



EMPLOYMENT TRIBUNALS

Claimant: Ms S Fox

Respondent: South Essex Academy Trust

Heard at: East London Hearing Centre

On: 29 January, 1 and 8 February 2021 (by CVP and Hybrid)
and (in chambers) 26 February 2021 (by CVP)

Before: Employment Judge A Ross

Members: Ms M Long
Mr D Ross

Representation

Claimant: In person
Respondent: Mr. H. Menon, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a Hybrid hearing, with the Claimant and the Employment Judge attending the Tribunal and with the other members of the Tribunal and participants in the hearing joining by CVP.

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent breached the duty to make reasonable adjustments imposed by sections 20 – 21 Equality Act 2010 by not providing to the Claimant all the documentary evidence relevant to her grievance, which was before the hearing officer, prior to the grievance hearing on 31 March 2017.
2. The complaints of constructive unfair dismissal and harassment related to disability are dismissed.

REASONS

Introduction

1. This Claim was originally heard over 9 days in September and October 2018. By Judgment and Reasons promulgated on 14 November 2018 (which we shall refer to as “the Reasons”), each complaint failed and the Claim was dismissed.
2. After a successful appeal, on 12 March 2020, the Employment Appeal Tribunal remitted the case to this Tribunal in order for specific matters to be heard and determined.

The Issues

3. The appeal was allowed in respect of the complaint of constructive unfair dismissal and specific complaints of harassment, and breach of the duty imposed by sections 20-21 Equality Act 2010 (“EQA”). The grounds which succeeded are fairly narrow in their factual scope, as set out in the EAT’s conclusions. This meant that most of the findings of fact set out in the Reasons remained.
4. After the EAT hearing, at the direction of the EAT, Counsel for the parties agreed a list of matters which were to be remitted to the Tribunal for determination. These are set out in the undated document, “Agreed issues to remit to the Employment Tribunal”, sent to the EAT on 16 December 2019. However, these were not in the form of a list of issues. The document began:

“The parties are in agreement that the following paragraphs of the ET judgment should be remitted for determination arising from the judgment of the EAT...”

The document consisted of a series of paragraph numbers under the heading “Factual Paragraphs”, against some of which explanation for the inclusion was provided. The Tribunal sought to address these paragraphs in reaching our findings and conclusions at this further merits hearing.

5. At a Preliminary Hearing on 3 June 2020, a list of the issues arising from the EAT Judgment and the “Agreed issues to remit to the Employment Tribunal” document, was largely agreed, subject to one point. Employment Judge Ross determined that dispute (after allowing the parties time to put in written arguments) for reasons given at the time. The list of issues was completed; it is at Appendix A to this Judgment.

The Hearing & Reasonable Adjustments

6. In the Reasons (paragraphs 22-38), the Tribunal set out the Claimant’s mental impairment and its symptoms, and how they had an adverse effect on her daily activities. We decided that the Claimant was a disabled person.
7. At the Preliminary Hearing, the case was re-listed in a pattern designed to accommodate the Claimant’s requests. Also, it was directed that the final hearing would be listed as a face-to-face hearing, to ensure the Claimant would not be disadvantaged in putting her case.

8. On 21 December 2020, further case management orders were made by Employment Judge Ross following correspondence from the parties. In particular, he was concerned about the size of the bundle proposed, given that the matters remitted to the Tribunal were relatively few, yet the bundle proposed would be about as large as the original bundle.

9. In January 2021, the resurgence of the Covid-19 Pandemic meant that all hearings were generally converted to a remote hearing by video or telephone in accordance with the Senior President's direction to Tribunals. Due to lack of staff resources, the Claimant was not informed until 28 January 2021 by the Tribunal's administration that the final hearing had been converted to a remote hearing by CVP. The Claimant applied for an adjournment.

10. The first day of the hearing, 29 January, was a reading day, for which the attendance of the parties had been excused. The Tribunal refused the application for an adjournment, but, having taken into account the Claimant's disability and the interests of justice, converted the final hearing to a Hybrid hearing, at which the Claimant could attend the Tribunal for the hearing, with Employment Judge Ross being present in person, and the Non-Legal Members, Respondent and its witness attending by CVP.

11. On 1 February 2021, the Tribunal provided a Tribunal room, with a large video screen. Prior to the start of the evidence, the Tribunal checked that each party was happy to proceed by way of a Hybrid hearing. Each party confirmed that they were happy to proceed in this way. There was no suggestion at any point of the hearing that either party suffered any disadvantage or unfairness by this arrangement. The fact that evidence and submissions were given in this way did not affect their quality; everyone present in the hearing could see everyone else, and all parties had a hard copy bundle and/or electronic bundle to work from.

12. The evidence was completed at about 1630 on 1 February 2021. The Tribunal adjourned. The parties exchanged their submissions on about 4 February 2021.

13. Oral submissions were heard on 8 February 2021. The Tribunal deliberated on their conclusions for the remainder of 8 February 2021 and on 26 February 2021.

14. The Tribunal specifically considered whether the hearing had been fair or whether something more could have been done by way of reasonable adjustment to assist the Claimant. The Tribunal found that the hearing had been as fair as it could have been. The Claimant was assisted by the Tribunal in identifying those parts of the Claimant's witness statement which were of direct relevance to the issues, which was not a straightforward exercise due to the length of the statement; the Employment Judge assisted with certain questions put by the Claimant in cross-examination; and the Employment Tribunal attempted to ensure that her case was put to the Respondent's witness in cross-examination, or clarified whilst the Claimant was giving evidence.

The Evidence

15. There was a bundle of documents spanning two lever arch files. This was not agreed. At the request of the Claimant, the Respondent had included several documents which it did not agree were relevant.

16. The Claimant had, however, filed a reading list and included a chronology at the end of her witness statement. These identified the documents that she relied upon in particular.

17. The Tribunal took into account the documents that were put into evidence and considered the extent to which they were relevant.

18. The Tribunal pre-read the following witness statements:

- 1) Supplemental witness statement of the Claimant (signed and dated before us);
- 2) Second witness statement of Gemma Calahane.

19. The Claimant's witness statement was relatively long (65 pages) and discursive, given the limited scope of the issues remitted for determination. We found that several parts of the Claimant's witness statement and a number of documents referred to by the Claimant were simply not relevant to the issues for determination. The Claimant gave evidence in respect of issues already determined and issues not remitted to the Tribunal by the EAT. It is not necessary to list these matters. It should suffice to indicate that the Tribunal focussed on the evidence relevant to the issues for determination.

20. It is important that this set of reasons is read in the light of the issues that were agreed between the parties (by Counsel after the EAT Judgment was handed down) and defined at the Preliminary Hearing on 3 June 2020. There was no application at this hearing for the list of issues at Appendix A to be amended or corrected in any way.

Findings of Fact

21. The Tribunal set out its findings of fact in respect of the Claimant's grievance at paragraph 181 - 245 in the Reasons.

22. We understood the EAT's reasoning to mean that those findings remained except for the paragraphs referred to in the "Agreed Issues to Remit to the ET document", to the extent that they were in issue as indicated in that document.

23. None of the following findings should be read as deviating from our findings of fact in the Reasons which were untouched by the EAT.

