**Case No.:** 1600877/2016
1600627/2017
1600279/2018
(Admin Code: V)

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C. Williams

**Respondent:** The Governing Body of Alderman Davies Church in Wales School

**HELD BY:** CVP - Video **ON:** 6-8th January 2021

**BEFORE:** Employment Judge T. Vincent Ryan
Ms L. Bishop
Ms Y. Neves

**REPRESENTATION:**

**Claimant:** Mr J. Sugarman, Counsel
**Respondent:** Ms L. Wynne Morgan, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is:

1. The respondent applied a practice of not providing the name of the child at the centre of a child protection allegation to the claimant.

2. Constructive dismissal:

   2.1. The discriminatory conduct the claimant says materially influenced his decision to resign was its failure to make reasonable adjustments in breach of its statutory duty in accordance with s 20 – s 21 Equality Act 2010 (EqA) being (albeit the claimant was not entitled to judgment in respect of each of these breaches of duty owing to jurisdictional time issues):

      2.1.1. The failure to provide more detailed information to the claimant about the nature of the said child protection allegation after the relevant Professional Abuse Strategy Meeting (PASM);

2.1.2. The failure to provide to the claimant the name of the informant in the said child protection issue after the PASM procedure was concluded;

2.1.3. Withholding from the claimant access to witnesses and documents in relation to the said child protection allegation after conclusion of the investigation that reported its findings to the respondent in November 2015;

2.1.4. Not providing the name of the child at the centre of a child protection allegation to the claimant (paragraph 1 above refers).

2.2. The claimant resigned, at least in part, because of that discriminatory conduct; that is, the claimant's decision to resign was materially influenced by the discriminatory conduct of the respondent listed at sub-paragraphs 2.1.1. – 2.1.4 above.

# REASONS

1. **Introduction**:

1.1. The first Employment Tribunal: The claimant's claims were considered at a tribunal hearing in Swansea over 17 days in September 2018; the panel then met in chambers over three days and reached a unanimous judgment which was sent to the parties on 16th April 2019 ("the ET judgment"); it commences at p.351/455 of the electronic (PDF) hearing bundle (to which all page references in this judgment refer unless otherwise stated). The tribunal comprised Employment Judge Beard and Messrs Fryer and Pearson ("the first ET). The first ET dismissed some claims and adjudged that some were well-founded. The judgment was then appealed in part by the respondent.

1.2. The Employment Appeal Tribunal: The appeal was heard by His Honour Judge Auerbach on 20th January 2020 ("the EAT"), and judgment was sealed on 4th May 2020 ("the EAT judgment"). It commences at p.420/455. Amongst other findings, the EAT substituted a finding that the claimant had been constructively unfairly dismissed for the ET's judgment on that issue. It remitted two issues (see below) to the first ET, but the first ET could not be reconstituted; the Regional Employment Judge for Wales substituted a panel comprising Ms Bishop, Ms Neves and me ("this tribunal") to adjudge the remitted issues.

1.3. The remitted issues agreed by the parties: The parties agreed that the following issues were remitted:

1.3.1. Did the respondent apply a provision, criterion or practice of not disclosing the name of the child at the centre of the child protection allegation? ("the PCP issue").

1.3.2. Was the claimant's constructive dismissal discriminatory? ("the constructive dismissal issues")

1.3.2.1. What was the discriminatory conduct the claimant says materially influenced his decision to resign?

1.3.2.2. Did the claimant resign at least in part, because of that discriminatory conduct i.e. was the claimant's decision to resign materially influenced by that discriminatory conduct?

1.4. Documents available to this tribunal in respect of the remitted issues:

1.4.1. An agreed bundle of documents selected by the parties for this tribunal, including the judgment of the first ET and the EAT judgment;
1.4.2. The claimant's Skeleton Argument;
1.4.3. The claimant's supplemental skeleton argument;
1.4.4. The respondent's skeleton argument;
1.4.5. Witness statements from the first ET hearing;
1.4.6. The claimant's chronology for the remitted hearing.

