated officer that details the allegation(s) and the scope of the investigation.* The respondent has not disclosed any brief. Mr Griffiths admitted in cross examination he had not done one so if anyone did it must have been Mr Wilkes. Ms Dalkin's report outlines her remit as *" the investigation is to ascertain whether or not Mr Thomas **is in** breach of the academy policies of "inappropriate use of the internet by posting derogatory or offensive comments about the school, a colleague, governor or parent".* Her remit was to establish if there was a case to answer, not decide it. She had two meetings on 29 March and 10 May 2018 with the claimant. Mr Wilkes held a sickness management meeting just before the first of those meetings, which reasonably appeared to the claimant to be connected.

2.34. Mr Griffiths says over 330 pages of this hearing bundle relate to the claimant's sickness absence and grievance process included at his insistence. The vast majority pre-date Mr Griffiths employment. I accept those and "context documents" appended to Ms Dalkin's report are **largely irrelevant but may provide vital context.** In a harassment case under the Equality Act 2010 the EAT in Reed-v-Stedman 1999 IRLR 299 quoted from a USA Federal Appeal Court decision:

'*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' (USA-v-Gail Knapp (1992) 955 Federal Reporter).

2.35. On 29 March 2018, the claimant said the frustration of not being listened to had led him to use social media, no one was listening to concerns had raised earlier with the SLT so he had no other option. Ms Dalkin suggested he provide evidence of context ***if it would make a difference to how the standalone comments could potentially be interpreted***. It was agreed he would and another meeting occur which it did on 10 May. He again said *" he has got to this stage due to the failings of dealing with issues raised at both SLT and governor level whilst using the correct and approved school policies and procedures".* Ms Dalkin failed to investigate whether he had in fact made protected disclosures or whether his comments of nothing being done could be verified. The conclusion of her report shows why "*Such stand-alone comments publicly made I would also conclude may be considered as disloyal and in breach of policy*". The investigation was one-sided and completely inadequate. Ms Dalkin may not have been ill-motivated but her report, dated 18 May 2018, concentrated on the posts and policies albeit including **"**context documentation" from the claimant of his grievance and appeal, Ofsted's acknowledgment e-mails 2018, a letter from NCC dated 14 March 2018, submissions to the DfE and his own statement. She says his submission to the online school teacher portal written whilst sitting in his car and e-mail to Ofsted dated 30 January 2018 was not included but I believe it was. Without trawling through every appendix and knowing far more than the report disclosed about the futility of previous efforts to raise concerns it would appear to a reader dismissive of the reason why the posts were made.

2.36. Having considered the report, appendices and in particular the posts, Mr Griffiths was satisfied a thorough investigation had been done. Looking only at the posts no-one could doubt there was a disciplinary case to answer, potentially gross misconduct. The charges put were:

"1. That the comments posted on social media were derogatory or offensive about the school, a colleague/governor/parent.
2. That the comments breached the following sections of the Academy's social media policy
Paragraph 5.2 "You must not engage in activities involving social media which might bring Berwick Academy into disrepute."
Paragraph 5.3 "You must not represent your personal views as those of Berwick Academy on any social medium"
Paragraph 5.5 "You must not use social media and the internet in any way to attack, insult, abuse or defame pupils, their family members, colleagues, other professionals, other organisation or Berwick Academy"
3. That the comments breached the following sections of the Academy's code of conduct:
*Page 3 under Point 8 Headed "Loyalty" "it is a fundamental implied term of your contract of employment that you are loyal to your employer" "**Generally speaking**, you must not actively criticise or challenge the policies or decisions of your school/academy **or their manager** in public."*
Page 3 under Point 9 "Personal behaviour" "Your personal behaviour will influence the public's opinion of your school/academy in any situation where you can be identified as an employee."
Page 5 "As a staff member you must:" "refrain from making reference on a social networking site to the school/academy, its staff or governors, its pupils or parents, …" "not post entries on a social networking site which are derogatory, defamatory, discriminatory or offensive in any way, or which

could bring the school/academy into disrepute" "not make discriminatory or offensive comments about work colleagues on social networking sites."

2.37. Mr Griffiths accepted when I asked he had looked mainly the nature of the comments , potential breaches of the various policies i.e. what was done, **not why. Provided he looked at the disciplinary hearing into the other circumstances,** the procedure as a whole may have avoided being unfair. Mr Griffiths contacted the claimant by telephone around 24 May 2018 saying a formal disciplinary hearing would be arranged, and to establish whether he was fit to attend in view of his long-term sick absence. The claimant was clear he was. Mr Griffiths informed Mr Wilkes as it is normal for a Headteacher to be told of any disciplinary involving a teacher.

2.38. Mr Griffiths as Nominated Officer was to make a decision on guilt and sanction, but the Procedure for Conducting Hearings and Appeals, states "*the person(s) deciding on the outcome of the hearing or appeal must have the appropriate **authority** to do so in accordance with the school's delegation scheme*". He told Mr Wilkes he was concerned he would not have the authority **to dismiss** the claimant, which was one of the potential outcomes. Mr Wilkes replied Ms Widdowson had generally dealt with disciplinary issues personally, and he was not aware of anybody other than the Headteacher or the Chair of Governors (of whom the claimant had been critical in the past) having authority to dismiss a member of teaching staff. They did not have access to advice from NCC HR at this point, so Mr Wilkes said he would attend the meeting as Chair, but Mr Griffiths would have sole responsibility for reaching a decision and make a recommendation which Mr Wilkes would accept and implement as Acting Headteacher. Mr Wilkes was not to be a co-decision maker. The claimant does not accept this, and I see why.

2.39. The claimant was invited to a disciplinary hearing on 19 June 2018. The invitation letter states "*the hearing panel will be made up of Stephen Griffiths and Steve Wilkes*". The letter was sent by the Clerk to the Governors Amy Walton. The claimant telephoned saying his union representative was not available so the hearing was rearranged first for 20 June then 11 July. Since Jhuti the issue is whether Mr Wilkes or Mr Cairns, consciously or not, influenced Mr Griffiths and, if so why. I accept Mr Griffiths **genuinely thinks** he made a free and unbiased decision. The claimant **thinks** Mr Wilkes used Mr Griffiths as his puppet. What followed confirmed to the claimant his disciplinary hearing was a "show trial" leading to a pre-determined outcome.

2.40. The disciplinary hearing took place on 11 July 2018. The claimant had Lawson Armstrong as his trade union representative. Lynn Scope (HR Consultant) provided HR support to the respondent. Mr Wilkes at the start said it was not a 'panel' hearing. Mr Armstrong said nobody from SLT or Trustees should hear the disciplinary as the claimant had criticised them all previously, so suggested an external panel. I accept Mr Griffiths had no conscious bias but I am astonished no-one saw there could be reasonable perception of bias. Mr Wilkes was Ms Widdowson's Deputy and if, though Acting Head, he felt he should not be a decision maker, he should have avoided any involvement. In Halliburton Co-v-Chubb Bermuda Insurance Ltd [2020] UKSC 48 the Supreme Court held the obligation of impartiality was a core feature of English law . When addressing an allegation of apparent bias the test to be applied was the objective test of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias, having regard to the realities . For Mr Wilkes to be literally sitting alongside Mr Griffiths would lead any fair-minded and informed observer to conclude there was a real possibility

of bias and/or “manipulation” . The objection was noted but the hearing went ahead regardless. A valid criticism of the claimant and Mr Armstrong is that they raised this at the hearing , not before, and had no suggestion of who else could have been co-opted to make the decision

2.41. Mr Griffiths questioned Ms Dalkin and spent considerable time asking the claimant questions. Ms Scope stopped the claimant talking about earlier disclosures and was adamant this was not part of the hearing. He was raising them to show they were basically the same points and a continuing process had led to the disciplinary. Mr Griffiths impression was the claimant and Mr Armstrong were combative and quite aggressive. Their position appeared to be the claimant had 'blown the whistle' and could not be disciplined. I asked the claimant if he thought that was so, then or now. He replied he did not and I accept that, but it is how he came across at the disciplinary hearing. When Mr Griffiths pointed out the posts were separate to any contact with Ofsted or other statutory agencies, he would just insist it was all part of the same process. The notes tend to show he was “shut down” on the essential question of **why** he had made posts. Had he said “*I stand by the truth of what I alleged but accept putting my views on the social media page of the local newspaper was an error of judgment, albeit caused in part by the pressures on me over the last 18 months* “ Mr Griffiths may have taken a different view, but says Mr Armstrong and the claimant displayed “*complete lack of perspective*“. Mr Armstrong forcefully insisted treating the posts as a disciplinary offence was infringing the claimant's right to make protected disclosures. Mr Griffiths replied the Academy's policies expressly permit employees to contact a range of appropriate external bodies such as Ofsted, DfE, MPs, trade unions , Public Concern at Work and that list is "*not exhaustive and individuals are free to contact any relevant organisation which it is felt will be able to deal properly with the individual's concerns*". They do not permit an employee to take to social media to make, in Mr Griffiths’ words “*gratuitously critical, insulting or abusive posts regarding the Academy or specific individuals (whether they be teachers, senior leaders or governors). It would be very obvious to anybody who consulted the Academy's relevant policies this would be completely unacceptable – although I would view that* ***as common sense*** *even in the absence of clear written policies*.” Generally I would agree, as does the claimant, but all the more reason to examine **why a long serving, previously loyal, employee did so**.

2.42. Mr Griffiths says the claimant showed little if any **remorse** rather “ *blindly insisted he was protected by PIDA”* He referred to it '***trumping***' the Academy's policies which suggested he considered he was entitled to behave however he pleased without any regard to the policies or general expectations of employee conduct. He was not even willing to accept his posts were abusive or insulting despite phrases such as "*ability to manipulate, persuade, bully and lie",* "*her dishonesty*", "*the Governors have been abject*" and "*incompetent, inept HT*". His pre-prepared statement said they were "*truthful"*, "*fair*" and "*factual information*" . He rejected the suggestion they may have damaged confidence in the school. Mr Griffiths clear impression was he felt justified legally and morally. It accept that is how he came across but any reasonable employer would also have considered why the claimant and Mr Armstrong came “with all guns blazing”.