24. The following findings may involve such repetition of our original findings of fact as necessary to provide the context for our additional findings of fact reached from the evidence that we read and heard at this hearing to determine the issues remitted.

Was the grievance investigation documentation sent to the Claimant on 1 March 2017 missing documents?

25. By email on 26 January 2017, Ms Calahane contacted the Head Teacher, and her deputy, Gemma Thurston. Ms Calahane assisted them to write statements in response to the grievance, by noting information on a copy of the Claimant's grievance. She referred to documents by number in a Human Resources ("HR") case file shared by them.

26. On 30 January 2017, Ms Stalham and Ms Thurston sent statements for the grievance, which were added to the HR case file. These statements are at p.257-258 and 1773-1775 (Catherine Stalham's first statement).

27. On 30 January 2017, the Claimant had an appointment with Occupational Health ("OH"), and a report was prepared. The findings of fact within the Reasons (paragraph 184) stated the conclusions of the Occupational Health report. The report included the following: p.932:

"The below may also assist with supporting to attend meetings and alleviating distress:

- *Allowing the person to be accompanied by a suitable person*
- *Allowing comfort breaks to enable them to regain composure, absorb/process content etc.*
- *Considering holding the meeting in a neutral location*
- *Providing the individual with information that forms the context of the meeting beforehand to enable them to prepare themselves in advance."*

28. The OH report was added to the HR case file.

29. On 2 February, Mrs Wiggins, as grievance investigator, collected the pack of documents put together by Ms Calahane in the HR case file and sent to the Westwood Academy.

30. On 5 February, Ms Wiggs contacted Ms Calahane to state that she was reviewing the pack of documents and asked if Ms. Grande-Imbernon would be providing a statement. Ms Calahane arranged for Ms. Grande-Imbernon to send her statement directly to Ms Wiggs.

31. On 8 February 2017, Ms Wiggs emailed an invitation to the Claimant to a grievance hearing on 7 February 2017.

32. On 13 February, the Claimant replied, and asked that documents should be provided in advance to enable her to prepare for the hearing. The Tribunal made relevant findings of fact about this reply at paragraph 187 of the Reasons.

33. By an email dated 14 February 2017, Ms Wiggs responded and refused the adjustments sought. Our findings of fact about this response are set out at paragraphs 189 – 193 of our Reasons. As the Tribunal pointed out to Mr. Menon during submissions, we had made findings of fact about the Grievance Procedure, including at Paragraph 191 Reasons. In particular, Ms. Wiggs quoted the Grievance Procedure in her response to the Claimant (see p.286). Mr. Menon, having not represented the Respondent at the first final hearing, had not heard Ms. Wiggs' oral evidence at that hearing (which we had accepted) which was that she had sought to apply the Grievance Procedure. This evidence was corroborated by her email response of 14 February 2017 (at p.286).

34. Despite the arguments of Mr. Menon, the Tribunal concluded that it had made a finding of fact that there was a PCP, in the form of the Grievance Procedure, which included the provision of not providing the grievance evidence documentation to an employee prior to a grievance hearing; this finding is set out in Paragraph 405 of the

Reasons. The EAT had not quashed this finding of fact; indeed, its Judgment was partly based on the PCP set out at paragraph 405 of the Reasons.

35. On 16 February 2017, the Claimant responded, stating that she would not be attending the hearing and explaining why. This email contained a subject access request under the Data Protection Act 1998.

36. On 21 February, Ms Calahane emailed the Claimant as explained in paragraph 198 of the Reasons. It is necessary to set out the contents of that email in more detail than in our original Reasons:

“Apologies for not getting back to you sooner, I was away over the half term. As I am managing the Sickness Absence Management procedure my involvement with the progression in your grievance case is limited. This segregation of duty is deliberate in order to safeguard against any unfair bias and to ensure the integrity of both the Sickness Absence Management Procedure and the Grievance Procedure whilst in progress.

However, the importance of progressing your grievance in order to diminish any further stress is a primary concern as I appreciate the intrinsic link to your health and well-being as identified in the Occupational Health report and recent communications. I have therefore made the following recommendations:

Guidance Procedure:

- The Trust will facilitate a companion of your choice to accompany you to the grievance meeting. A non official companion can only support and comfort as this role does not facilitate any form of official representation on your behalf.*
- An investigation pack will be compiled and sent to you under separate cover seven working days prior to an agreed grievance meeting date.*
- An alternative venue will be arranged.*
- Appropriate breaks are ensured.*

The query on accrued holiday entitlement over the period of your sickness absence 2014/2015 has now been investigated. The calculation following this review has been independently verified by ECC HR and I regret to inform you that you have no entitlement outstanding. As this review formed part of your grievance, I will forward to Mrs Wiggs all correspondence pertaining to this review for inclusion in the grievance meeting pack to be sent to you.

Mrs Wiggs an investigating officer, will continue to be your contact for progressing your grievance.”

37. This extract demonstrates that Ms Calahane was well aware of her role as managing the Sickness Absence Management Procedure and that she understood that her involvement with progressing the grievance was limited, for good reasons.

38. The email tended to show that Ms Calahane saw her role as merely forwarding information to Ms Wiggs and that Ms Wiggs remained the Claimant's "contact" for progressing the grievance. The inference from the email is that Ms Calahane thought that Ms Wiggs would forward on the investigation documents to the Claimant. The Tribunal found that from the 21 February to the end of March 2017, there was a failure to define who had the duty or duties to send the Claimant the evidence produced for the grievance hearing, with Ms Wiggs relying upon Ms Calahane to do so. This confusion over who was to carry out this role either arose from or was exacerbated by the pressure on Ms Calahane arising from the following matters:

- 38.1. Winter Garden School had become part of the Respondent Trust. Ms Calahane was responsible for centralisation of many HR paper files from 1 September 2016 into one place. HR files from the Claimant's school and the other schools were all in the process of being centralised in a different building in Westwood Academy. Ms. Calahane was trying to manage this process, although she worked in an office on a different site. Ms. Calahane described a process of trying to integrate a series of filing cabinets.
- 38.2. The files from Winter Garden School were in a poor state.
- 38.3. Ms. Calahane was responsible for HR matters for four Academies and there was only one part-time employee to assist her. Ms. Calahane accepted in evidence that they were overwhelmed at the time. They had difficulty locating documents; for example, they had never been provided with the documents from the Claimant's Pay Appeal bundle despite requesting these.
- 38.4. Ms. Calahane was on annual leave over February half-term 2017.
- 38.5. From around the beginning of March 2017, a bereavement of a close family member of Ms. Calahane.

39. In addition, certain information was passed directly to Ms Wiggs, and Ms Calahane was not aware of it, evidenced by the email of 22 February 2017, at p.304, which showed Ms Calahane had passed some information directly to Ms. Wiggs without Ms Calahane being copied in. In her oral evidence, Ms Calahane could not recall being sent the questions sent to Ms Stalham by Ms Wiggs, nor the responses of Ms Stalham, although it was apparent that she was sent the email correspondence between them which indicated some documents were to be passed to Ms. Wiggs: see email of 26 February 2017 at 23.26, p.312. It was clear from Ms Calahane's evidence that there was no system to track the evidence produced for the grievance by Ms Wigg's investigation nor to track whether it had been provided to the Claimant; and Ms. Calahane had never dealt with such a grievance before, which went back over such a time.