1.5. Procedure adopted at this hearing as agreed with the parties:

1.5.1. After introductions on the first day and a brief rehearsal of the agreed timetable, when the claimant was represented by Ms J Watson in Mr Sugarman's absence, the remainder of the day was spent by the tribunal completing its reading according to the reading lists provided by both parties (including a request from Ms Watson to read certain witness statements). That reading was completed, the tribunal having had advance receipt of the hearing bundle and respective skeleton arguments so that each member of the panel had done some pre-reading.

1.5.2. The parties made their respective oral submissions, augmenting their written skeleton arguments on the morning of the second day after which the tribunal retired to deliberate for the remainder of the day.

1.5.3. The tribunal concluded its deliberations and reached a judgment during the morning of the third day. That judgment was announced in the afternoon. The respondent repeated its earlier request for the provision of written reasons. The hearing then became a private case management hearing when Case Management Orders were made to assist preparation for a remedy hearing (separate minutes and Orders have been prepared and sent to the parties).

2. **The PCP issue**:

2.1. The first tribunal found the following facts:

2.1.1. The respondent suspended the claimant on 13th April 2015 in relation to an allegation relating to child protection. There was confusion as to the date of the alleged child protection incident; the respondent investigated the events of an incorrect date and disclosed and worked on the basis of a couple of different material dates at different times.

2.1.2. The respondent did not tell the claimant the identity of the child involved in that allegation ("the information"), or the informant, from that date (13th April 2015) until 30th September 2016 despite repeated requests for that information, and non-disclosure of it forming part of a formal grievance raised by the claimant.

2.1.3. The claimant made it known to the respondent throughout the period from 13th April 2015 until 30th September 2019, and the respondent was so aware, that non-disclosure of the information (and details of the informant) was adversely affecting the claimant's health and that he felt a sense of injustice as the lack of information impeded his understanding of the allegation and his preparation to answer any such allegation. (The claimant's evidence to the first ET included evidence to the effect that he could better recollect events, understand his position and prepare his explanations/defence/mitigation if he was made aware of the information and the identity of the informant as it would provide context; absent the information and access to people and documents he became distressed and anxious).

2.1.4. Not knowing the information put the claimant at a substantial disadvantage due to his disability, in comparison with a non-disabled person in such a situation.

2.1.5. It was principally the Head Teacher, Mrs Matchett, who withheld the information from the claimant. She said initially that by not making disclosure she was following an "All Wales" policy and guidance in relation to child protection, later that she was protecting the child from the risk of undue pressure; ultimately Mrs Matchett was just maintaining control of the proceedings against the claimant. Her rationale or justification relied upon for the non-disclosure changed. By the end of November 2015, the initial justification was no longer relevant, because the initial investigation had been completed. Whilst non-disclosure was reasonably justifiable during the first investigation, that is until the end of November 2015, it was unreasonable after that.

2.1.6. It follows that Mrs Matchett either believed or said that she believed that there was a practice to be followed during investigations and she refused disclosure on that basis. She established the practice of not

disclosing the information relying on the above justification which justification changed over time.

2.1.7. When Mrs Matchett's stated justification for not disclosing the information changed her practice did not, until September 2019. She continued the practice of refusing to make full disclosure, withholding the information, until that time. The practice was established, and it continued unreasonably after November 2015, according to the first ET.

2.2. <u>The law in relation to the PCP issue:</u>

2.2.1. Both parties agreed that this tribunal was being asked to consider whether the respondent applied a practice of non-disclosure, as opposed to applying a provision or criterion. Counsel for the respondent agreed the test for the existence of a practice as described in the claimant's submissions and set out below; both counsel approved the authorities cited by each other, although they emphasised different parts of the ratios of those cases.

