EMPLOYMENT TRIBUNALS

Claimant	Mrs Helen Thorowgood
Represented by	Mr Joseph Bryan (counsel)
Respondent	Shrewsbury House School Trust Limited
Represented by	Mr Matthew Curtis (counsel)
At:	London South Employment Tribunal (by Cloud Video Platform)
On:	4 – 9 January; 8 February 2021 (in chambers)
Before:	Employment Judge Cheetham QC Ms H Bharadia Mr J Turley

JUDGMENT

1. The claims for detriments and dismissal as a result of making protected disclosures, constructive unfair dismissal and wrongful dismissal are dismissed.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V – video. A face to face hearing was not held because it was not practicable and the issues could be resolved without the need for such a hearing. The documents to which the Tribunal was referred were those contained in the Tribunal case file, the agreed hearing bundle and additional documents, counsels' written submissions.*

2. This is a claim brought by the Claimant, Mrs Helen Thorowgood, against Shrewsbury House School Trust Limited ("the School") on 15 May 2019.

3. The Tribunal heard evidence from the Claimant and her husband Mr Alan Thorowgood and, for the Respondent, Mrs Jan Hand (the Claimant's line

manager), Mr Kevin Doble (Headmaster), Mr Darren Johns (Chair of Governors) and Mrs Nikki Annable (HR Director – independent of the School).

4. There was an agreed bundle, which in electronic form, ran to 1,334 pages. This included an agreed list of issues, as follows:

Constructive unfair dismissal:

1. Did R (or, on its behalf, its employees or agents) fail to deal with C's grievance in a fair and proper manner (which is the most recent act or omission which C says caused her resignation)?
2. If so, did C affirm the contract since that act?
3. If not, did R (or. on its behalf, its employees or agents), without reasonable or proper cause, thereby act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence?
4. If not, was the failure to deal with G's grievance in a fair and proper manner nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? The acts and omissions on which C relies are stated in paras. 28.1-28.9 of the Particulars of Claim.
5. If not, was or were any of the acts or omissions stated in paras. 28.1-28.9 of the Particulars of Claim, whether viewed separately or cumulatively, a (repudiatory) breach of that term?
6. Did C resign in response (or partly in response) to that breach?
7. If so, C was constructively dismissed.

Wrongful dismissal

8. Was C constructively dismissed?
9. If C was constructively dismissed, R accepts that it owes C 12 weeks' notice pay.

Protected disclosure(s)

10. Did C act as stated in paras. 12-14 of the Particulars of Claim?
11. If so, whether those acts are viewed separately or cumulatively, did C thereby disclose information?
12. If so, did the information so disclosed tend, in C's reasonable belief, to show:

> *12.1. that R had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject, namely to cooperate with and provide all relevant material to an ISI inspection; and/or*
> *12.2. that information had been, was being or was likely to be deliberately concealed which tended to show that the health or safety of Child X had been endangered or that a criminal offence had been committed (as alleged against Dr Mansour) or that the School had failed, was failing or was likely to fail to comply with its above-mentioned legal obligation?*

13. If so, was the disclosure, in C's reasonable belief, made in the public interest?

Automatic' unfair dismissal

14. If C was constructively dismissed and made a protected disclosure (or protected disclosures), was the reason (or, if more than one, the principal reason) for R's conduct that caused C to resign (excluding the matters stated at paras. 28.1-28.2 of the Particulars of Claim) that she had made the protected disclosure(s)?
15. If so, the dismissal was unfair.

'Ordinary' unfair dismissal
16. If not, has R shown what was the reason (or, if more than one, the principal reason) for its conduct that caused C to resign? R contends that the reason for that conduct was an alleged irretrievable breakdown in the relationship between the parties.
17. If so, has R shown that that reason is a potentially fair reason within the meaning of s.98(1)(b), ERA 1996?
18. If so, was the dismissal fair or unfair within the meaning of s. 98(4), ERA 1996?