40. In short, the emails of 21 and 22 February and the oral evidence of Ms Calahane at both this hearing and the hearing in 2018 showed that the failure to send the Claimant all the relevant documents that Ms. Wiggs intended the Claimant to have before the grievance hearing was not due to the deliberate acts or omissions of Ms Calahane and it was unrelated to the Claimant's disability. The failures which we describe below were the result of administrative mistakes or oversight, not manipulation or victimisation as the Claimant alleged.

41. On 22 February 2017, Ms Wiggs invited the Claimant to the re-arranged grievance meeting on 7 March 2017: see letter p.305-307, Reasons at paragraphs 199-200. The invitation included:

“Any relevant documentation relating to the investigation I have carried out (including statements from witnesses etc) will be provided to you in due course at the earliest opportunity under separate cover.”

42. This email was copied to HR and forwarded to Ms Calahane. The Tribunal found that the inference from the documentary and oral evidence was that Ms Wiggs genuinely believed Ms Calahane would forward to the Claimant the documents produced by the grievance investigation, not that Ms. Wiggs would need to do so.

43. On or about 22 February 2017, Ms Wiggs received further information, which we found was a copy of the Pay Appeal minutes at p.175-177, not the Pay Appeal bundle. We found that she did not receive the Pay Appeal bundle of documents; from the Pay Appeal, only the minutes are listed in paragraph 30 of Ms. Wigg’s statement. There was no real evidence before us, as opposed to the Claimant’s presumption, that Ms. Wiggs had received the whole of the Pay Appeal bundle.

44. Having received this further information, Ms Wiggs emailed Ms Stalham, thanked her for providing documents for the grievance, and requested evidence in response to a list of questions about the grievance and offering to collect documentary evidence: see email 22 February, 10.31pm (p.304).

45. From the email correspondence (p312-313), Ms Wiggs and Ms Stalham agreed that Ms Wiggs would collect documents from Ms Wiggs at the Trust day on 1 March 2017. Ms Wiggs stated that the documents were *“only signed pmrs and the criteria SF was given”*, which tended to show that the Pay Appeal bundle was not held by Ms Stalham nor provided to Ms Wiggs.

46. On 24 February 2017, Ms Stalham replied to Ms Wiggs with her answers to the questions asked by Ms Wiggs as part of her investigation. This response has been referred to at this hearing as Ms Stalham’s second statement for the grievance.

47. On 26 February 2017, Ms Wiggs forwarded her investigation questions and the answers from Ms Stalham to Ms Calahane for inclusion in the papers to be sent to the Claimant. Although Ms Wiggs forwarded to Ms Calahane the email chain between herself and Ms Stalham, which included the answers and which arranged collection of the further documents (see p.312), this email did not contain any attached documents nor was Ms Calahane expressly requested to forward those further documents onto the Claimant.

48. On 1 March 2017, the Claimant received the documents in the HR case file collated by Ms Calahane and Ms Stalham, which had been provided to Ms Wiggs on 2 February 2017. It was common ground that these are shown on the index at p.316.

49. The documents obtained by Ms Wiggs after 2 February 2017, which were relevant to the grievance, had not been added to the case file by Ms Calahane nor sent to the Claimant by Ms Wiggs (who, by inference from her emails over the relevant period, expected Ms Calahane to do this task). The was solely due to the pressure on her from the factors set out above in paragraph 38.

50. In addition, on 1 March 2017, Ms Wiggs met Ms Stalham and collected the supporting documents referred to in her questions sent on 22 February 2017. These were:

- 50.1. the Performance Management Review (“PMR”) Planning and Review statement for the 2015 – 2016 academic year, dated 26 February 2016 (p.186-188) which was unsigned;
- 50.2. the Training and Support annex for 2015-2016 (p.189);
- 50.3. the PMR Planning and Review statement for the 2016 – 2017 academic year (p.201-205), also unsigned;
- 50.4. the criteria from STPCD for UPS (p.412-413).

51. The grievance hearing set for 7 March 2017 was postponed at the request of the Claimant due to her ill-health. We have explained in the Reasons (paragraphs 209-210) that the Claimant was referred to OH again and invited to a third grievance meeting to take place on 31 March 2017.

52. The invitation letter of 21 March 2017 from Ms Wiggs included the statement that any further documentation relating to her investigation would be forwarded to the Claimant: see p.368-369.

53. The Subject Access Request was not complied with on the due date, 28 March 2017.

54. By her email dated 28 March 2017 (p372-378), the Claimant stated that:

- 54.1. she was prepared to attend the grievance meeting;
- 54.2. but whether she was fit enough would largely depend on the availability of documentation prepared for that hearing;
- 54.3. the non-compliance with the SAR had an affect on her disability and the ability of a grievance hearing to resolve her complaints;
- 54.4. as an investigation into the grievance should be fair and objective, she requested that documents listed at 6a-6l should be added to the grievance bundle;
- 54.5. the documents listed at 5 and 6a-6l would be “*very helpful to prevent the grievance hearing appearing subjective and biased*” and should be provided ahead of the grievance.

55. This is a long email. From the tone of it, the Tribunal found that most recipients would understand it to state that all documents in the SAR were relevant to her grievance and should be provided ahead of the grievance meeting.

56. On 29 March 2017, Ms Calahane received the further report from OH (p.946-947). The report stated that the Claimant was fit to attend the grievance hearing and: “... I understand she is in the process of making you aware of the information she requires prior to this going ahead.”

57. On 29 March 2017, Ms Wiggs sent two emails in response to the Claimant’s email request for documents. The first of these stated to the Claimant that Ms Wiggs would “take into account all the evidence the Claimant had referred to and signposted”. The second email to Ms Stalham copied and pasted part of the requests in paragraphs 6A-6L of Claimant’s email of 28 March 2017 (but missed off the sections 6G-L which, by inference, was a mistake by Ms Wiggs because she had no reason to miss them off).

58. Contrary to the suggestion in the Claimant’s evidence, the OH opinion does not state that the provision of all the investigation evidence collected by the Respondent is a necessary adjustment to enable the Claimant to attend the grievance meeting. However, having considered all the evidence, the Tribunal found that the Claimant required the relevant documents for her grievance which Ms Wiggs had received, but which the Claimant did not have, for the reasons that she gave in her email of 30 March 2017 at 14.18 (at p.414-415). The Claimant pointed out that the adjustment requested, to have the documents in advance, was to minimise the effect of her condition:

“...my anxiety isn’t just a word to show I have ordinary concerns and need some re-assurance, my condition is enormously debilitating. For instance, it makes me question concerns to the point of panic....When I ask for documentation to be prepared before the hearing it isn’t to be difficult or because I’d prefer to see it in advance, it is because it is necessary, essential, in order that I can answer questions that I have to minimise the effect of my condition as far as possible in order to attend the hearing as someone without my condition would be able.”

59. On the same date, Ms Wiggs forwarded this email to Ms Calahane. Ms Wiggs explained in this email that she had arranged to collect the evidence requested from Ms Stalham, who had worked on it the day before. It is clear from this email (at p414) that Ms. Wiggs intended to share Ms Stalham’s response with the Claimant at the meeting and that due to the short timeframe she would not be able to respond in writing, after HR approval, ahead of the meeting; and it is also clear that she intended to give the Claimant time at the meeting to consider the response from Ms Stalham.