2.2.2. The Court of Appeal in Carreras v United First Partners Research [2018] EWCA Civ 223 approved the proposition that a tribunal ought not adopt "too restrictive a manner" in approaching the construction of a provision, condition or practice (PCP) but rather a "liberal, rather than an overly technical approach" because of the protective nature of the legislation (as quoted by counsel for the claimant). The reason for this explanation of the approach to be adopted is that the legislation is aimed at removing barriers, substantial disadvantages, facing people living with disabilities when they are at work; as such, a purposive approach is required.

2.2.3. A PCP may include "one off decisions" (Lamb v Business Academy Bexley EAT 0226/15), which counsel for the claimant submits, and this tribunal agrees, is consistent with the EHRC Employment Code, in particular in including "one-off or discretionary decisions" within the ambit of a PCP, albeit not every "one-off" can amount to a PCP. A one-off inadequate investigation (one that is not on-going and where the shortcomings were not evidenced in any other case or circumstance) would not establish that an employer had a practice of failing to investigate maters inadequately.

2.2.4. Respective counsel took opposing views on the authority of Ishola v Transport for London [2020] ICR 1204 with regard to whether a "one-off act" can amount to a PCP. Mr Sugarman considered that it assisted the claimant and Ms Wynne Morgan the contrary. The Court of Appeal rejected the submission that all one-off acts "necessarily qualify as PCPs", while accepting that a broad, non-technical approach to construction was appropriate. It was held that to be a PCP it must be capable of applying to others. Such a comparator can be hypothetical,

someone to whom an alleged PCP could or would be applied. In Ishola it was held that there was no PCP but, on its facts, a one-off decision.

2.2.5. This tribunal considers that for there to be a practice there must be an element of repetition. That is not to say that any such practice must be applied in all similar circumstances, although it must be capable of being applied more than once.

2.2.6. The EAT concluded at paragraph 79 of the EAT judgment:

> "….for there to be a practice, no actual non-disabled comparator need be found. It is sufficient if the putative practice would put the employee bringing the claim at a disadvantage because of their disability, compared with an employee who did not have such a disability, were it applied to them. Further, whilst, to amount to a practice, there must be some element of repetition or persistence about what the employer has done, rather than it being a one-off occurrence, that element of persistence or repetition may be found within the four walls of how the employer is found to have treated the individual complainant"

2.2.7. It follows, and this is the test that the parties agreed and which counsel for the respondent conceded before the EAT and this tribunal, for there to be a practice giving rise to the statutory duty to make reasonable adjustments it must, if applied to a non-disabled person, put that person at a disadvantage (in relation to whom a claimant who is a disabled person is placed at a substantial disadvantage), and there must be an element of persistence or repetition. The persistence or repetition may be in so far as any practice is applied to a claimant alone at any given time ("within the four walls").

2.2.8. Sections 20 – 21 EqA seek to remove barriers facing people who live with disabling conditions. These statutory provisions are practical in nature and deal with particular situations facing employees at work. The wording of the section does not import principles relating to rationale for a PCP, or motive of a respondent in the application of a PCP. There is no requirement that a practice, once adopted, maintains its rationale or justification. What matters is whether a practice places an employee living with a disability at a substantial disadvantage compared to others who do not live with a disability, in relation to a relevant matter. In those circumstances the duty arises to make reasonable adjustments to remove the disadvantage.

2.3. <u>This tribunal's findings in relation to the PCP issue:</u>

2.3.1. Initially, at the time of the claimant's suspension, Mrs Matchett applied what she said she believed was a practice required by an applicable policy, the practice of non-disclosure;

2.3.2. She maintained that practice even when her justification changed, or became obviously, to one of maintaining control. The practice did not change in that the respondent continued to refuse to disclose the information to the claimant. It changed from being a reasonable practice to being unreasonable, but the practice remained the same.