2.43. The claimant knew Mr Wilkes was aware the Ofsted report was damning, that he would be faced with a difficult time to try to turn the school around, that the local community would be looking to him to do so and the claimant would be likely to continue to alert authorities such as Ofsted, DfE and his MP if he felt there were continuing concerns. There is clear motivation for Mr Wilkes wanting to dismiss the claimant and he appeared in control of the process of the

disciplinary and dismissal. The Disciplinary Procedure says the Nominated Officer " *is appointed by the governing body or headteacher and is responsible for commissioning an investigation into the allegations and deciding whether there is a case to answer. They will appoint an investigatory officer to investigate the allegation on their behalf and review the officer's draft report to ensure a reasonable investigation has been carried out. The nominated officer will hear the disciplinary case and make a decision about the outcome.* However, the involvement of Mr Wilkes was considerable. He chose Ms Dalkin to investigate, chose Ms Scope as HR Adviser and chaired the meeting in order to have someone there with dismissal powers. Mr Griffiths was told prior to the hearing by Ms Scope the claimant's grievance was not relevant. In cross examination he accepted he told the claimant it was not about the background but whether the breaches had happened. He further acknowledged he ought to have looked at all the circumstances, but did not.

2.44. It reasonably appeared inevitable to the claimant dismissal would occur so this was a " show trial ". When a person is "cornered" he will almost always fight back hard denying any fault rather than adopt a moderate approach and give an explanation for doing **something** wrong.

2.45. Mr Griffiths said he would not have agreed to be a puppet, which I accept he did not, but he adds *My view was the fundamental purpose of the Claimant's posts was to damage the reputation of the Academy and others in the wider community – in any event, that was the inevitable consequence.* His reasoning on this point is in my view flawed and betrays that he was not considering the full picture. First he says the posts were not made to people who could address any concerns the claimant had but on the social media site of local newspaper which has a very significant following in the isolated community of Berwick. The reason the claimant had done so was exactly because he felt he had raised it with people, including Mr Wilkes and Mr Cairns, who could, and should have done something but had not. Next he says as Ms Widdowson had left by this point, the only foreseeable achievement of this post could be persuading other readers to have a highly negative view of her ***"(and, as a result, of the Academy)"***. That makes no sense. An analogy would be a back bench MP being openly critical of the party leader and/or cabinet. That does not mean he has stopped supporting of the party and what he believes it should stand for. The claimant has always said but for Ms Widdowson the Academy would have done much better.

2.46. Next Mr Griffiths says the claimant was clear the governing body, who effectively oversee the Headteacher, all needed to resign from their roles. **Exactly so**, he was saying if more vigilant Trustees were not brought in history could be repeated. He adds the posts identified the claimant *as a current teacher, and professed to have significant inside knowledge by claiming he was "in full dialogue at many levels" .My view was that the Claimant did so in the belief that the negative views which he was posting regarding the Academy and connected individuals would be given more weight by readers.* That is exactly what a claimant needs to show to make use of s43G.

2.47. Mr Griffiths did not accept the claimant believed he was sending a message to only to Dr Henderson even initially, adding the newspaper's page on a social media site is universally-known for being a public platform and it was inconsistent with his defence, which was he was justified in making the posts and "*I wouldn't have done it if I hadn't already gone down the PIDA route" .* He adds "*Even if the Claimant's position regarding this was true, I would not have been satisfied that he would have acted any differently had he known that he was making public posts. He doggedly defended the posts during the disciplinary investigation process, rather than deleting them when a third party responded to this thread (Rob Patterson). He did not delete these posts at any point*

during the disciplinary process, and had still not removed them when I checked at the time that I prepared this witness statement".

2.48. Mr Griffiths did not grasp what he had to decide was **why** the claimant went public which explains why he concludes the posts "*underline the Claimant's relentless determination to ensure that the Academy received negative media attention*." He is adamant the claimant was not dismissed for going to Ofsted on 30 January 2018, "*his argument was the posts themselves were protected disclosures and the relevance of contacting Ofsted was it had not worked so he could go public"* Mr Griffiths was willing to accept the claimant had contacted Ofsted and other agencies but says this absolutely did not factor into his decision. **It should have if the claimant was saying he only made the posts because he had tried everything else and nothing had worked**.

2.49. Following the hearing, he took a few days to consider and get legal advice. His view was the most allegations should be upheld, amounted to gross misconduct so the claimant should be summarily dismissed. He claims only then did he speak with Mr Wilkes, explain his decision and the main reasons. I find that hard to accept as Mr Wilkes had been with him at the hearing. Mr Wilkes set out the decision and reasons in an outcome letter dated 27 July 2018, which Mr Griffiths approved before it was sent, but **it is signed by Mr Wilkes**. Ms Cowen asked Mr Griffiths whether he had been "played" and used by Mr Wilkes to "distance himself" from the dismissal. I find he was not alert to the possibility others who had a negative view of the claimant might influence his decision. He tried to be objective but no reasonable decision maker who had just come to the Academy would have accepted Ms Dalkin's report as thorough or allowed the claimant to be kept as rigidly as he was to the facts of the posts. I have no doubt the claimant did make the major error, as he did before me, or throwing so many matters into his lengthy statements that many people, including Mr Griffiths, would not see his real case. Every Judge has to strike a balance between letting a claimant go on and on about everything and anything he wants and shutting him down too soon. The claimant actually said before me the internal processes should have taken longer and everything he had written or included in his documents read and considered in full. He was represented by a full time union official who should know that is not how decisions are made. That said at some stage before the decision was made , at investigation or at the hearing , someone should have looked actively at what the procedure quoted at 2.32 above calls "*relevant **facts surrounding** the alleged misconduct***". No-one did and, though the claimant could have explained it better, two wrongs do not make a right.**

2.50. The investigation and disciplinary hearing taken together were very unfair procedurally. Mr Griffiths may well have been influenced to take a narrow view of the allegations **because** dismissal was the result some people **wanted** due to the claimant's whistleblowing being likely to cause them embarrassment. One reason people mind a protected disclosure is if it causes them to have to admit they were wrong earlier or others to find they were and hold them responsible. That could have been the case in respect of Mr Wilkes, other members of Ms Widdowson's SLT, Mr Cairns and other governors. It is a matter I return to in my conclusions.

2.51. The claimant appealed. Mr Griffiths provided a written statement of case to be considered by the appeal panel in conjunction with the Academy's legal advisers, ensuring it accurately represented his own views and reasons for dismissal and his position regarding the appeal. He

attended the appeal hearing to present the case for upholding his decision and answer questions from the panel and the claimant. That ended his role.

2.52. Existing governors had been involved in the claimant's grievance process and his argument was they had been neglectful.The disciplinary outcome letter stated " *the Academy would be willing to appoint an external appeal panel rather than forming the appeal panel from Academy governors*". This was an unusual step but a wise one **if it could be done**. The disciplinary outcome came at the start of the school summer break, and , as any Employment Judge knows, getting the education sector to do anything in the holiday period, is difficult .

2.53. Ms Fiona Hall made initial efforts to arrange an external panel by telephoning and e-mailing Mr Dean Jackson, the new Director of Education at NCC. He did not respond so Ms Goddard as the new Chair of Governors chased him. He finally responded saying he would not be able to assist. In view of the time which had already elapsed and the requirement to give at least 3 weeks' notice of the appeal hearing, Ms Goddard decided the best way forward was to arrange for an independent HR consultant to chair an appeal panel, of herself and Christine Robinson an ex-Headteacher who had just joined the governing body in September 2018. Ms Goddard was impressed by the CV of Caroline Dixon at Holgate HR who had significant amount of high-level experience, including in the public sector. I accept this was a wholly appropriate panel.

2.54. The claimant was invited on 8 October 2018 to a hearing on 5 November 2018. Ms Goddard wrote to him on 17 October 2018 to require him to produce a written statement of case together with any evidence and a list of witnesses. With his statement of case he sent a considerable number of e-mails with links or attachments to the governing body's clerk, Amy Walton. His list of witnesses included *'A.N. Other subject to appropriate protection*', and suggested the Academy would need to issue witness summonses for some as they had signed settlement agreements. Ms Walton responded he needed to identify all witnesses, there was no power for the Academy to issue a witness summons and she was unable to access some of the links he had sent. He confirmed this witness should be removed and Ms Walton could leave out what she could not print. Why send it in the first place? I make the point again, the claimant does not help himself by throwing in such a volume of material. The risk is of relevant points being missed, to borrow a phrase used in the North-East, of the “baby being thrown out with the bathwater”.

2.55. Ms Goddard’s background is not in education but the private sector. She has 25 years' experience in fairly senior roles relating to such things as information security and data protection, managing large teams and dealing with HR issues. She is originally from the South-East of England and moved to the region in 2006. Four of her five children have attended local schools, including the Academy. She became a Trustee in June 2018, and Chair in October 2018. She had no knowledge of the claimant’s sickness absence or his grievance. Ms Widdowson had left some months before she joined the Trustees. She accepts various Ofsted reports say the Academy had not performed in recent years and those results may have been due to poor leadership by Ms Widdowson. An autocratic Headteacher is hard to control and, when previous Trustees tried, Ms Widdowson raised through her union an allegation of bullying against them Ms Goddard said the Ofsted report even in its non-final form, was the***” lever”*** they needed. She accepted the claimant and others outside the Trustees may not have known any of this, so the Trustees may have appeared to be ineffective. Finally, she said it takes time to reverse years of decline.

2.56. The appeal was heard on 5 November 2018 and was the first time Ms Goddard met the claimant. He brought his sister as his companion not his trade union representative and had not notified this before despite having been asked to confirm the name of his companion. The panel agreed to allow her to participate to the same extent a trade union representative would. Ms Goddard became aware two witnesses had signed confidentiality provisions contained in settlement agreements with the Academy some time before. She spoke to them both beforehand to remind them of the obligations they had entered into, although she did not suggest they should not give evidence. Both asked she waive the confidentiality provisions. She did not feel it appropriate to give a blanket waiver but said she would not stop them being a witness and it was their choice. She could have pointed they had already breached confidentiality in discussion with the claimant, **but did not** as she wanted to ensure the claimant had the opportunity to present his appeal in the way he wanted.