Additional grievance investigation documents obtained by Ms Wiggs

60. On 30 March 2017, Ms Wiggs collected documents from Ms Stalham, consisting of a third statement from Ms Stalham with Appendices 1-5. These are at p.383-411. The appendices consisted of:

- 60.1. Cover diaries;
- 60.2. Meeting notes (pp402-405)
- 60.3. Absence report email and screen shot of epayroll absence reporting for the period required by the Claimant;
- 60.4. Return to work meeting letter of 11 November 2015;

60.5. Accrued leave policy.

61. Ms Stalham also gave evidence in the third statement about the Return to Work Meeting on 19 October 2015 and events after the Claimant returned to work, including that Ms Stalham discussed UPS at the interim PMR meeting on 26 February 2016 and not before; Ms Stalham stated that the criteria was given at this meeting and the responsibility was on the Claimant to provide the evidence. The third statement of Ms. Stalham also included evidence that an independent calculation was carried out to ensure that no accrued holiday entitlement was outstanding, and that this was validated by Essex County Council HR.

62. On 31 March 2017, the grievance meeting went ahead. The Tribunal found that the Claimant did not attend because of her impairment and its adverse effects combined with the failure to provide her with the relevant grievance documents which Ms Wiggs had received. We found that the non-disclosure of that documentation caused the Claimant to be unable to manage her symptoms, which meant that she was unable to attend the grievance hearing. Contrary to our finding at paragraph 219 of the Reasons, having heard and read the relevant evidence over this hearing, it is apparent that documents relevant to her grievance were readily available, because these documents were already in the possession of Ms. Wiggs before the grievance hearing commenced, and they were not provided to the Claimant prior to 31 March 2017.

The Grievance Outcome

63. One matter remitted related to paragraph 237 of the Reasons, in respect of whether there were flaws in the grievance outcome; another matter remitted was the question of whether there was anyone who lacked impartiality, who was controlling the documents held by the Respondent (paragraph 238 Reasons).

64. As we have explained above, the Tribunal found that there was no person employed by the Respondent who was deliberately withholding documents from the Claimant nor preventing their disclosure. Although the Claimant did not receive all the relevant documentation held by Ms Wiggs, this was the result of error and oversight by Ms Calahane. Ms. Wiggs clearly did not know this at the time of the grievance hearing; she believed that the Claimant had received all the documentation that she had received: see third paragraph of the grievance outcome letter, p421.

65. In so far as it is alleged that the grievance outcome did not reflect documentation obtained throughout the grievance investigation, the Tribunal did not agree. Ms. Wiggs had reached the conclusions that she had for the reasons set out in the decision letter. We find that this was proved for at least the following reasons:

651. The letter gave detailed reasons for the decision not to uphold the grievance, save in respect of Point 3 of the grievance (concerning holiday pay); but this holiday pay ground did not turn on any documentation provided to Ms Wiggs, who understood that the question of holiday pay had been investigated and confirmed by Ms Calahane separately.

- 65.2. In respect of Point 1 (lack of adequate support), Ms Stalham provided detailed evidence of the extensive support provided to the Claimant: see her second statement for the grievance, p.309-310, and her third statement, p.383-384 and its appendices. Ms Wiggs provided a reasoned explanation for her decision.
- 65.3. In respect of Point 2 (failure to support the application for UPS1 progress), Ms Stalham provided evidence to Ms Wiggs to explain why the Claimant had not progressed to UPS1. In essence, this evidence was that the Claimant had not applied for or provided evidence to Ms Stalham to show that she should progress through UPS1, despite opportunities to do so. Moreover, Ms Wiggs found that this was evidenced by the PMR documentation. For example, the Planning and Review statement at p.187, February 2016, states that the Claimant has yet to apply to go through the threshold. Ms Wiggs provided a reasoned explanation for her decision.
- 65.4. At the hearing in 2018, we found Ms Stalham to be a good witness and we accepted the evidence that she provided about the degree of support, as set out at various paragraphs of the Reasons including from paragraph 113. Furthermore, we found that the Claimant had failed to apply to pass through the UPS1 threshold nor provide evidence that the Claimant's work meant that she passed the threshold: for example, see paragraphs 80, 126 – 133 of the Reasons. None of these findings of fact were challenged on appeal. We found that even if the Claimant had the documentation provided by Ms Stalham to Ms. Wiggs before the grievance hearing, and even if the Claimant had attended the grievance hearing, the outcome would have been the same on Points 1 and 2 of the grievance.
- 65.5. In respect of Point 4 (the behaviour of Ms. Grande-Imbernon at the Sickness Absence Review Meeting on 12 January 2017), Ms Wiggs had a witness statement from Ms. Grande-Imbernon corroborated by a statement from Ms Calahane. These did not support the Claimant's ground of grievance. Ms Wiggs explained her reasons. At the first merits hearing, we heard evidence from Ms. Grande-Imbernon and Ms Calahane and accepted their evidence; we explained in the Reasons that the Claimant was very distressed at this meeting on 12 January 2017 which we were sure affected her recollection of events: see paragraphs 168-179 of the Reasons. The Tribunal found at this further hearing that, even if the Claimant had had all the relevant documents that were before Ms Wiggs, and even if she had attended, the outcome on Point 4 would have been the same.
66. In addition, the Claimant had received the Pay Appeal outcome letter. The Pay Appeal meeting minutes did not add anything more than minor in substance to the Pay Appeal outcome letter; and, in any event, it was obvious from the grievance outcome decision that Ms. Wiggs had taken into account the Pay Appeal minutes because she referred to the good and outstanding lesson observations referred to in those minutes.
67. For the avoidance of doubt, the index at p.366 of the Bundle was a work in progress index periodically updated by Ms Calahane and her assistant, which was not sent to the Claimant. This is why it differs slightly from the index at p.316 which the

Claimant received: number 62 is not relevant and number 63 is the second statement of Ms Stalham (p309-311) which it is common ground was not disclosed to the Claimant ahead of the grievance hearing. We found that the index at p.366 was updated some time after the bundle was sent to the Claimant on 1 March 2017 and that nothing turned on this.

The Grievance Appeal

68. By an email of 13 April 2017, the Claimant appealed the grievance outcome. The Tribunal made relevant findings of fact about the grievance appeal at paragraphs 246 to 257 of the Reasons, which were left untouched by the EAT Judgment.

When did the Claimant receive the remainder of the grievance investigation documents?

69. On 27 April 2017, the Claimant was provided with three further bundles of documents, because Ms. Calahane had found additional documents sought. These did not include all documents relevant to the grievance but did include a HR/finance document relevant to accrued leave on a phased return (Point 3 of the grievance).

70. On 2 May, the Claimant was invited to her grievance appeal hearing on 9 May 2017.

71. On 3 May, the Claimant received a further pack of documents. This pack included the grievance investigation questions sent to Ms. Stalham on 22 February 2017, but not the answers and not other documents before Ms. Wiggs at the grievance hearing.

72. After her resignation, during the disclosure process in these proceedings (in November 2017 and at other times thereafter), the Claimant received the other documents relevant to the grievance. We accepted the Claimant's evidence about when she received those documents.

Summary: did the Claimant receive, in advance of the grievance hearing, all the documents that Ms Wiggs had at that hearing?