Unlawful detriment
19. Did R subject C to a detriment (or detriments} by acting as alleged in paras. 28.4-28.9 of the Particulars of Claim?
20. Did Mr Doble, Mrs Hand, Mrs Brumwell, Mrs Shine and Mr Johns subject C to a detriment (or detriments) by:
> *20.1. acting as alleged in paras. 28.4-28.9 of the Particulars of Claim; and/or*
> *20.2. causing C to be constructively dismissed?*

21. If so, was each named individual acting at all material times in the course of their employment and/or as an agent of R with its authority and are their acts to be treated as also done by R?
22. In any case, was C subject to any such detriment on the ground that she had made a protected disclosure (or protected disclosures)?

5. At the start of the hearing, the Tribunal heard an application to adduce an additional statement by Mrs Hand on behalf of the Respondent. Having heard submissions on the issue, it decided not to allow it. Witness statements were exchanged on 31 July and this statement – at 8 single-spaced pages – was a lengthy addition, which essentially provided a response to the Claimant's evidence. It contained matters that could be put to the Claimant in cross-examination. If appropriate, Mrs Hand could be asked a limited number of questions in chief.

6. There was also a discussion about whether the hearing should deal with liability first and, as appropriate, go on to deal with remedies. Mr Bryant urged the Tribunal to hear all of the evidence on liability and remedies together, but the Tribunal decided to stick to its plan of considering liability first.

7. There were also issues of disclosure and there was some ongoing disclosure during this 5-day hearing, but it is not necessary to set that out further.

Findings of fact

8. The Claimant was employed by the Respondent School from 1 September 2005 until her resignation on 22 January 2019. She started work as the School librarian, but in September 2007 took on the additional role as matron. However, the Claimant stated in her evidence that she was not a healthcare professional

9. Year 3 boys at the School would attend a short medical with a GP. The GP was Dr Mansour, who was also at some point a School governor. Following a query from a parent in 2012, it was agreed that the Claimant would attend medicals with Year 3 boys, if their parents were not available to attend with them. A letter was written explaining this, which was written by Mrs Hand, although it appeared to come from the Claimant.

10. The Claimant said that she was responsible for organising the boys for the medical, for measuring their height and weight and for generally assisting the GP. The boys would queue up outside the room where the GP carried out the examinations, although they were also weighed outside the room. The Claimant's attention was not on the medical examination itself; it was more that she was another adult in the room (at least for most of the time). Although the Claimant said she would also attend to emails on her laptop during this time, the Tribunal had some difficulty in seeing how there was time for that as well, especially as she told the Tribunal in evidence that the various tasks associated with the medicals kept her "very busy".

11. The Claimant's tasks during the medical raise the issue of training. No specific training was provided and no one at the School was aware of any need for dedicated "chaperone" training. In any event, this was not chaperoning in the way envisaged by the GMC and NHS guidelines, to which the Tribunal was taken. The GMC guidance refers to the chaperone usually being a health professional who, amongst other things, must be familiar with the procedures involved and "be able to see what the doctor is doing". The NHS guidance refers to a "formal chaperone" as being "a clinical health professional".

12. The Claimant is not a healthcare professional and she was not there to monitor what the GP was doing, so this guidance would not apply to her. When carrying out her role as an assistant at the medicals in the absence of a parent, she was not acting as what is understood (at least by the GMC and the NHS) by the word "chaperone". Even with a parent present, someone else was presumably doing the weighing and measuring and getting the boys to line up and the Claimant was doing little beyond that and being generally present in parental absence.

13. The Respondent said that, in any event, it had provided adequate safeguarding training, although it was the Claimant's case that she had not received this when it was given in 2010. She even said that the training records, certificates and emails confirming attendance were fabricated.

These various documents showed the Claimant as listed to attend, certified as having attended and acknowledging emails about the training.

14. The Tribunal found it wholly unlikely that this was a complete fabrication. Despite Mr Bryan's forensic deconstruction of the documentary evidence, the overwhelming likelihood is that the Claimant attended and now – more than 10 years later – has just forgotten that she did so. There is no obvious reason why she would not have been included and the evidence strongly suggests that she was. Therefore the Tribunal found the School did provide adequate safeguarding training, which the Claimant attended.

15. In May 2016, Child X wrote to Mr Doble, raising concerns about the medical appointments for Year 3 boys, which was referenced in an email to teaching staff on 18 May 2016. Then in May 2017, the Local Authority Designated Officer ("LADO") contacted the School to speak with the Chair of Governors about a safeguarding issue, which it transpired also concerned Child X. The police then indicated that they were investigating and, as part of that investigation, wished to interview the Claimant and Mr Doble and these interviews were to take place at a police station and would be "under caution".