2.57. The panel agreed it was vital thoroughly to explore all the issues before reaching a decision, even if that meant the hearing would take longer than expected and an outcome would not be delivered until after it. Although the Procedure stated the appeal could only consider matters raised in the appeal letter, it also stated "*the appeals body will act as the final arbiter, hear the case afresh and confirm, rescind, or amend the original penalty*" They therefore approached the appeal as a rehearing, meaning they would make their own findings on guilt and sanction. They allowed the claimant to raise matters he had not raised at the disciplinary hearing or in his appeal letter eg the sanction being inconsistent with previous ones for misconduct on social media.

2.58. Although the claimant said he would be presenting his case using his statement of case he did not stick to that. He gave a detailed background including historic issues with the school, his sickness absence and grievance procedures. The hearing was recorded and transcribed. Eight pages in the core bundle 142 -150 of closely typed A4 show hardly anyone apart from the claimant spoke. Although the panel wanted to understand the build-up to the posts, he spent an inordinate amount of time talking about this. Ms Dixon had to point out to him a few times he might run out of time unless he began to deal with specifics. The panel accepted he was passionate about education, genuinely held the views he expressed and they were of public importance.

2.59. His overriding theme was the entire narrative formed one “process” and his posts were part of the process which could not be separated. The panel gave careful consideration to the context of the posts so did not ignore what he was saying but fundamentally disagreed they could not themselves be a disciplinary issue distinct from previous processes and any contact with Ofsted. Ms Goddard says: *Our unanimous view was the fact somebody may have previously raised concerns does not give them blanket immunity from subsequent serious misconduct. Likewise, the disciplinary process and dismissal was not because of Ged's sickness absence levels or the fact he had raised a grievance.”* My task is to look at why the panel took the decisions they did **.**The claimant does not see the effect of dwelling on his sick absence and the grievance was to give to the panel an appearance of him allowing **his personal differences with Ms Widdowson, justified though they may be, to lead him into a personal attack on her, and others whom he saw as aligned with her, so valid points about the effect her management had on the school and its pupils were harder to spot . Ms Goddard readily agreed with me it is impossible for teachers to teach and pupils to learn if discipline is so lacking that that the classroom is unruly. That is also the claimant’s view.**

2.60. Ms Goddard says the natural progression of the complaint to Ofsted would have been continuing to participate in their investigation or any by other regulatory bodies, not posting derogatory comments on Facebook in response to a media article and to members of the public. Although the claimant referred to having "exhausted" the correct processes it was evident from his timeline submissions document this was not the case as the majority of his communications with external bodies took place after 1 March 2018. In the panel's view, his approach conflated distinct matters, and was a refusal to accept the difference between raising concerns to an employer or a responsible regulator, and making comments on social media. That panel felt his lack of perspective on this point was unreasonable particularly having had months to consider this since the the disciplinary investigation in March. When Ms Goddard directly asked him about what he understood the difference to be between raising issues to regulators and social media, his response was to justify why he had posted rather than to acknowledge the difference .

2.61. After the March 2018 report, changes had taken place in leadership and governance. An interim Ofsted inspection in the summer of 2018 acknowledged some improvements but said they were not fast enough and the school had a long way to go. An inspection in January 2019 made clear significant improvements were still necessary, but acknowledged positive measures had been implemented which were having a beneficial impact. The current Trustees developed a strong relationship with NCC , notwithstanding Academy status. One of the most important steps has been improving the relationship with the local community where local media and social media are a significant influence in a fairly remote town such as Berwick.

2.62. I asked Ms Goddard if the claimant had toned down language saying Ms Widdowson was an autocratic but poor leader (rather than a *liar*, *bully* and *dishonest*) and Trustees as volunteers had been ineffective in controlling her policies (rather than *abject* and needing to *hang their heads in shame*) may the panel's decisions have been different ? She replied that would have been better.

2.63. Ms Goddard accepts the "last resort" argument explains his decision to raise issues with Ofsted (which he was welcome to do), but not the posts. He did not say the posts were made in the reasonable belief improvements would be hampered if he had not responded to Ms Henderson in the way he did. I, and Counsel, asked him questions which now show that is his view . The appeal panel tried to give him that opportunity but he was not prepared to take it , for reasons to which I will come in my conclusions

2.64. The claimant talked about a previous stress risk assessment but did not suggest to the panel the posts were made due to stress. He said his wife had remarked "*are you sure you want to do that?*" at the time. **He and his sister were adamant the posts had not been "rash".** He said he was naïve about social media and originally believed he was posting only to Dr Henderson but it quickly became apparent **to him** his posts were viewable by others when there was a "*stream of responses*", but still he did not delete them.

2.65. At the end of Day 3 when the claimant had given some apparently contradictory answers, I intervened . His responses to me showed what I consider to be the unvarnished truth. When he saw Ms Henderson's first post he considered she was not only hypocritical but wrong. Ms Widdowson had picked her SLT so getting rid of her alone would not solve the problem. The SLT

would have to go too as would the Trustees who had let it happen. When he realised his posts had gone public and Mr Rob Patterson suggested he moderate public expression of views he decided not to take down the posts, because as he said, he was convinced they were right and it would be ***cowardly*** to withdraw them. The plain fact is he did not put this argument to the appeal panel or before I extracted it from him. In the absence of that, looking at the motivation of the appeal panel their decision was not due to the disclosures to Ofsted, the DfE, the MP or anyone else . They saw the posts as separate and though they MAY be protected under s 43G (3) neither the appeal panel nor Mr Griffiths could have known the claimant's thinking at the time.

2.66. The panel looked into his arguments about the Social Media policy not having been available to him. It had been approved in November 2013, with revisions made in June 2014 and October 2015 all before his sickness absence commenced in substantially the same format as the further revised 2017 version, which he claimed he had not seen. I accept he had not but that was immaterial to his decision to leave the posts in place.

2.67. At the appeal the claimant presented as witnesses two ex-employees, Mr Nick Allan and Ms Jackie Brothwood who spoke about their own experiences of how they felt they did not receive sufficient support, their concerns and culture at the Academy. Neither explained why it might have been necessary to have made the posts. His other witness was Ms Georgina Hill whose evidence corroborated concerns about the Academy during Ms Widdowson's tenure and mentioned other teachers had commented on the Berwick Advertiser article.

2.68. Ms Brothwood raised an issue around consistency of treatment regarding inappropriate posts on social media saying she had been given a warning for posting on social media. The panel thought that relevant to whether sanction was disproportionate. Ms Brothwood was not able to provide much detail. The panel resolved to investigate this after the hearing. They did so and found, several years previously, Ms Brothwood had made "veiled" comments only a few people would have understood; nobody was specifically named (though some people would be able to identify the person referred to), and only her Facebook friends would have been able to see it as her profile has privacy settings. Ms Brothwood said another colleague had been informally reprimanded around five years previously for social media posts. She did not provide a name, what had been posted or the sanction imposed, admitting she was "woolly" on specific detail.

2.69. Ms Dixon asked the claimant what was his desired outcome from the appeal. He replied "***there must be, must be an admission and an acknowledgement of the management leadership failure of governance*****"**. He talked about teaching generally, a breakdown of trust and confidence between him and the Academy and how his pay should not have been reduced whilst on sick leave. Then, having been kept on track by Ms Dixon several times, he said his dismissal should be "*rescinded*". Ms Goddard would have expected that to be his first answer, instead, the most important thing to him was receiving an agreement his comments were justified in criticising Ms Widdowson, "her" SLT and Trustees. He still used forceful terms when speaking about the SLT similar to those in posts eg , "*disgraceful*", "*negligent*" and "*abject ignorance*" He insisted he had not been disloyal to the Academy, and claimed he had actually been loyal to **it** as opposed to Ms Widdowson the SLT and Trustees. He said he should not have been disciplined, it was "*utterly ridiculous*" and he was "*absolutely disgusted as a human being*". He said Mr Wilkes and Mr Cairns

were the reason he was dismissed. The furthest he went to show any regret about the posts was "*maybe I should have taken it down*". He had still not removed them.

2.70. Ms Goddard's statement includes "*He did not suggest that in hindsight he should have adopted a less critical and aggressive tone or language in his posts.*" Her answer to my question *If the Claimant at the appeal hearing had said "I reacted as I did for good reasons because I was frustrated but with hindsight maybe that was the wrong thing to do" may the outcome have been different?* was "*Yes…. I can't be confident without speaking to the other members of the panel, it would have definitely have been a mitigating factor for me. Everybody makes mistake from time to time.* She said, due to what he said at the appeal hearing t**he panel had no confidence he would not do the same again if he was reinstated.**

2.71. At the top of Page 153 of the core bundle the minutes clearly show the claimant attacking the Trustees' abdication of their role in controlling Ms Widdowson. The panel member Ms Christine Robinson, the ex-Headteacher who became a Trustee in September 2018, interjected saying neither she nor Ms Goddard had anything to do with any previous failings of a Board of Trustees of which they were not at the time members and she wanted that minuted. In my view rightly so. The same point as I made earlier in relation to the disciplinary applies with even greater force. The claimant thought it was inevitable dismissal would be confirmed and this was a " show appeal". However, apart from the fully explained delay, nothing the panel said or did could have been more clearly reassuring it was not. The damage to his confidence any internal process could go in his favour had been done at an earlier stage. So, rather than admit **some** fault and give an explanation the claimant and his sister continued to give the appearance of attacking everyone. To an extent he still does His statement in this case includes:
(a) *The people responsible for mismanagement and failure of the school have all been allowed **to slip away without any accountability and the Trustees have attempted to protect themselves** through **a process of cognitive dissonance***.
(b) *not only did Alexis Widdowson resign and walk away without any accountability the same has happened with Steve Wilkes initially as Acting HT, then back to Deputy HT and ultimately slipping away from the school without any formal announcement or acknowledgement Spring Term 2019*
(c**)** *Similarly there have been three Chairs of the Board of Trustee Colin Frame, David Cairns and Donna Goddard who are all fully aware of these events and multiple resignations and changes to the makeup of the Board of Trustees. This has created discontinuity, glaring inconsistencies and allowed individuals to actively distance themselves from responsibilities and accountability*.
(d) ***It is now also abundantly apparent that a veil of secrecy has been drawn over** Berwick Academy as the actions required to bring about the urgent improvements necessary to deliver good secondary education in Berwick upon Tweed are not being achieved.*

2.72. He now attacks the integrity of "outside" bodies and people. His comments include:
(a) *The school and the **statutory agencies responsible** for delivering and monitoring local state education in England, along with the **local authority**, responsible for ensuring appropriate school organisation was in place to deliver a good standard of secondary education, and **the MP** for Berwick upon Tweed have failed in their responsibilities to me as teacher at Berwick Academy when making protected disclosures regarding a series of serious failures taking place in a stand alone, state funded academy. (p.735-739) My children and their educational opportunities and the young people and their families in the constituency of Berwick upon Tweed have also been failed.*

(b) *Donna Goddard and her team have chosen to ignore a range of serious issues and buried evidence and communications to justify their actions and* ***build a veil of secrecy around Berwick Academy;*** *in the process attempting to drive me into despair in the hope that I would go away.*

I find no basis or justification for these views.