73. At paragraphs 20 – 54 of its Judgment, the EAT drew attention to important relevant findings of fact made by this Tribunal in the Reasons. Paragraph 35 of the EAT's reasons is as follows:

“In paragraph 223 the ET made an important finding that CW had dealt with the grievance on the basis of the evidence that she had before her including that listed at paragraph 30 of her statement. CW's own evidence from her witness statement was that she had been, “forced to conduct the hearing on the strength of the evidence supplied” see paragraph 30 of her witness statement. She listed that evidence in the same paragraph of her witness statement as follows:

(1) Statement from individuals named in the grievance;

(2) Evidence of support from Winter Gardens Academy (cover diaries and weekly meetings);

(3) Stress risk assessment by Gemma Thurston dated 27 September 2016;

- (4) *Signed performance management documentation form 2015 to 2016 and 2016 to 2017;*
- (5) *Lesson observations;*
- (6) *Pay appeal minutes dated 11 June 2015;*
- (7) *Sickness absence management review minutes dated 12 January 2017;*
- (8) *An OH report dated 30 January 2017.”*

74. From the evidence, and by comparing paragraphs 3 and 30 of Ms Wiggs’s witness statement, we found that the Claimant did not have all of the documents listed in paragraph 30 of the witness statement of Ms Wiggs prior to the grievance hearing.

75. The Tribunal found that from the list of documents at paragraph 30 of Ms Wiggs’s witness statement, by the date of the grievance hearing, the Claimant had received:

- 75.1. The first statement of Ms. Stalham;
- 75.2. The statement of Ms. Thurston;
- 75.3. Some weekly meeting notes and lesson observations (provided 1 March 2017, item 54 at p.316);
- 75.4. The target-setting part of the PMR, of 26 February 2016 and October 2016 (provided 1 March 2017, item 30)
- 75.5. Stress risk assessment dated 27 September 2016 at p.879-881 (which the Claimant admitted that she had received on that date)
- 75.6. Sickness absence management review minutes (which she admitted she had received prior to the grievance);
- 75.7. OH report, 30 January 2017, p.392 (1 March 2017 index item 55);
- 75.8. The Pay Appeal outcome letter dated 11 June 2015 (1 March 2017 index item 14) p.178-179.

76. With the Claimant’s assistance in her evidence and submissions, the Tribunal found that she did not have the following relevant documents prior to the grievance hearing:

- 76.1. The witness statement of Ms. Grande-Imbernon;
- 76.2. The second statement of Ms. Stalham at p.309-311 (consisting of the answers to the questions posed by Ms. Wiggs);
- 76.3. The documents provided by Ms. Stalham after her answers were sent by email, including some meeting notes that Ms. Stalham relied upon as showing support provided to the Claimant.

- 76.4. The PMR from July 2016 (unsigned part), at p.186-189, containing the pay recommendation of Ms. Stalham (including "*Sarah is on the top of the scale and therefore is not relevant for progression unless she applies for threshold*");
- 76.5. The third statement of Ms. Stalham, with attachments, at p.383 to p.411, including cover diaries and some other meeting notes.
- 76.6. The Pay Appeal minutes dated 11 July 2015.

77. On balance, we found Ms Wiggs was unlikely to have had the pages at "Appendix 6", p.412-413. We considered the bundle index produced for this hearing was probably incorrect. The document at "Appendix 6" was not listed by Ms Stalham as disclosed (see appendices to the third statement of Ms Stalham for the grievance at p.384) and the words "Appendix 6" appear to be in different handwriting from that of Ms Stalham. We decided that these pages formed part of some other bundle which had become mixed up with the appendices provided by Ms Stalham to Ms Wiggs.

78. In addition, we found that Ms Stalham did not send Ms Wiggs further lesson observations (other than those mentioned in the index to the bundle sent to the Claimant on 1 March 2017, at p.316); and that the reference in the grievance outcome letter (at p.424) to lesson observations was likely to have been taken from the Pay Appeal minutes (eg. p.176 at para 1.22). This was for several reasons:

- 78.1. lesson observations are not listed in the appendices to the third statement of Ms Stalham provided to Ms Wiggs (see p.384);
- 78.2. lesson observations do not appear to have been sent with the second statement of Ms Stalham: see p.312 ("*its only signed PMRs and the criteria SF was given*");
- 78.3. in cross-examination, the Claimant admitted that she did not know exactly what documents Ms Wiggs had in her possession at the grievance.

79. In conclusion, the Tribunal found that the documents pack sent to the Claimant on 1 March 2017 was missing relevant documentation for the grievance, and that Ms Wiggs conducted the grievance hearing when the Claimant had not been provided with all the relevant documents. Furthermore, the grievance outcome letter did refer to documentation that had not been provided to the Claimant.

Did the Claimant resign because of the alleged breaches or last straw event?

80. The Claimant's evidence at paragraph 203 of her Supplemental Witness Statement was that she had resigned because of the Tribunal's failure to make a reasonable adjustment to the grievance process, the inference being that the failure was the provision of all documents relevant to the grievance in advance of the meeting.

81. The Tribunal did not accept that evidence, finding that although the Claimant now perceived this to be the case, her perception about past events was adversely affected again because of her over-sensitivity about the actions of the Respondent towards her. We found that the Claimant did not resign because of the breaches alleged at paragraph

2(a) to (d) of the List of Issues nor because of the breach of the duty to make reasonable adjustments. We reached this finding for the following reasons.

82. In her letter of resignation, dated 15 May 2016 (p1813ff), the Claimant did not state that the alleged failure to make the adjustment of providing all documents relevant to the grievance in advance of the meeting, nor any of the matters at Issues 2(a) to (d), as a reason for her resignation. The Tribunal found the letter to be inconsistent with paragraph 203 of her Supplemental Witness Statement.

83. We asked ourselves whether the alleged failure to make a reasonable adjustment, or the alleged breaches at issue 2, whether taken individually or together, formed one reason for her resignation, rather than the sole reason. However, weighing the contents of the letter of resignation and all the other findings of fact with the Claimant's evidence at this hearing, we concluded that those matters, taken separately or together, did not constitute one cause of the resignation. In particular:

83.1. The resignation letter (p.1813-1816) identified specific matters which the Claimant stated were a fundamental breakdown in the employment relationship or breach of the implied term of trust and confidence. These were:

- a) The Head Teacher had made an untrue statement (end of p.1814);
- b) The invitation to the grievance appeal hearing, in circumstances in which her solicitor had asked for the appeal to be delayed (middle p.1815);
- c) The notice to attend an informal meeting in respect of her sickness absence (p.1815, bottom);
- d) The scheduling of meetings was done in order to manipulate the situation, to try and find ways to cover the employer where there were failings and errors that it did not want to address. The Claimant could not cope with being bullied again, as had taken place in the January 2017 meeting (p.1816).

The non-disclosure of documents and the hearing of the grievance in the absence of the Claimant were not identified in the resignation letter as amounting to a breach or breaches of the implied term of trust and confidence. We did not accept the Claimant's explanation for this, nor her complaint that Mr. Menon had been unfairly selective in identifying these items.

83.2. In cross-examination, the Claimant stated that her view having received the document pack on 1 March 2017, which included the first statement of the Head Teacher, was that Ms Stalham was lying in her first statement and controlling the documentation disclosed to the Claimant, being selective to make the Claimant look bad.