16. In anticipation of the interview, there was a discussion on 14 June 2017 between the School and the Claimant about payment of legal fees. Mrs Hand's evidence was that she agreed that the School would meet the legal fees of the Claimant (and Mr Doble) for their preparation and attendance at the police interview. The Claimant's evidence was that there was no cap on fees or any condition and her understanding was that the School was agreeing to pay her legal fees, whatever they might be and over whatever period.

17. Following this meeting, the School arranged for the Claimant to have representation from a firm of solicitors (Weightmans), where she would be represented by Mr Euros Jones. Mrs Hand accepted that, when she spoke to Mr Jones, she did not say anything to limit the fees for preparation and attendance at interview, but she was clear that the entire conversation was about the police interview.

18. Weightmans' letter of engagement to the Claimant (21 June 2017) refers to, "*your instructions to represent you in an ongoing police investigation*" and the Claimant relied upon this as suggesting that the solicitors also understood the instructions to be open-ended. However that letter also provided a costs estimate "*up to and including attending and representing you at interview at a police station*" as £7,500, not including VAT and disbursements.

19. Mr Doble had his fees covered on the same basis as the Claimant. His evidence was that the School was paying to cover the solicitors' work related to the police interview. He added that it would also cover any subsequent actions by the police.

20. On this important issue, the Tribunal found that the School did not agree to provide open-ended support by paying the Claimant's legal fees indefinitely, as she maintained. It accepted Mrs Hand's evidence that the financial support that it offered was limited to the anticipated police interview. As a matter of common sense, the School could not possibly have committed itself to paying an indeterminate amount over an indeterminate period and neither Mrs Hand nor any other individual was authorised to do that. Although the letter from Weightmans was a little ambiguous, its cost estimate reflected the parameter of its instructions, which related to the interview. Also Mr Doble understood that there was a limitation, albeit that further police investigation might lead to additional costs.

21. Staying with the legal representation, Weightmans' client was the Claimant, not the School, but the School was responsible for paying the invoices supplied by Mr Jones. Weightmans' first invoice (18 July 2017) related to work carried out between 14 and 29 June 2017 in the sum of £10,946.18 inclusive of VAT (therefore exceeding the costs projection). It was paid without issue.

22. The next invoice was received in November 2017, even though there had only been the one police interview in June (dealt with below). By March 2018 and after further invoices, additional fees in the sum of £7,688.16 had been incurred, despite there being no further costs estimate. The invoices provided no breakdown of what had been done to incur those fees and, as a general point, the Tribunal found it was reasonable for the School to ask for a breakdown, although obviously they could not ask (for example) the nature of any advice given and nor did they.

23. The Claimant was signed off sick with stress on 16 June 2017 and the police interview was on 22 June. The Claimant described being subjected to rigorous questioning and accusations, which must clearly have been very distressing and, as described by the Claimant, appeared to the Tribunal to be somewhat heavy-handed on the part of the police. It was at this interview that the police raised the reference to being a "trained chaperone".

24. Within the same timeframe as the interview, there are two allegations made against the School's solicitor, who was attending the police station with Mr Doble. The Tribunal did not hear from the solicitor, but accepted the Claimant's evidence that he did make a remark around whether she had brought her toothbrush just before her police interview, which was probably an attempt at "gallows humour", if somewhat ill-judged. He may also have declined to shake the Claimant's hand when they were both in a café beforehand.

25. However, the Tribunal found it difficult to associate this behaviour with the School or, as the Claimant maintained, to accept that it damaged the Claimant's relationship with the School. The solicitor may have been representing the head teacher, but these were very much his own actions and Mr Doble did not see either incident. The Claimant did not complain to the School at the time about the solicitor's behaviour.

26. The Claimant was initially signed off sick with stress until 10 July, which was extended by further statements of fitness to work (all referring to stress), so that the Claimant did not return to work until October 2017. Prior to her return, there was an occupational health referral and the Tribunal heard evidence about the arrangements for the Claimant's return to work. Although the Claimant was critical of those arrangements (particularly in her written statement), the Tribunal does not need to make specific findings about the return to work as it is not said to be part of the reasons why the Claimant resigned.