2.73. It appeared, reasonably, to the panel his primary purpose was to persuade others to share his views of Ms Widdowson, the SLT the previous Trustees. Ms Goddard had not seen earlier an e-mail from the MP's Chief of Staff to the claimant four weeks after the Facebook posts: "*You will be aware that there has been over many months a lot of negative comments about the school and its issues in the social media arena,* ***this has not been helpful****,* ***the effect of this has been to exasperate the situation***". (I think its author may have meant "exacerbate"). Ms Goddard said these remarks resonate with her own view. In my judgment that is entirely reasonable because in schools, and much of the public sector, improvement is rarely achievable quickly, is assisted if people work together looking to the future while learning the lessons of the past, but hampered , as I will explain in my conclusions , by public calls for retribution on those who failed previously.

2.74. The minutes were sent to the claimant to agree and reflect minor amendments he made. He provided three further documents in his e-mail of 20 November 2018 (i) a letter dated 9 November **2014** (ii) a note about a safeguarding concern from May **2015** (iii) his May 2018 letter to his MP.

2.75. The panel unanimously agreed the allegations should remain upheld, amounted to gross misconduct, and the appropriate sanction was summary dismissal. Ms Dixon drafted the appeal outcome letter which the other panel members reviewed and amended. It was sent on 29 November 2018. After the appeal, the claimant made comments on Facebook regarding Mr Wilkes who stepped down as Acting Headteacher for health reasons in December 2018, similar in nature to the posts. He did remove these comments from Facebook some time after.

2.76. The claimant's contract entitled him to be paid monthly. Its terms together with the 'Burgundy Book' say he must take his paid annual leave during school holidays. Pay during that time depends upon the pay received on the final day of term. If a teacher is receiving nil pay on the final day as a result of exhausting his sick pay, he is not entitled any payment in school holiday. If paid his normal salary on that day, he will receive the same throughout the holiday.

2.77. The claimant started sick absence on 9 November 2016, was paid full pay until 8 April 2017 then half pay for six months. He ran out of sick pay in October 2017, after which he received no pay at all. His grievance was of the actions of Ms Widdowson, her SLT and the Trustees. He says he received no support or empathy which further damaged his health at a time he was exceptionally vulnerable and he was then "*subject to blatant abuse of policies and procedures to try and force termination on grounds of ill health capability*". From October 2017 to December 2017 he was still pursuing his grievance. A letter from his union requested full pay be reinstated, but that was refused. The grievance appeal outcome came in December. The respondent did not take steps to confirm whether he was fit to return to work, so he stayed at home and continued to be paid nothing under the sick pay provisions.

2.78. He says at the point he raised his grievance on 1 July 2017, he ought to have reverted to full pay, as the ill health management process was suspended during the grievance process. I cannot

anchor that in any express or implied term and it appears nonsensical a person on sick leave can re-activate his right to full pay just by raising a grievance. I call this the “grievance argument”.

2.79. The Burgundy book says teachers are entitled to full pay where sickness absence is attested by a medical practitioner to have arisen out of and in the course of employment. The claimant says the way in which he had been treated caused his sickness absence so was injury caused in the workplace. A letter was sent on his behalf by his union in January 2018. No response was received. When chased in March 2018, the respondent refused to pay. Its position is no medical practitioner made an attestation. Also the wording refers to absence due to “accident injury or assault”, not **anything** happening at work. I call this the “injury at work” argument.

2.80. Mr Wilkes visited him at home on 19 February 2018 to discuss a possible return to work and training. He attended a 2 day AQA PE training course in Manchester. He argues attendance constituted a return to work so he should have been returned to full pay. A letter from Nicola Shotton at Employee Services at NCC on 26 February 2018 confirmed this. I understand he was paid for the days attending the course. He would have continued to be paid had he returned to work but he did not. He also says the ‘clock’ for sick pay should be reset from this date. This is a strange proposition which without being taken to an express term I do not accept. On that basis anyone off sick for six months less one day could drag themselves into work for that day, go back on sick the next day and have another six months full pay. I call this the “back to work” argument.

2.81. The claimant had to provide equipment for his work as a Games teacher. He did so with Mr Wilkes’ knowledge to whom he spoke when he asked to collect his belongings, but found they were not where he had left them **in the male staff changing rooms**. The Burgundy Book says “*The teacher shall be entitled to such compensation for losses or damages to personal property sustained during the course of their duties at school or during approved out of school activities as may be provided by the authority in pursuance of the national recommendations set out in paragraph 1 of Appendix V”* . The respondent’s position an express term in the Burgundy book is any loss or damage would not be its liability, but where not attributable to negligence on the part of the teacher, it would be reasonable for the employer to consider a compensatory payment. He says the school has failed to take reasonable care of his personal equipment provided to facilitate his role as PE teacher. The equipment list and value has been provided and are about £500.

3 The Relevant Law

3.1. Section 98 of the Act provides:
“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates to ..... the conduct of the employee.”

3.2. Section103A says:
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

3.3. Protected disclosures are defined as follows, as far as relevant ,

*43A In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is **made** by a worker in accordance with any of sections 43C to 43H.*

*43B (1) 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,
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed'.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

3.4. Section 43C includes
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—
(a)to his employer, or
(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,
to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

3.5. Section 43F includes
(1) A qualifying disclosure is made in accordance with this section if the worker—
(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b) reasonably believes—
(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii)that the information disclosed, and any allegation contained in it, are substantially true.
(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed

3.6. Section 43G includes
(1) A qualifying disclosure is made in accordance with this section if—
(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c)he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2)The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4)For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

3.7. Section 43H includes

(1) A qualifying disclosure is made in accordance with this section if—
(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) the relevant failure is of an exceptionally serious nature, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

3.8. Section 43L includes

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."

3.9. Ms Justice Slade said in Cavendish Munro Professional Risks-v-Geduld **simply** voicing a concern, raising an issue or setting out an objection is not disclosing "information". The example given was a nurse saying "*there are health and safety breaches on Ward 10"* (which gives no information) and adding "*because there are sharps lying around and it has not been cleaned for a week*" (which does). **Merely** expressing an opinion is not enough Goode-v-Marks and Spencer plc EAT 0442/09 .Slade J , in Norbrook Laboratories (GB) Ltd-v-Shaw 2014 ICR 540 held two or more communications taken together can amount to a qualifying disclosure, even if each on its own would not. If facts are disclosed or drawn to the attention of the person to whom they are made the employee need not spell out how they show a relevant failure. Geduld, which I believe to be entirely correct on the facts, runs the risk of being misinterpreted as saying a document containing allegations cannot be a protected disclosure. A document, or a series, may contain allegations, concerns **and** information. Many will have all. Information may be couched in the language of allegation, as said in Kilrane-v-London Borough of Wandsworth 2018 ICR 1850 but still qualify. Bean LJ. in Simpson-v-Cantor Fitzgerald Europe affirms the law on all these points.

3.10. The requirement of "good faith" was repealed and the words **is made in the public interest** inserted for disclosures made after 25 June 2013. Before, if an employee reasonably believed what he was saying tended to show a relevant failure, disclosure could be made in respect of a legal obligation owed only to himself Parkins-v-Sodexho. I believe Parliament intended to require a disclosure to serve some public interest but it may serve a private one as well. Also the legislation does not require it to be in the interests of **all** the public, only a significant sector, see Chesterton Global-v-Nurmohammad 2018 ICR 731 which also held If the information **disclosed had sufficient factual content and specificity tending to show a relevant failure,** that is enough.

3.11. Darnton-v-University of Surrey and Babula-v-Waltham Forest College confirmed the worker does not have to be correct in the assertion he makes. His belief must be reasonable. Darnton said whether there was a correct factual basis for the disclosure would be "*an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure.* Ms Cowen's written submissions set out some provisions of the Education Act 2002 and Education (Independent School Standards)Regulations 2014 which impose a legal obligation imposing on Academies, as well as LEA maintained schools, to provide a sound education and ensure health and safety of pupils, which cannot be done without maintaining good behaviour amongst pupils.

3.12. Sections 43D-43H provide further routes to creating a protected disclosure from a qualifying one but the conditions become more onerous the further one gets from the employer, the intention of Parliament having been to ensure workers **start** by raising concerns with the employer, see Korashi-v-Abertawe Bro Morgannwg Health Board 2012 IRLR 4 .Ofsted was added to the list of prescribed persons under section 43F on 1 October 2014 but the respondent has always accepted, if the online submission and email on 30 January 2018 was a qualifying disclosure, it is protected under 43C(2) by being made to a body set out in its Whistleblowing Policy. For the posts to be protected s 43G and/or s 43H would have to be engaged. Ms Cowen rightly does not argue 43H

3.13.In Abernethy-v-Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by it which **cause** it to dismiss. The reason may be established as at the time of the initial decision to dismiss and/or at the conclusion of any appeal. Although it is an error to over minutely dissect the reason, one must determine its constituent parts. In ASLEF-v-Brady Elias P (as he then was) said:
Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal ..
It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.
On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.