83.3. Although the letter does complain that the Claimant was not sent all the documents relevant to the grievance in advance of the grievance hearing, this was a minor or subsidiary part of the resignation letter. For example,

there was far more complaint about the alleged flaws in the grievance decision and the alleged failure to postpone the grievance appeal hearing: see for example, bottom p.1814-1815.

- 83.4. Moreover, in her cross-examination, when this was pointed out and the Claimant was asked if the complaint of failure to provide documents relevant to the grievance had been added to the complaint of constructive unfair dismissal in order to take advantage of the decision of the EAT, she said no and stated that at the time that she wrote the resignation letter, she still had not had disclosure of documents relevant to the grievance, and that being precise was difficult if she had not been given all the documents. Furthermore, in cross-examination, she stated: *“My point is: I did not know what Ms. Wiggs had.”* The inference we drew from this and other passages of her evidence was that it was only later, after she had resigned and received fuller disclosure, that she realised certain documents existed which were relevant to her grievance and appeal. Therefore, the Tribunal found that this evidence tended to show that the failure to disclose all documents relevant to her grievance hearing before the resignation could not have had any real effect on her decision to resign.
- 83.5. Furthermore, in her oral evidence, the Claimant stated that she resigned when she did because she had panicked because at that point, she could not imagine circumstances where she could return to the school. When asked if this was because she believed the Respondent was trying to *“stitch her up”*, she replied that she did not know and was thinking of different possibilities because of her anxiety. We found that that panic was not caused by the alleged breach of duty to make reasonable adjustments nor the matters alleged at issues 2(a) to (d).
- 83.6. In response to a question from the Tribunal, the Claimant agreed that she would have resigned even without the failure to provide all documents relevant to her grievance, although she could not state when that would have been.

The Law

Breach of the duty to make reasonable adjustments

84. The relevant statutory framework was set out at paragraphs 318 - 320 of the Reasons.

85. Although Mr. Menon relied upon Carphone Warehouse v Martin UKEAT/0371/21 to argue that one-off administrative incompetence was unlikely to be a PCP, this was not relevant in this case because:

- 85.1. There was a PCP set out in the Grievance Procedure; and
- 85.2. The Tribunal had already concluded what the terms of the PCP were (see Paragraph 405 of the Reasons); and
- 85.3. The EAT had not interfered with this conclusion.

86. Applying the guidance provided in Environment Agency v Rowan [2008] IRLR 20 at paragraph 27 and having already defined the PCP, this Employment Tribunal must identify:

- 86.1. the identity of non-disabled comparators (where appropriate); and
- 86.2. the nature and extent of the substantial disadvantage suffered by the Claimant.

87. Substantial disadvantage is such disadvantage as is more than minor or trivial.

The operation of the reverse burden of proof provisions within s.136 EQA

88. In respect of the application of the burden of proof provisions in complaints of breach of the duty to make reasonable adjustments, we considered the guidance in Project Management Institute v Latif [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54. In short, the Claimant must prove the facts necessary to prove discrimination. If the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Harassment

89. Section 26 EQA is set out in the Reasons, with an outline of the relevant law and the relevant paragraphs of the EHRC Code.

90. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EQA 2010, as explained in Igen v Wong [2005] EWCA Civ. 142 and Madarassy v Nomura [2007] ICR 867. The Respondent relied on the guidance in Madarassy.

91. The guidance given by Mummery LJ in Madarassy was expressly endorsed by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870 where Lord Hope added at paragraph 31:

“The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden.”

92. Lord Hope emphasised the point that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where a tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

Constructive unfair dismissal

93. An outline of the law in respect of constructive unfair dismissal is set out in the Reasons, commencing at paragraph 349. There was no challenge to those directions of law by either party. We directed ourselves in law in the same way in reaching the conclusions set out below.

Affirmation

94. In Kaur v Leeds Teaching Hospitals NHS Trust [2019] I.C.R. 1, Underhill LJ at para 63 held:

“exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract.”

95. In Gordon v J&D Pierce Contracts Limited UKEATS/0010/20 (12 January 2021, unreported), Lord Summer confronted conflicting Court of Appeal authority and applied the guidance of Underhill LJ in Kaur. Lord Summer held:

“[15] The proposition articulated here is that it does not follow that an employee should lose his right to challenge the continuing existence of a contract because he has exercised a right of appeal under that contract (in Kaur the right to appeal a disciplinary decision). Underhill, LJ does not excavate the foundations of this proposition. But it is evident that he is drawing on the contractual concepts that underpin this area of law. Where a contract is repudiated by a party, the other party to the contract may accept the repudiation. If he does so the contract is rescinded and is brought to an end. The innocent party may choose to accept the repudiatory act or he may choose to affirm the contract. It is evident that Underhill, LJ does not consider reliance on one contractual right necessarily signifies an acceptance that all other contractual rights are intact. I respectfully agree. A contract is a bundle of obligations. Some are mutually interdependent. Some serve distinct and severable purposes. In Kaur the employee had written to her employer to say that she both wished to participate in the disciplinary process and maintain her right to treat the contract as at and end. As I understand it Underhill, LJ's comment is designed to indicate that irrespective of the letter, he did not regard her participation in the disciplinary process as “an unequivocal affirmation of the contract”.

“[23] It appears to me that where an employee intimates that he considers the contract has come to an end, he is not to be taken to affirm that the contract has come to an end for all purposes. In particular I do not consider that the parties can be presumed to intend that a clause designed to procure the resolution of differences should be regarded as being evacuated because one party asserts that the implied obligation of trust and confidence has been breached.

[24] Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure. While a breach of contract of contract may have the effect of releasing the parties from their obligation to perform those obligations that are counterparts of one another (having regard to the principle of mutuality of obligation) it should not have the effect of dissolving all obligations (McBryde The Law of Contract in Scotland para. 20-49 and 20-53).”

Submissions

96. The parties each filed written submissions ahead of the hearing listed on 8 February 2021. The Tribunal read all the submissions. Again, the fact that we do not refer to any particular submission is not evidence that it was not taken into account. The

Tribunal took into account each and every submission, but it was not necessary to refer to all of them in this set of reasons, the purpose of which was to explain how we reached our conclusions on the issues agreed between the parties.

97. Mr. Menon's central focus was on the scope of the issues remitted by the EAT. He pointed out the nature of the issues remitted, which was for the Tribunal to consider the effect of the non-disclosure of documents prior to the grievance hearing. In particular, he argued that this was limited to consideration of such non-disclosure as there was in relation to documents 1 – 8 of those listed in paragraph 30 of the witness statement of Ms. Wiggs and the effect of this on the complaints of unfair constructive dismissal, harassment and breach of the duty to make reasonable adjustments.

Conclusions

98. Applying the law and the findings of fact set out above to the List of Issues at Appendix A, the Tribunal reached the following conclusions. In doing so, we considered the EAT's Judgment as well as the list of factual paragraphs which Counsel at the EAT agreed were to be remitted.

Issue 2: Breach of the implied term of trust and confidence?

99. The Respondent accepted in submissions that the factual basis of the issues at 2(a) to (d) were made out. In reaching our conclusions, we directed ourselves to the test in Malik.