2.3.3. It was repeated throughout the period from suspension until 30th September 2016, being deliberately applied, or the continuing practice was confirmed, every single time that the claimant requested disclosure or complained about non-disclosure. The act of refusal to provide the information was not a one-off act or decision. The act was repeated serially. The decision to so act was made each time as is apparent from the fact that the justification relied upon and found by the first ET changed.

2.3.4. It was a practice that could be applied to others and to non-disabled employees, emanating as was claimed from an All Wales Policy and guidance and effectively giving control of disciplinary and related proceedings to the respondent.

2.3.5. It would have disadvantaged any employee accused of a disciplinary matter who wanted to defend or mitigate during a disciplinary procedure. The first ET found that the claimant was put at a substantial disadvantage by virtue of his disability in comparison to the accepted disadvantage that a colleague who did not live with a disability would have encountered.

2.3.6. We do not think it necessary to find whether the respondent would, or will, apply the practice of non-disclosure to others in the future, as Ms Wynne Morgan seemed to submit. We were not moved by the respondent's submission at this stage of proceedings that the consequences of Ms Matchett's practices were not to be visited on the respondent because of legal advice it received from the local authority solicitor, or that the respondent and its Head Teacher were not as one. Findings were made by the first ET about the management of the school, knowledge and adherence to policies and procedures and the controlling nature of Mrs Matchett. It was also found to be reasonable initially and during the investigation. Based on the facts found by the first ET we see no reason to believe that this was inevitably and always to be a one-off application of the practice exclusively to the claimant. Given the judgment of the first ET, the EAT judgment and the judgment of this tribunal we would sincerely hope that the respondent will adopt better practices in the future; that would not undermine the claimant's claim.

2.3.7. For all the above reasons, applying the law to the facts found we conclude, in respect of the PCP issue:

*Did the respondent apply a provision, criterion or practice of not disclosing the name of the child at the centre of the child protection allegation?* Yes.

3. **The constructive unfair dismissal issues**:

3.1. The first tribunal found the following facts:

3.1.1. The claimant resigned because he had in mind "much" of what he complained about in his claim.

3.1.2. The claimant claimed that he was bullied, harassed and subjected to cumulative mistreatment. This treatment influenced his decision to resign (clarified in the EAT judgment at paragraphs 46, 51 and 67).

3.1.3. Some of the claimant's such claims would have amounted to disability discrimination but they were presented out of time, such as certain failures to make reasonable adjustments, namely:

3.1.3.1. The failure to provide more detailed information to the claimant about the nature of the said child protection allegation after the relevant Professional Abuse Strategy Meeting (PASM);

3.1.3.2. The failure to provide to the claimant the name of the informant in the said child protection issue after the PASM procedure was concluded;

3.1.3.3. Withholding from the claimant access to witnesses and documents in relation to the said child protection allegation after conclusion of the investigation that reported its findings in November 2015;

3.1.4. If non-disclosure of the information (the child's name) had been found to be a practice, then it would have amounted to an act of discrimination (a failure to make reasonable adjustments).

3.1.5. Erroneously the first ET found that there was no dismissal (a finding of constructive unfair dismissal being substituted by the EAT on a correct application of the law to the facts found by the first ET). There was no finding as to any potentially fair reason for dismissal.

3.2. The law in relation to the constructive unfair dismissal issues:

3.2.1. An employee will be treated as having been unfairly dismissed if they resign in circumstances where they are entitled to because of the employer's conduct such as by a repudiatory breach of contract; a breach of the implied term of trust and confidence as alleged here would amount to a repudiatory breach of contract (s.95 Employment Rights Act 1996).

3.2.2. The employee must not delay too long, that is in terms of affirmation of the contract rather than chronology, before resigning.

3.2.3. The breach of contract alleged must be the reason for the resignation. The decision to resign must be materially influenced by the unaffirmed repudiatory breach(es).

3.2.4. Even then an employer may try to establish that the constructive dismissal was fair, although where the breach is of the implied term trust and confidence (especially where denied throughout litigation) that will be a rare exception.