3.14. In Kuzel-v-Roche Products Mummery L.J. said:

57. I agree when an employee positively asserts there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

3.15. Where one is seeking the" reason why" treatment was afforded some Equality Act cases are useful. Tribunals considering claims under s 103A often refer to victimisation cases. In Chief Constable of West Yorkshire Police-v-Khan 2001 ICR 1065 Lord Nicholls stated the causation issue is not legal, but factual. A tribunal should ask: '*Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason*?' The Khan approach was expressly approved for the purposes of s103A in Trustees of Mama East African Women's Group-v-Dobson EAT 0220/05 ("Dobson") establishing the reason for dismissal required the tribunal to determine the

decision making process in the mind of the dismissing officer by considering his conscious and unconscious reason for acting as he did.

3.16. A long standing problem, dealt with in different ways by some of the best employment lawyers among our judiciary over many years, is whose mind we should look to when deciding the reason of "the employer" when it is a form of "corporate" entity. In Orr-v-Milton Keynes Council Lord Justice Sedley (dissenting) began "*The question at the heart of this appeal is whether an employer, when considering dismissal of an employee for misconduct, is to be taken to know exculpatory facts which are known to the employee's manager but are withheld from the decision-maker.* Moore-Bick and Aikens LLJ gave one answer and Sedley LJ another.

3.17 Underhill LJ addressed the problem in CLFIS-v-Reynolds ,a discrimination case, Royal Mail-v Jhuti and Co-Operative Group -v-Baddeley 2014 EWCA Civ 658 the last two being claims of unfair dismissal where the person who initiated the disciplinary process was motivated by the fact the claimant was a whistleblower but those who took the actual decision to dismiss were not. Underhill LJ in Baddeley referred to Cairns L.J.'s words in Abernethy and continued: *"There was some discussion before us of whether that approach was applicable in all cases or whether there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation in short,* ***a Iago situation****.* [Counsel for the employer] *accepted in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct."*

3.18. Mitting J. in the Employment Appeal Tribunal (EAT) in Jhuti said this (the decision maker was Ms Vickers, the person who acted as Iago because of the protected disclosure was Mr Widmer)

In those circumstances, it is not only the mind of Ms Vickers which needs to be examined to discern the Respondents' reasons for dismissal. The reason and motivation of Mr Widmer must also be taken into account. Once it was, as the Employment Tribunal found, it was inevitable that dismissal would occur and it did occur on the Tribunal's findings by reason of the fact that the Claimant had made prohibited disclosures principally to Mr Widmer.

3.19. The Supreme Court's decision in Jhuti 2019 UKSC 55 means one must also look at why any person who gave information to, withheld it from, or "manipulated" the dismissing officer did so. If it was because the claimant made a protected disclosure the dismissal will be automatically unfair, if a person in the ***hierarchy of responsibility*** was motivated by it that can be attributed to the employer at the point dismissal occurs. Lord Wilson said it may be necessary to attribute to the employer knowledge where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, by a person above the claimant in the hierarchy. Where the reason for that is the protected disclosure, the automatic consequence is a finding of unfair dismissal and, at remedy, no statutory cap on compensation. So, I must decide if Mr Griffiths and/or the appeal panel were "manipulated", or made up their minds without influence. Rather than using the word "manipulated" I prefer to think the decision maker being led to a decision by a person who did not want the full story to be known, and that requires consideration of that person's "motive".

3.20. In **Orr** Moore-Bick LJ said
Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any

person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly ***if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances.*** *That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. … The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose****. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained****.*

3.21. Moore-Bick LJ's analysis cannot be good law after the Supreme Court in Jhuti However, in what Underhill LJ called the "Iago" situation, Iago need not **act overtly** to bring about a dismissal but himself or via HR officers, to save himself looking bad may feed incomplete information to a dismissing officer who reacts predictably to dismiss. That may be automatically unfair, but even if it is not fairness under s 98(4) is unlikely to be achieved.The Supreme Court in Chhabra-v-West London Mental Health NHS Trust considered the extent to which an HR department could permissibly influence an investigation under a contractual disciplinary procedure. In Ramphal-v-Department for Transport, the EAT considered whether the ruling in Chhabra should also be applied in determining fairness under S.98(4) where the decision maker had been heavily influenced by HR advice. An employment judge had concluded the process was not rendered unfair by the involvement of HR as the decision maker made the ultimate decision. The EAT reiterated for a dismissal to be fair there has to be a fair investigation and disciplinary procedure. A third party materially influencing the decision maker might well render the process and any consequent dismissal unfair. In Whitbread Plc-v-Hall 2001 IRLR 275 the Court of Appeal said *"…Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up."* Taken together with Ramphal, if a person other than the apparent decision maker is similarly ill disposed to the claimant, had "his mind made up" and, with HR help, ensured the decision maker would be impelled to dismiss, the dismissal would be automatically unfair if it was protected disclosure which **caused** him to be ill motivated, but may be "ordinarily" unfair even if it was not .

3.22. Ms Cowen cites Ethnic Minorities Law Centre-v-Deol EAT/022/14 which said where a manager sits on the disciplinary panel but due to involvement in the investigation had already formed a view the claimant was guilty as charged he could not be impartial. The disciplinary hearing would be flawed from the outset because the manager could not approach it with an open mind. This is a good point but not a hard and fast rule. I do not think Deol should be read as compelling a finding of unfairness.

3.23. Difficult questions arise when a disclosure is preceded, accompanied or followed by behaviour on the part of the employee which is unacceptable to the employer. The law is meant to prohibit detrimental treatment on the ground of **the making** of the disclosure, not to enable an employee by making a disclosure to render himself immune from disciplinary action. Martin-v-Devonshires Solicitors upheld a Tribunal's finding a firm of solicitors did not dismiss an employee **because** she had made allegations of sex discrimination against various partners. A number of **related and**

separable features of the allegations, not the allegations themselves, were the reason for the dismissal including similar behaviour was likely to occur in future. Underhill P. said there could in principle be cases where an employee was subjected to detriment in **response** to the doing of a protected act but where the **reason** was not the act as such but some feature of it which could **properly be separable** such as the manner in which the complaint was made. In Hossack-v-Kettering Borough Council EAT/1113/01 the claimant argued if she had made a protected disclosure, it was not open to the employer to discipline or dismiss her for the 'manner' in which it was made unless there was evidence of her acting maliciously. The EAT rejected this argument. The tribunal had found the reason for dismissal was the manner in which she went about the protected disclosure which was a manifestation of her inability to understand her role.

3.24. Bolton School-v-Evans 2007 ICR 641 is the leading Court of Appeal authority. A teacher had become concerned a new computer system could be hacked into by students. He raised his concerns with two members of staff and the Head of IT agreed the system should be tested. Mr Evans then hacked into the computer system to demonstrate its security failings, later informed the Headteacher but failed to tell IT services, which, on discovering the intrusion, shut down the entire system, causing losses of £1,000. The Court of Appeal held he was disciplined for his actions in hacking into the system, **not** for informing the school its system was insecure. Even if his whole course of conduct amounted to **a continuing act of disclosure**, the school's principal reason was its belief he had, **at the same time as making the disclosure**, committed an act of misconduct. The Court observed, tribunals should be careful when an employer alleges an employee was dismissed because of acts related to the disclosure and not the disclosure itself.

3.25. Panayiotou-v-Kernaghan 2014 IRLR 500 confirmed a distinction may be drawn between the making of disclosures and the manner or way in which a worker "*goes about the process of dealing with protected disclosures …There is, in principle, a distinction between the disclosure of information and the manner or way in which it was disclosed. An employer may be able to say the fact the employee disclosed particular information played no part in a decision .. but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable.* The factors relied upon must be genuinely separable from the making the disclosure and be the reasons why the employer acted as it did. Lewis J said *"Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the..provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact the distinction may be illegitimately advanced in some cases does not mean that it is wrong in principle."*

3.26. Ms Cowen cites Dobson where dismissal, allegedly for three acts of misconduct —making false allegations, failing to follow proper procedures and breaching confidentiality — was in fact by reason of a protected disclosure, as all were so connected to the disclosure, the decision-maker should not have separated them from it. The EAT said it would be contrary to the purpose of the legislation if an employer could put forward an explanation for dismissal which was not the disclosure itself, but something **intimately connected** with it, in order to avoid liability. It is no

defence for the respondent to say it **did not think** disclosures were protected, as the test is an objective one Croydon Health Services Trust-v-Beatt 2017 ICR 1240. In Dobson , decided before Panayiotou and Evans, the necessary sufficient "separation" was found as fact not to be present.

3.27. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether inside or outwith the course of employment, it impacts on the employer/employee relationship. The ACAS Code of Practice talks in terms of "the employment implications" of the conduct. In Gunn-v-British Waterways, the effect on the employer's reputation was held to be relevant.

3.28. If the circumstances of two employees are essentially indistinguishable, it may be unfair to dismiss one but not the other - Post Office-v-Fennell and Hadjioannou-v-Coral Casinos . The latter case contained guidance approved in Paul-v-East Surrey District Health Authority by the Court of Appeal. An argument one employee received a greater sanction than others is relevant where (a) there is evidence employees have been led to believe certain conduct will be overlooked or dealt with by a sanction less than dismissal (b) other evidence shows the purported reason for dismissal is not the genuine principal reason (c) in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal. If an employee had done something similar before and not been disciplined, dismissing him later for a second similar offence may not be the genuine principal reason and/or be unfair.

3.29.If there was no protected disclosure or it was not the principal reason for dismissal s 98(4) says "*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
(a) depends on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.30. An employer does not have to prove "guilt", even on a balance of probability ,only show its genuine belief. The Tribunal must then determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, British Home Stores-v-Burchell - Boys and Girls Welfare Society-v-McDonald. In A-v-B 2003 IRLR 405, Elias J (as he then was) said
"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations .., where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries ***should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges.*** *Employees found to have committed a serious offence .. may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an* ***even-handed approach*** *to the process of investigation would not be reasonable in all the circumstances.*
Where the investigation is defective, it is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. ***If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact it may have caused no adverse prejudice to the employee goes to compensation."***

When His Lordship refers to "*the investigation"* I believe he meant the whole process up to and including the disciplinary hearing.