Non-disclosure of documents: 2(a), 2(c), 2(d)

100. The documentation sent to the Claimant on 1 March 2017 was missing relevant grievance documentation.

101. Furthermore, the grievance hearing took place despite the fact that the Respondent had not provided the Claimant with all the relevant grievance documents.

102. The Tribunal concluded that Ms. Calahane was not biased against the Claimant in her treatment of disclosure of documents. As our findings of fact demonstrate, there was no deliberate withholding of documents. Ms. Calahane did fail to forward certain documents to the Claimant, but this was due to a genuine misunderstanding over who would be responsible for sending documents and administrative oversight, not because of any conscious or unconscious bias against the Claimant.

103. We concluded that the conduct of Ms. Calahane was not calculated to destroy or seriously damage the relationship of trust and confidence between herself and the Respondent.

104. However, the Tribunal went on to consider whether, objectively viewed, the conduct of Ms. Calahane was likely to destroy or seriously damage the relationship of trust and confidence, even if there was no intent to do so.

105. We concluded that, objectively viewed, the Respondent's conduct was not likely to have that effect because:

- 105.1. The Claimant took a very negative view of the failure to disclose all relevant documents. However, the Respondent had never refused to disclose these documents; indeed, Ms Calahane had informed the Claimant that she would be given all the relevant grievance documentation in advance of the hearing and the Claimant had been given a substantial bundle of documents on 1 March 2017, evidenced by the index at p.316.
- 105.2. Ms Wiggs, in her email to the Claimant on 14 February 2017 (p.286), had made clear to the Claimant that she would adjourn the grievance hearing and carry out further investigations if necessary.
- 105.3. It was clear that Ms Wiggs intended to go through with the Claimant at the grievance hearing the later documents sent by Ms Stalham with her third statement: see the email dated 30 March 2017, p.414, from Ms Wiggs. Had such an examination of the documents provided by Ms Stalham on 30 March 2017 taken place, it was likely that Ms Wiggs would have been made aware that the Claimant did not have the other relevant documents that she had in her possession and then ensured that the Claimant was provided with them.
- 105.4. The grievance outcome letter demonstrated that Ms Wiggs believed that the Claimant had been given all the other grievance documentation that she had received; the inference from that letter is that the Respondent's intention was that the Claimant should be given all the relevant grievance documents, not that any should be withheld or concealed; if the situation were otherwise, Ms Wiggs would not have stated (in the third paragraph of the grievance outcome letter p.422): "*All of the paperwork I have considered I understand was provided to you as part of your subject access request.*"
- 105.5. The Claimant's perception of the Respondent explained in the Reasons (see, for example, paragraph 20) led to her being disproportionately sensitive to the failure to disclose all the documents that she considered relevant in advance of the grievance, in circumstances in which she did not know precisely what documents Ms Wiggs had in her possession at the date of the grievance, as she admitted in evidence.

106. For the avoidance of doubt, the annotations made by Ms. Calahane on the Claimant's grievance had no relevance to the issue of non-disclosure; in the experience of the Tribunal, many HR officers may have made such annotations to assist witnesses.

Proceeding with the grievance hearing in the absence of the Claimant: 2(b)

107. To the extent that the decision to proceed in her absence undermined the Claimant's trust and confidence in the Respondent, the Respondent had not acted in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence, and/or there was some reasonable for the conduct, because:

- 107.1. The Claimant had been provided with a large number of documents in the HR case file on 1 March 2017, evidenced by the index at p316 which lists 61 documents or types of document.

- 107.2. Ms Wiggs and Ms Calahane had stated that the Respondent would provide the Claimant with the relevant documentation. Due to oversight, neither Ms Wiggs nor Ms Calahane realised that the Claimant had not been provided with documents generated by Ms. Wiggs's investigation.
- 107.3. Contrary to the Claimant's allegation, Ms Wiggs did not refuse to provide the documents requested very shortly before the grievance meeting on 31 March 2017. The inference from Ms Wiggs's email of 30 March was that she intended that the Claimant would have time at the grievance hearing to consider all the additional documents, had she attended and discussed the documentary evidence that Ms Wiggs had.
- 107.4. The Respondent continued to provide documents sought by the Claimant even after the grievance.

Issue 3: Did the Claimant resign because of the alleged breaches and/or the last straw event(s) alleged in issue 2?

108. The Claimant did not resign because of the alleged breaches or last straw event or events alleged in issue 2. We repeat the findings of fact at paragraphs 84 above.

Issue 4: Did the Claimant affirm the contract of employment after the alleged breach or breaches of the implied term of trust and confidence and/or the last straw event by not resigning until 15 May 2017?

109. Although unnecessary, in view of our conclusions above, the Tribunal decided to provide our conclusion on the issue of affirmation.

110. The Claimant made a grievance appeal after receiving the grievance outcome letter. In so doing, the Claimant was taking a step under the contract of employment by exercising the right to appeal.

111. The Respondent submitted that the Claimant had affirmed the contract of employment by deciding to appeal against the grievance decision and/or by the delay between her receipt of the grievance outcome on 6 April 2017 and her resignation on 15 May 2017.

112. The Tribunal directed itself to the guidance provided in Kaur and Gordon. We concluded as follows:

- 112.1. Although the guidance in Kaur was not an absolute rule, there was no reason for that guidance not to apply in this case.
- 112.2. The fact that the Claimant was not challenging a disciplinary sanction, but a grievance outcome including her pay, was not a reason not to apply the guidance provided. In the experience of this Tribunal, a complaint about being paid the incorrect amount may well be raised by way of grievance; and it would be contrary to the guidance in Gordon and Kaur if an employee was to lose the right to resign because she complained about pay, made a grievance, and sought to appeal the decision, when the

procedure that she relied upon was intended to resolve complaints about his employment.

- 112.3. Moreover, on the facts in this case, the argument advanced by Mr. Menon was very unattractive; on the Respondent's own case, the Claimant had not been provided with all the relevant documents for the grievance hearing before that hearing and, as a result, the Claimant had been unable to attend the hearing.
- 112.4. The fact that the Claimant had resigned before the grievance appeal hearing was a fact which weighed against a finding that she had affirmed the contract of employment. It was good evidence that she had not affirmed the contract of employment.
- 112.5. The period of the delay was relatively short. Although the Claimant would have received a further monthly payment of her wages, this was only equivocal evidence of affirmation. The Claimant had appealed the grievance and was, until she resigned, awaiting the grievance appeal hearing.

Issues 5 -7: Harassment

113. The factual basis of the allegations at issue 5 was admitted. The Respondent also admitted issue 6, that the conduct was "unwanted".

114. The Tribunal considered whether the unwanted conduct was related to disability.

115. The Respondent's case was that the unwanted conduct was not related to disability. Mr. Menon relied upon Unite v Nailard [2018] IRLR 730 and argued that the necessary motivation required for a claim under section 26 EQA was absent in this case.