3.2.5. Where an act of discrimination materially influenced the conduct that amounted to a repudiatory breach, and materially affects the employee in resigning, the dismissal is discriminatory (Berriman v Delabole Slate [1985] ICR 546; Nottinghamshire County Council v Meikle [2004] IRLR 703)

3.2.6. The said influence has to be significant and not trivial, that is it must be material (Igen Ltd v Wong [2005] ICR 931; Pnaiser v NHS England & another [2016] IRLR 170).

3.3. <u>This tribunal's findings in relation to the constructive unfair dismissal issues</u>:

3.3.1. The claimant makes many claims of alleged mistreatment including bullying and harassment by Mrs Matchett and mismanagement by the respondent's senior staff and the Respondent body where the same or similar complaints may have been made by other, including non-disabled, colleagues.

3.3.2. In addition to those matters the claimant complains of matters found by the first ET to have been discriminatory but out of time. They are listed in the claimant's skeleton argument for this tribunal (at para 61), allegations of a failure to make reasonable adjustments ("the discriminatory conduct"):

3.3.2.1. The failure to provide more detailed information to the claimant about the nature of the said child protection allegation after the relevant Professional Abuse Strategy Meeting (PASM);

3.3.2.2. The failure to provide to the claimant the name of the informant in the said child protection issue after the PASM procedure was concluded;

3.3.2.3. Withholding from the claimant access to witnesses and documents in relation to the said child protection allegation after conclusion of the investigation that reported its findings in November 2015;

3.3.2.4. Not providing the name of the child at the centre of a child protection allegation to the claimant.

3.3.3. The four matters listed all relate to the child protection allegation made in relation to the claimant and his inability to defend himself because of the practices adopted, preventing him access to information, witnesses and documents. They all relate to the process by which he felt impeded in his defence. The claimant describes this in terms of an injustice contrary to principles of law.

3.3.4. The claimant resigned by letter dated 16th June 2016. On 7th July 2016 the claimant wrote a letter to each of the respondent's governors (p269/455ff). He set out a number of allegations and instances explaining his conclusion that he had lost trust in the respondent and his resignation. Front and foremost are examples of how he felt he was impeded in defending himself in relation to the child protection allegation. He cites the matters referred to paragraph 3.3.2 above, principally that he was not provided with the name of the alleged victim or the informant. We have found the withholding of the child's name to have been a practice (PCP), which in consequence of the earlier judgments amounts to a failure to make reasonable adjustments, an act of discrimination.

3.3.5. This tribunal finds that the sense of injustice caused by the discriminatory conduct, and that conduct, were "much" of what was in C's mind as evidenced by the documents before, and the findings of, the first ET. The repudiatory breach of contract was materially influenced by the discriminatory conduct.

3.3.6. That sense of injustice and that breach of the implied term materially influenced the claimant's decision to resign; they may have been the most significant influences as would appear from a reading of the letter to the governors. On any reading of the documents in this case, the judgment of the first ET, and the EAT judgment, it is clear that the influence of the discriminatory conduct in the breach and the resignation was more than trivial; it was significant and material. The claimant's resignation was a constructive unfair dismissal. The dismissal was discriminatory.

3.3.7. For all the above reasons, applying the law to the facts found we conclude, in respect of the constructive dismissal issues:

3.3.7.1. *What was the discriminatory conduct the claimant says materially influenced his decision to resign?* The matters listed at 3.3.2 above,

*3.3.7.2. Did the claimant resign at least in part, because of that discriminatory conduct i.e. was the claimant's decision to resign materially influenced by that discriminatory conduct?* Yes.

*3.3.7.3. Was the claimant's constructive dismissal discriminatory?* Yes.

Employment Judge T.V. Ryan

Date: 14.01.21

JUDGMENT SENT TO THE PARTIES ON 15 January 2021

FOR THE TRIBUNAL OFFICE