3.31. In Polkey-v-AE Dayton Lord Bridge of Harwich said :
"*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:*
(b) that he had been guilty of misconduct
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

3.32. Stoker-v-Lancashire County Council held where an employer has written disciplinary procedures they should normally be expected to follow them but Westminster City Council-v-Cabaj 1996 ICR 960 held failure to do so did not necessarily justify a finding of unfairness. The Court said the relevance of failure to follow a disciplinary procedure is whether it denied the employee the opportunity of demonstrating the reason for dismissal was not sufficient. This is a question for the tribunal to decide on the facts.

3.33. Ladbroke Racing-v-Arnott held a rule which states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's rules. The standard of acting reasonably requires an employer to consider **all the facts relevant to the nature and cause of the breach**. But rules are not irrelevant. Employers are entitled to place weight on matters important to them. In Meyer Dunmore International-v-Rodgers, where the rule was against fighting , Phillips P put it thus:
"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that it is plainly adopted, that it is plainly and clearly set out, and great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed.

3.34. British Leyland-v-Swift says an employer deciding sanction can take into account the conduct of the employee during the investigative and disciplinary process. Retarded Children's Aid Society-v-Day held where an employee **appeared not to recognise he had done anything wrong**, and was "*determined to go his own way*", it would be reasonable for an employer to conclude warning him would be futile. However, in this case, I think any employer would be outside the band or reasonableness if it **disregarded** the question of **why** the employee appeared intransigent.

3.35. In all aspects substantive and procedural Iceland Frozen Foods-v-Jones , HSBC-v-Madden and Sainsburys-v-Hitt, hold a Tribunal must not substitute its view the employer's unless that view falls outside the band of reasonable responses. In UCATT-v-Brain, Sir John Donaldson said:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to

me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

3.36. Taylor-v-OCS Group 2006 IRLR 613 held, whether an internal appeal is a re-hearing or a review, the question is whether **the procedure as a whole** was fair. If an early stage was unfair, the Tribunal must examine the later stages "*with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker,* ***the overall process was fair notwithstanding deficiencies at the early stage*** **"** (per Smith L.J.)

3.37. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws-v-London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. Dishonesty towards the employer is the paradigm example of gross misconduct and other behaviour may fall into the category even where there is no intention to make personal gain -Adesokan-v-Sainsbury's Supermarkets. Another example is **wilful** failure to obey lawful and reasonable instructions, which may be in the form "standing orders" made known clearly as essential for employees to follow. In wrongful dismissal the standard of proof is not the "Burchell test", a Tribunal may substitute its view for the employer's, and take into account matters the employer did not know about at the time (Boston Deep Sea Fishing Co-v-Ansell). Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful.

3.38. Section 27(1) of the Act includes

(1) …"wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

3.39. Section 13 includes

(1) *An employer shall not make a deduction from wages of a worker employed by him*

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Agarwal-v-Cardiff University held a tribunal does have jurisdiction to construe a contract to see what was"properly payable" and when. If the contract says a payment is due if, and only if, certain conditions are met, and they are not, no tribunal can find an unlawful deduction on the basis the claimant "deserved" some payment, or **could have** met the conditions if in fact he did not .

3.40. Terms of contracts are express or implied and written or oral. Statute may require terms to be implied into a contract **contrary** to express terms but **normally that is not allowed.** The common reasons for implying terms into a contract are:
(a) To give effect to a Custom and Practice which subsists generally in an industry.

(b) To give “Business Efficacy” to a contract which without the implied term. would be practically unworkable.

(c) The remaining two, which overlap to an extent are (i) to reflect the conduct of the parties during the contract to the extent it shows they both must have understood what happens in practice was what both always intended to happen and (ii) to insert terms which are obviously what the parties intended, but failed to say, sometimes called the “officious by-stander test” . That test means if such a person had asked at the time the contract was made whether the parties understood a certain payment was due, **both** would have answered “But of course!”.

Unless the claim in respect of missing personal property is a breach of contract claim, I cannot deal with it, because I have no jurisdiction in matters of negligence or bailment.

3.41. Compensation for untaken annual leave is provided for in the WTR. Regulation 14 says:
(1) This regulation applies where –
(a) a worker's employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.
(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
The payment due under paragraph (2) is determined by a formula set out in ss (3) The parties agree the leave year commences on 1 September. NHS Leeds-v-Larner established a claimant who did not take paid annual leave because she was sick, was entitled to carry her untaken leave forward to the next leave year without making a prior request to do so. As her employment was terminated in that year, before she could take the carried forward leave, she was entitled to payment on termination for the paid annual leave she had been prevented from taking.

3.42. As this hearing has not been listed to decide remedy, I will confine my statements of law to matters of principle only. The Act was amended in s 123(6A) to provide for the reduction of compensation if ‘*it appears to the tribunal that the protected disclosure was not made in good faith*’ Parliament contemplated a disclosure may be made in the public interest and yet not made “ in good faith” as explained by Wall L.J. in Street-v-Derbyshire Unemployed Workers Centre . If the reason was not the protected disclosure no issue under s 123(6A) arises.

3.43. Section 207A of TULRCA is all about form not substance. If the ACAS Code’s steps are followed there is no uplift, even if I thought the “spirit” of the Code was not followed.

3.44. Sections 122(2) and 123(6) permit reduction of compensation on account of an employee’s conduct. Nelson-v-BBC (No2) held the conduct under s123(6) must be culpable and blameworthy. **In** Arriva London South-v-Graves. EAT 0067/15 HHJ Peter Clark held a tribunal is not precluded from finding contributory fault and reducing compensation where it finds a dismissal is automatically unfair. The sections are directed to the effect of the conduct on the dismissal, not the employer’s reason for dismissal. He added
27…. the Tribunal appears to have concluded that no contribution enquiry was necessary because it had found that dismissal was for the prohibited reasons. That is not correct.

28. Given the Claimant was, guilty of blameworthy conduct, the question is whether that conduct caused or contributed to the dismissal to any extent and, if so, to what extent (applying the slightly different tests under sections 123(6) and 122(2))?

4. Submissions and Conclusions

4.1. In the short case management hearing I conducted to deal with how this case was to be heard during the pandemic, I quoted Rule 2 of the Employment Tribunal Rules of Procedure 2013 ,the overriding objective, and Mummery L.J.'s words in Davies-v-Sandwell Borough Council *The ETs are not obliged* ***to read acres of irrelevant materials nor do they have to listen, day in and day out, to pointless accusations or discursive recollections which do not advance the case****.*

4.2. Ms Cowen appears under direct access to the Bar, so the claimant has prepared his case without a solicitor. Both side's statements were far too long. Employment Judges Buchanan, Arullendran and Morris had done everything possible to convey the price many parties pay for prolix statements and huge bundles is to make it harder for the Tribunal at trial to see the important points. I read all statements thoroughly but not all of the documents. There are good and bad reasons for "shutting down" a witness - the bad one is not wanting to listen to what he has to say , the good one is to stop him losing his good points in a mire of bad ones. That is relevant at the disciplinary and appeal stages in this case. The tendency to include too much information cuts both ways. The respondent's policies and rules are so many and detailed it is no surprise the claimant, like many, would not read them. Its procedures are likewise confusing and contradictory.

4.3. Both Counsel's submissions were so good, I will set out the most important points. The burden lies on the respondent to prove the reason for dismissal but it was agreed between Counsel Ms Millns would go first. She said the principal reason related to conduct. If I conclude it did not **and** the principal reason was the making of protected disclosures, the claimant will succeed in a claim of automatic unfair dismissal (Kuzel). She cited Beatt-v-Croydon Health Services NHS Trust 2017 EWCA Civ 401 thus

First question*: Was the making of a disclosure the reason (or principal reason) for the dismissal? This question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss.*

Second question*: Was the disclosure in question a protected disclosure within the meaning of the ERA 1996? 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 types of wrongdoing or failures listed in section 43B(1)(a)-(f) of the ERA 1996. This question must be determined objectively by the ET.*

If the answer to both questions is yes, the employee will have been unfairly dismissed

I prefer to start by deciding the second question first i.e. what were qualifying disclosures and whether they were "protected".

4.4. The online form, email and attachments to Ofsted (Core bundle 48-55) largely copied to DfE and the MP, tended to show (a) holding children in the squash courts to avoid the inspector meeting them (b) standards of behaviour and pupil numbers had dropped due Ms Widdowson and her SLT's running of the Academy (c) the Trustees had not prevented it. I do not think the claimant can have known of attempts by previous Trustees to challenge Ms Widdowson's approach being met with her raising a "bullying" complaint against them via her union. He spoke out in the public interest

about issues detrimental to secondary education in Berwick, in December 2017 at a public meeting. Ms Widdowson's approach continued and the Trustees appeared to the claimant not to have taken any effective action. Then he found out about the children hidden in squash courts and disclosed to approved external bodies and people. The claimant reasonably believed this was contrary to the legal obligation to provide adequate education, risked pupils' and staff's health and safety and it was in the public interest to say so. It also tended to show deliberate concealment of information**.** These were plainly qualifying and protected disclosures as is now conceded, and not before time.

4.5. As for the posts I find all elements of s 43B are satisfied:
(i) there was a disclosure of information **with** "*sufficient factual content and specificity such as is capable of tending to show "* relevant failures (Kilraine and Simpson). Inter alia, the posts provide information on the role played by Ms Widdowson and the Trustees in the mismanagement of the school leading to what was anticipated to be, and became, a very bad Ofsted report. I accept the claimant had raised concerns with the SLT and Trustees. Ms Goddard said she could appreciate why the claimant felt such issues were a result of mismanagement, especially of pupil behaviour, and readily agreed, when I put it to her, where there is no discipline, pupils cannot learn.

(ii) the information, couched in the language of accusation, tended to show, (a) the respondent had failed to comply with its legal obligation to provide adequate education (b) health and safety of children and staff had been, was being or was likely to be endangered (c) staff being bullied and silenced (d) financial wrongdoing (re pupil premium funding) and (e) poor behaviour management.

(iii) the claimant had a reasonable belief disclosure did show those failings and saying so was in the interest of all the public in the area who had or would have children of secondary school age .