116. We concluded that the unwanted conduct was not related to the Claimant's disability for the following reasons:

- 116.1. The acts of compiling the bundle and omitting to forward certain documents were the result of oversight and mistake by Ms Calahane in the course of her duties. These acts were not related to the Claimant's disability in any way. The administrative oversights that Ms Calahane was responsible for were understandable given the context in which they occurred, which we have explained above. They arose in consequence of a lack of clearly defined roles for the provision of documents to the Claimant for the grievance and for the other reasons set out in our findings of fact particularly at paragraph 38.
- 116.2. All the primary facts led to a positive finding of fact that the reason for the non-disclosure of documents were mistakes, which were in no way related to disability.
- 116.3. In answers to the Tribunal's questions, the Claimant stated that Ms Calahane was responsible for the acts of harassment alleged. When asked why, she stated that, from very early on, she was close to the

Head Teacher and was given Ms Stalham's version of events which had clouded her view. The Claimant alleged that the bundle of documents served on her on 1 March 2017 was created not to be spiteful but because Ms Calahane was motivated by unconscious bias, and it was created with a closed mind. This explanation did not suggest that the non-disclosure of documents was related to her disability.

Issues 8-9

117. If we are wrong in our conclusion to issue 7, and the unwanted conduct related to disability and that it had the proscribed effect set out in section 26(1)(b) EQA, the Tribunal concluded that it was not reasonable for it to have this effect, for the following reasons:

- 117.1. Ms Calahane and Ms Wiggs had assured the Claimant that she would be sent all relevant documents in advance of the grievance. It was not reasonable for the failure to do so to have the proscribed effect, in circumstances in which a bundle of documents had already been provided and such assurances had been made, without at least attending the grievance to see what documents Ms Wiggs had in her possession.
- 117.2. If it was perceived that the unwanted conduct had been done with unconscious bias, it was not reasonable for such unconscious acts to have the proscribed effect.
- 117.3. At the time of the grievance, the Claimant did not know exactly what documents existed and did not know what documents Ms Wiggs had, which the Claimant did not have. In those circumstances, it is difficult to view it as reasonable that it had this effect on the Claimant.

Issues 10 – 13: Breach of the duty to make reasonable adjustments?

118. The Respondent applied the PCP of not providing the grievance evidence documentation prior to a grievance hearing: see paragraph 405 of the Reasons:

119. Mr. Menon submitted that all of the documents referred to by Ms Wiggs at paragraph 30 of her witness statement were:

- 119.1. relevant to the grievance;
- 119.2. considered by Ms Wiggs in reaching her grievance decision; and
- 119.3. should have been disclosed to the Claimant in advance of the grievance hearing.

120. We directed ourselves to the issues identified in Rowan and reached the following conclusions.

The identity of non-disabled comparators

121. Non-disabled comparators would be employees who were not placed at a substantial disadvantage by not being given documentary evidence relevant to the grievance in advance of the grievance hearing. The comparators would be employees who did not have a more than minor or trivial difficulty in absorbing the contents of documents when they read them, who did not have a reduced ability to communicate, and who did not suffer anxiety and/or who did not have to take steps to manage any anxiety.

Did the PCP place the Claimant at a substantial disadvantage? What was the nature and extent of the substantial disadvantage suffered by the Claimant?

122. The Tribunal concluded that the nature and extent of the substantial disadvantage suffered by the Claimant as a result of the PCP was apparent from the findings of fact in the Reasons: we made findings about the symptoms and substantial effect of the Claimant's mental impairment at paragraphs 22-38 of the Reasons, having accepted the evidence in the Claimant's Impact Statement.

123. The Claimant's mental impairment in essence consisted of stress-related anxiety and depression. At paragraph 26 of the Reasons, we listed the symptoms of her mental impairment. The evidence was that the Claimant had a reduced ability to communicate for the reasons we explained. A good example of this is set out in the Claimant's evidence at paragraph 3f of her Impact Statement, at pp77-79 of the original hearing bundle (the contents of which were not challenged in evidence at the first merits hearing).

124. The non-disclosure to the Claimant of relevant grievance documentation, which had been received by Ms Wiggs, led to the Claimant being unable to minimise her symptoms and meant that she was unable to attend the grievance hearing. We have explained this conclusion in more detail in the findings of fact above.

125. Accordingly, the Tribunal concluded that the PCP placed the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

126. The Respondent admitted (at paragraph 7.5 Submissions) that, if the Tribunal reached the above conclusions, it would have been a reasonable adjustment for the Respondent to give to the Claimant all the documents relevant to the grievance held by Ms. Wiggs. This concession must be correct; after all, the Respondent had agreed to provide this documentation in advance of the grievance precisely because the Claimant requested this adjustment because she had the mental impairment that she described to them, the relevant effects of which were explained in her email of 28 March 2017.

Summary

127. The complaint of breach of the duty to make reasonable adjustments is upheld for the reasons set out above.

128. The complaints of harassment and constructive unfair dismissal are dismissed.

129. The case will now be listed for a remedy hearing, unless the parties can agree remedy without the assistance of the Tribunal, in which case they should inform the Employment Tribunal as soon as possible.

Employment Judge A Ross
Date: 22 March 2021

APPENDIX

LIST OF ISSUES DEFINED AT PRELIMINARY HEARING ON 3 JUNE 2020

Constructive unfair dismissal

1. The Claimant alleges that the Respondent's conduct breached the implied term of trust and confidence, entitling her to resign and claim that her resignation was a dismissal in law.
2. Did the Respondent, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them and the Claimant when:
 - (a) The investigation documentation sent to the Claimant on 1 March 2017 was missing documentation;
 - (b) The Respondent conducting the grievance hearing in the Claimant's absence;
 - (c) The Respondent conducting the grievance hearing without having provided the Claimant with all the grievance documents;
 - (d) The grievance outcome sent to the Claimant did not reflect the documentation obtained throughout the grievance investigation and/or cited documentation that had not been provided to the Claimant.
3. Did the Claimant resign because of the aforementioned alleged breaches and/or the last straw event?
4. Did the Claimant affirm the contract after any alleged breach by not resigning until 15 May 2017?

Harassment

5. Did the Respondent engage in conduct as follows:
 - a) Not providing particular and/or all grievance documentation prior to the grievance meetings and/or at all during the Claimant's employment;
 - b) The Respondent conducting the grievance hearing in the Claimant's absence;
 - c) The Respondent conducting the grievance hearing without having provided to the Claimant all documents.
6. If so, was that conduct unwanted by the Claimant?
7. If so, did that conduct relate to the protected characteristic of disability?
8. If so, did the conduct have the purpose or the effect of violating the Claimant's dignity or did it create an environment that was intimidating, hostile, degrading, humiliating or offensive for the Claimant in the circumstances?
9. If the conduct had the above effect, taking into account the Claimant's perception and the other circumstances of the case, was it reasonable for the conduct to have that effect?

Duty to make reasonable adjustments

10. The Respondent applied a PCP of not providing the grievance evidence documentation to an employee prior to a grievance meeting (see finding paragraph 405 Liability Judgment).
11. Did this PCP place the Claimant at a substantial disadvantage when compared to persons who are not disabled? The Claimant's case is that she was placed at the following comparative disadvantage by the PCP: due to her stress and anxiety, she needed to prepare for meetings prior to attending them and therefore needed all relevant documents in advance, because she could not prepare at short notice.

12. The Respondent had the requisite knowledge at the material times.
13. If so, would the following have been a reasonable adjustment for the Respondent to take to prevent the PCP causing the comparative substantial disadvantage: sending the Claimant all relevant information prior to grievance meetings (whether the meetings were only planned or in fact took place).