4.6. Those posts were made in a manner prescribed by section 43G because the claimant
(i) believed the information disclosed, and any allegation contained in it, were substantially true,

(ii) did not make the disclosure for personal gain

(iii) had previously disclosed to his employer and recently under 43F to Ofsted (as well as to the DfE his MP and NCC). S 43G(1)(d) only requires him to satisfy one condition under ss (2), and he has.

(iv) it was reasonable for him to make the disclosure **in the posts** for several reasons
(a) the disclosure was made initially to Dr Henderson, known as a local journalist and author, who had written on the topic. Later he discovered the comments would be seen by those in the community with an interest in Berwick's education provision who followed the Berwick Advertiser on Facebook and had taken time to examine the article about Ms Widdowson's departure and Mr Cairns thanking her for her "*hard work and dedication to the school*" (quoting the article). Such people reasonably had the right to know a fuller picture.
(b) the failures were serious
(c)the failure had been ongoing for years and was continuing. The delay in releasing the Ofsted report indicated the school may be taking issue with it. The claimant could have no confidence the publishing of the report would see an end to the problems. At a time he made the posts the risk of the relevant failure continuing or recurring in the future was high **if lessons were not learned from the past.** The lessons were having **any** autocratic headteacher, especially with limited experience in

the education sector. and Trustees who, for whatever reason, could not control her should never be allowed to happen again. Dr Henderson's posts signaled people with influence in the community may not prevent the same problems arising unless the claimant, as a person with "inside knowledge" spoke out to correct her. The first lines of his first post read "***To suggest that the HT is of limited influence in this matter is to completely fail to understand the dynamic of relationships at the school***". His point became clear to me on listening to the evidence of Ms Brothwood who said what the problem was without "targeting" individuals. The Academy is (a) not part of a multi academy trust (b) over 60 miles from NCC headquarters in Morpeth (c) about 30 miles from the state secondary school in Alnwick (d) has a Board of volunteer Trustees who met twice a term (e) was not signed up to any NCC support package . The Headteacher and her chosen SLT were therefore in a position to dictate what happens and although the Trustees have nominal power to hold her to account , no higher body, which knows about education, exists to control or advise them. The upshot of all this is that unless the Headteacher is a man like Mr Quinlan, the model of an Academy in Berwick gives rise to major risks.

(d) No duty of confidentiality was owed by the respondent to any other person as the identity of Ms Widdowson was set out in the article and already in the public domain.

(e) Ofsted had said they would look into the poor state of the Academy (as had the MP and DfE) but, in the case of Ofsted, not *as a result of the previous disclosure"* which occurred on the day of a planned inspection. There was no indication any action was being taken by any of these three. Whether the disclosure was on 1 March to Dr Henderson, or a few days later to anyone looking at the Berwick Advertiser's Facebook page makes no difference.

(f) Such action as Ofsted, the MP or RSC branch of DfE may take would not effect improvement unless his posts gave information in a more public arena of ways in which Ms Widdowson imposed her views on staff, and any other Headteacher might . Ms Cowen submits it was entirely reasonable in all the circumstances for the claimant to answer points made by Dr Henderson publicly to ensure action was, at long last, taken. **I agree** though it may have been just as effective to refer her as "domineering" rather than " *her ability to manipulate , persuade bully and lie*"**.**

4.7. Ms Millns submits the **entirety** of the posts were plainly not a protected disclosure because (a) there was no *disclosure of information* **only** a series of allegations and personal attacks on Ms Widdowson and the Trustees (b) they did not identify which "relevant failure" any information tended to show **or** the grounds for his reasonable belief in the alleged information, **or** that it was in the public interest to give voice to what she calls his "*intense dislike of AW and the governors*". I do not agree as a matter of fact. Ms Millns adds in all the circumstances it was not reasonable for him to he make the disclosure **when** he did, as he had many other '*irons in the fire'* . I prefer Ms Cowen's argument the timing does not prevent the disclosure being protected under s43G, but it will be a matter I take into account for causation and for remedy.

4.8. One person normally targets another either as a punishment for having done something or as a deterrent from doing or repeating something. Very few mind a protected disclosure unless it (a) places pressure upon them to take steps to correct the matters which it highlights, which they are reluctant to take or (b) causes them to have to admit they were wrong earlier (c) may cause them to be the subject of internal or external criticism or scrutiny. Having a motive is important.

4.9. The claimant's case is Mr Wilkes and/or Mr Cairns **wanted** him removed because, even after Ms Widdowson resigned, **he would expose their compliance with, and/or failure to curb, her.** Both had told him privately of their concerns about the way the school was managed and agreed with some of his concerns **but done nothing**. The claimant wrote in response to the letter inviting him to an investigatory interview indicating he had been in contact with MP, NCC, DfE and Ofsted. I agree they had a motive to use the posts as an excuse to dismiss to save their own reputations.

4.10. I agree with Ms Cowen, Ms Widdowson's attempt to agree an exit with the claimant must have been authorised by a Trustee. As Chair Mr Cairns was likely to have been aware of it.

4.11. I accept Mr Cairns and Mr Wilkes were fully aware of the history of the claimant's comments and had been criticised by him for their failures. Mr Cairns raised the posts with Mr Wilkes . Mr Wilkes instigated the disciplinary process, effectively chose the Investigating Officer and the Nominated Officer, chaired the disciplinary hearing and implemented the decision to dismiss including by signing the letter. Ms Dalkin and Mr Griffiths should have been **made** aware of the background. They were not and were discouraged from looking beyond the posts and the policies.

4.12. Ms Cowen says Ms Dalkin and Mr Griffiths were manipulated by Mr Wilkes, Mr Cairns and maybe others who would look bad if their failures to act earlier were made public. Such people had the motive, means and opportunity to sway decision makers but **I must decide if they (a) tried (b) succeeded.** I see why the claimant thinks decisions had already been made and a course of action determined. In his words " *This was more than evident in the process of decision making where the same person who initiated action was subsequently responsible for ratifying the decision to dismiss, Mr Wilkes and that discussions had taken place with the then Chair of Trustees, Mr Cairns 17 July 2017, who had all the way through my grievance process been willing to privately acknowledge the extent of the problems at Berwick Academy, including serious concerns about the actions of the HT in relation to school leadership, control, educational direction, behaviour management and safeguarding but would not admit to this formally.*

4.13. I accept Ms Dalkin did not look into why he made the posts, just the fact that he did and they were in breach of policies. This is the approach rejected in Ladbooke Racing-v-Arnott. Her investigation failed to look for any exculpatory signs as required in A-v-B.

4.14. Mr Griffiths did likewise, guided, for whatever reason, by Ms Scope not to pay much heed to the claimant's attempts to explain why he acted as he did, which inevitably would involve some consideration of background and context. I accept the claimant and his union representative were unwise to go to the disciplinary hearing with "all guns blazing" and not to try to extract from the pile of information they presented as "context documentation" what was truly relevant but expect those considering his case to trawl through it to find what is important . Fortunately for the claimant, he now has Ms Cowen to do that. All that said, had Ms Dalkin, Mr Griffiths or Mr Wilkes been in the least interested in finding out why a long serving previously loyal employee with no disciplinary record made such outspoken posts , the answer was readily apparent.

4.15. The investigation and disciplinary stages were deeply flawed on many grounds: (a) over emphasis on the breaches of policy in themselves as the reason for dismissal and (b) going further than needed to curb the claimant's tendency to repetitive overstatement thus giving the impression to him of cutting his arguments off (c) avoiding looking into relevant context. Mr Wilkes

and Mr Cairns, from whom I have not heard so am reluctant to judge, may have tried to sway Mr Griffiths simply by restricting the scope of his role. Alternatively, it may have been a very poor investigation and disciplinary hearing through incompetence. The claimant asserts even if I find Mr Griffiths was the sole decision-maker and accept, as he said, he "*would never have agreed to being a puppet, it was my decision only"* the respondent has failed to show anything truly separable from the disclosures was the principal reason for dismissal at the first disciplinary stage Following Kuzel and Jhuti there is enough for me to infer, in the absence of an explanation the protected disclosures themselves, possibly those in January but more probably combined with the posts, were the principal reason for the initial dismissal and , in the absence of any convincing evidence it was not, I would draw that inference.

4.16. However, the appeal stage is very different. Ms Millns submissions wisely focussed on it saying the principal reason for the appeal panel upholding the decision to dismiss was not the protected disclosures but conduct associated with it can be distinguished from the making of any disclosure. Ms Millns says, as the final arbiters, Ms Goddard and the appeal panel should be considered the "employer" for these purposes. **I agree**. There is no evidence from which I could infer that panel was swayed in any way. Ms Goddard, in my judgment, would not consciously allow herself to be swayed by anyone , and unlike the earlier stage there is nothing from which I can infer that panel allowed themselves to be restricted in the scope of their enquiry. Ms Goddard said in cross examination the claimant was consistent in the points he made and right in raising them.

4.17. I agree with Ms Millns the reason the claimant's dismissal was upheld was not the information conveyed in the posts but (a) the **manner and timing** of putting his opinions on social media, and(b) **most importantly what he said at the appeal hearing.** I have set out in my findings of fact why his criticisms that the appeal should have been heard by a fully independent panel and the hearing was delayed to hinder a claim to the employment tribunal are without merit.

4.18. I do not accept Ms Cowen's submission the appeal panel showed "little interest in critically exploring the evidence" or outcome was pre-determined. On the contrary the panel were actively looking for a credible explanation for why the claimant "went public" in the manner and at the time he did . Ms Goddard and Ms Robinson joined as Trustees in the second half of 2018. Ms Dixon did not as an HR professional try to shut down the claimant or become "impatient" as Ms Cowen submits but only tried to keep the claimant to the point. I accept the outcome letter reflects Ms Goddard's mistaken view of the law that "*social media is not a protected disclosure and that's not me writing the law, that's just a fact*" but do not accept that shows the panel had a closed mind or made a pre-determined decision. They were not tainted by involvement in any prior decision-making and the comment from Ms Robinson which she insisted was minuted at the top of p153 of the core bundle is entirely correct. Neither she nor Ms Goddard can be criticised for the inaction of a Board of Trustees of which they were not members. **Vitally, none of this panel had any motive to resent the protected disclosure or fear damage to their reputations.**

4.19. The claimant's concerns having built over many months, if not years, and still no-one appearing to be doing anything. Dr Henderson post, which does contain some criticisms of Ms Widdowson , appeared to the claimant to excuse her. **He erupted**. When he realised the posts had gone public he was unconcerned because he had previously spoken at public meetings, in the press, and most recently in Belford on 24 February 2018 to his MP and Leader of NCC. Had not been for the way the respondent dealt with him, he would have recognised erupting was unwise.

4.20. I specifically asked Ms Goddard whether, had the claimant said he would not again make outspoken public posts, while reserving his right to make reports to bodies who could act if new Trustees were not making changes for the better, or being too slow, whether it would have made any difference to her decision. She was clear it would and thought her colleagues would agree. Had he said the school needed also to rid itself of those who had collaborated with Ms Widdowson but he would look forward to working with others to accelerate the recovery and accepted the posts may have been "rash" and counterproductive, the appeal panel would probably not have upheld the dismissal and if they had **it** would have been outside the band of reasonable responses. **He did the opposite.**

4.21. The claimant came across as seeking revenge and the public humiliation of the SLT and Trustees, whoever they might be past or present**.** His lack of recognition the words he used were derogatory and offensive, his belief he should not face punishment, his overall lack of recognition of any wrong doing, his choice not to take the posts down and that he was adamant his posts were not "rash" were all parts of their reason. Most important' was their belief his **past and likely future** comments were detrimental to the school moving forward. At para 35 of her statement Ms Goddard agrees with the sentiments Tom Forrester, the MP's chief of staff expresses. Her oral evidence was **'***By not allowing the situation to play out, you become more part of the problem.'*

4.22. I can illustrate the appeal panel's view simply**.** The type of person needed to **volunteer** to be a Trustee is one with an interest in education and some knowledge to contribute meaningfully and usefully to reversing the failure of the Academy. No such person would put themselves forward for a demanding unpaid role if they thought anything they did or said which did not meet with the approval of the claimant would expose them to criticism and **vilification** on social media.

4.23. The causes of the disastrous decline in the past were (a) an autocratic Headteacher not steeped in teaching (b) a deputy who saw she was wrong but said it was more than his job was worth to challenge her (c) a "business manager" who did whatever she asked (d) Trustees who met only six times a year , knew little about teaching and allowed themselves to be intimidated by a union backed bullying allegation (e) no NCC support or HR package (f) no other staff having the initiative to go to external bodies . Saying it must never happen again would be fine , saying those who had failed to stop it should not be allowed to "*slip away*" and suggesting a metaphorical public flogging is not . Expressing (a) to (f) would be understood by the public the Academy is there to serve, uttering phrases like "*cognitive dissonance*" would not. I reiterate motive is important in deciding why a person behaves in a particular way. The claimant had reason to resent strongly the way Ms Widdowson dealt with his compassionate leave and sick absence after the death of his mother, as well as her refusal to appoint him to leadership roles. He seems not to realise the effect on the panel of revisiting these matters was to give the impression he had a motive to attack which was not associated with his genuine concerns about the failure of the Academy

4.24. The claimant's view people still needed to be pushed to act may justified in hindsight by a letter written by Mr Wilkes and Mr Cairns on 24 March 2018 saying the school could be turned around in 18-24 months. It has not been. The claimant still thinks giving Ofsted and other agencies more time was unnecessary. He does not agree with the reply by Mr Brian Bowden that only taking it back under LEA control would work but demands a root and branch cull of the SLT and Trustees.

4.25. The facts known to the appeal panel, or beliefs held by it, which were the principal reason which caused it to dismiss were **not** the communications to Ofsted , DfE, the MP or NCC **or the posts** (each of which were protected disclosures). They were the claimant's refusal to accept he had done anything wrong and the panel's reasonable concern he would do the same again. That is separable from the posts themselves. The panel did not consider his comments to be unfair or untrue, but reasonably felt he should have waited more than 4 weeks before "sounding off" as he did. Most importantly, his failure to understand the repetition of his views would convey to the readers of them that one Headteacher having caused, and one Board of Trustees having failed to cure, the problems of the school, so might every new Headteacher cause, and every new Board fail to prevent, the same problems , was counter-productive. Without himself believing that only taking it back under LEA control would work, he was, as an insider, providing those who thought so with the ammunition they needed to end the existence of the Academy as a stand alone entity. That related to his conduct. The panel had reasonable grounds after a reasonable appeal hearing for its genuine beliefs, mainly because of the claimant's conduct at the appeal hearing.

4.26. Good as it was, this appeal could not correct the unfair investigation and disciplinary hearing. So restricted were the scope of both **applying A-v-B the initial flawed investigation does make the dismissal unfair . Other matters may go to compensation.**

4.27. This is not just a procedural point it goes to the heart of the concept of a fair overall procedure. At the end of Ms Millns' submissions I considered the panel's view to be harsh but probably fair in light of Retarded Children's Aid Society-v-Day . Ms Cowen's submissions changed my view. She submitted even if the disclosures were not the principal reason, the dismissal was still unfair. That the claimant he had made protected disclosures without being heeded should have prompted the panel to consider further whether dismissal was within the band of reasonable responses Romanowska-v-Aspirations Care Ltd EAT/0015/14. I agree they should have and think they would have but for the claimant not recognising any fault, and being as confrontational at the appeal, as he had been at the earlier hearing. **I ask myself why**. He may have adopted extreme rhetoric because he is natural to him, though that is not the impression I formed of him, and it does not sit comfortably with his many years of patience and restraint . Far more probably because he had such an unfair first hearing, he "over-compensated". In my judgment his stubborn refusal to admit any fault was the consequence of everything which had gone before.

4.28. By the time of the investigation the claimant had a long period of ill health, the capability and grievance process had taken six months, he was receiving no pay. The investigation was poor and it was followed by a hearing which from his perspective was a show trial in which Mr Griffiths was Mr Wilkes puppet . He says "*None of this was considered or taken into account with regard to why I had acted as I did and* ***whether it affected my lack of remorse***". I now understand his point . It is that after a show trial at first instance he was not prepared to trust the integrity of the appeal panel and show any weakness in his conviction he was right and justified in blowing the whistle**.** The damage done at the earlier stages was so great nothing the appeal panel did , or could have done would result in the outcome envisaged in Taylor-v-OCS of a process which was fair overall.

4.29. I therefore find the dismissal was unfair, but not for under s103A, relying on the decision of the appeal panel. There are two elements to unfair dismissal compensation: the basic award, set out in s 122, and the compensatory award explained in s 123 which as far as relevant says:

(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award ***by such proportion as it considers just and equitable*** *having regard to that finding .*

4.30. In Polkey Lord Bridge having said: "*If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant. … In such a case the test of reasonableness under section 98(4) is not satisfied"* then continued *but if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation as Browne-Wilkinson J puts it in Sillifant's case "There is no need for an "all or nothing" decision. If the.. Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".*

4.31. The so called "Polkey reduction" is explained in Software 2000-v-Andrews .Elias P. set out the law applicable at the time which now must be adjusted since the repeal of s98A (2) of the Act but much his Lordship says still applies including "…*the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made...Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal ..should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact an element of speculation is involved is not a reason for refusing to have regard to the evidence.* This is also said by the Court of Appeal in Scope-v-Thornett

4.32. Had it not been for the unfairness and bias shown in the early stages, the claimant would not have adopted at the appeal the attitude that having had one unfair hearing he was about to have another. He would have been more moderate, explained why he had acted as he did and given the reassurance he would not "erupt" again. I am convinced the appeal panel would then have overturned his dismissal and substituted a final warning. There is no chance he would then have been fairly dismissed, so no Polkey reduction is merited.

4.33. However, compensation should be reduced to take into account his contributory conduct both in the terms he used in the posts and his stance during the disciplinary process, especially at the appeal hearing. His conduct prior to dismissal is such that is would be just and equitable to reduce the basic award and it clearly contributed to dismissal The guidelines are that if he is equally to blame for his dismissal , which I think he is, a reduction of 50% is appropriate and I would apply that percentage to both parts of the award.

4.34. The case does not warrant an uplift for breach of the ACAS Code.

4.35. The respondent has not proved on the balance of probabilities the claimant was guilty of gross misconduct because any breach of lawful and reasonable instructions was not an indication of his disloyalty to , or wish to harm, the Academy as such , therefore not a fundamental breach of his contract with it . On that basis, the respondent was in breach of contract in dismissing as they did without notice.

4.36. The conditions about personal property are cryptic and need to be supplemented by an implied term. I have no doubt if an officious bystander had asked "*What will happen if a games teacher leaves his property in a staff changing room and it vanishes* ?" both parties would have said "*But of course the school will recompense him for his loss*". On that basis this part of his breach of contract claim succeeds.

4.37. In his wages claims, I reject the "grievance argument" because I cannot anchor it in any express terms and there is no warrant to imply a term to the effect for which the claimant argues. I reject the "injury at work" argument **not** because mental ill health is not covered by the provisions but because there is no proof it was caused by the respondent's actions as separated from his other problems and it is not attested by a medical practitioner as being so merely by a change in wording of a sick note. The "back to work " argument was not his pleaded or argued case until submissions. Also from December 2017 to March 2018 the claimant says he ought to have been **brought** back into work but was ***left to sit*** at home *awaiting instruction*. Why did he not see his GP, obtain a fit note and just return? There is no reason. After the training course Fiona Hall told him to lodge sick certificates, which he did. He says was an error on the part of Ms Hall. It is no error at all. No employer is under a contractual duty to tell an employee what is in his best financial interests and, by consequence, in its worst. His entire wages claim is predicated not on what the contractual position was but what it might have been had he acted differently.

4.38. His WTR claim is clear. In the leave year commencing 1 September 2017 he took little or no paid leave before his termination at the end of July 2018. He is entitled to about 11/12 ths of his statutory 5.6 weeks leave less anything he received for the autumn 2017 half term. There can be no contracting out . If, which I doubt, he was paid for less than his statutory 5.6 weeks in the leave year commencing 1 September 2016, he may carry it forward as provided for in NHS -v- Larner.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 10 December 2020