27. There was a phased return to work between 13 October and 10 November 2017, at which point the Claimant was able to return to working her usual hours. On 27 November, the School became aware of an imminent inspection by the Independent Schools Inspectorate ("ISI"), which started on 29 November. It is perhaps uncontentious that such an inspection creates for any School both an immediate and significant workload and also an element of stress. The focus of the inspection was compliance, rather than a full inspection involving lesson observations.

28. During the Claimant's sickness absence, her First Aid duties had been covered by her colleague Mrs Anne Shine. On 27 November, Mr Doble circulated a schedule of meetings for the inspection. The section "Visit to sick bay; medical and accident records", required Mrs Shine and Mrs Hand's attendance. The Claimant complained that she had been left out. Mr Doble's evidence was that she had been absent for much of that term and he thought Mrs Shine was in a better position to respond to the inspectors' questions.

29. The Tribunal accepted Mr Doble's evidence and did not find that there was anything wrong with that decision. Although the Claimant said that "it could not be true" that her absence was the reason, she had only been back to her normal hours for 2 weeks. The Claimant also said that, when she asked her about this schedule, Mrs Hand said "you could be ill" and that it was to protect her, which Mrs Hand denied. The Tribunal did not accept the Claimant's evidence and find that there was no reason why Mrs Hand would have said this, as there was an entirely plausible reason for the Claimant not being on the schedule, namely that she had been absent for much of the term.

30. The Claimant also alleges that there was a conversation with Mrs Hand on 28 November when she said that the inspectors should be told about Child X. She said that Mrs Hand said that, because Child X had left the School, the inspectors did not need to know and she referred to Child X's file being "pulled". Mrs Hand denied this. She said there were no papers "to pull", as there was no complaint on the files. That being the case, the Tribunal preferred Mrs Hand's evidence and found that she did not refer to Child X's file being "pulled".

31. In fact, Mr Doble then revised that schedule to include the Claimant, because the inspectors had specifically asked to speak to her. That was because of adverse comments in pupil questionnaires about the Claimant's practices and allegedly unsympathetic comments she had made.

32. In order to explain the change to the schedule, Mr Doble met with the Claimant, Mrs Hand and Mrs Shine on 29 November 2017 (i.e. the day the inspection was starting). Mrs Shine left and there was then a conversation that is disputed. The Claimant's evidence is that she asked why the inspectors were not being informed about Child X and, in terms, Mr Doble said there was no need for them to know. She says she was distraught and considered there was an obligation to tell the inspectors

33. Mr Doble refuted this version of events and said Child X was not raised. Had he been, he would certainly have taken legal advice. Rather, he tried to reassure the Claimant, who was plainly anxious. He did not recognise the Claimant's written account of the meeting as being at all accurate. His evidence is supported by Mrs Hand.

34. It is always difficult for a Tribunal where there are parallel, but opposing accounts of meetings and discussions. In preferring the Respondent's evidence regarding this meeting, the Tribunal is not saying that the Claimant has been dishonest and it prefers to find that her recollection is simply incorrect, perhaps because she was so distraught. If one just looks at the evidence, then the School did not need to disclose the "complaint" from Child X, because there was no complaint. The inspectors did not need to be informed of this matter. Of all people, Mr Doble was likely to be the most sympathetic to the Claimant, as he was in the same unenviable position of having being interviewed by the police. There was nothing to cover up and there was no reason why the School – and Mr Doble in particular – would not have continued to be supportive of the Claimant.

35. On 30 November, the Claimant sent an email to Mrs Hand, as follows:

> *Further to our discussion yesterday regarding the inspection.*
> *I don' t want to be unhelpful but the advice I have been given is that due to the nature of my case I should not engage in an Inspection process that is not transparent.*
> *I will **meet** the Inspector to answers questions related to First Aid, however I will mention that I am waiting for a resolution of an ongoing case which involves an ex pupil which I am not at· liberty to discuss in any detail.*
> *Please understand that I have not taken this decision lightly but feel I have to protect myself given my current situation.*

36. The Claimant said she then waited in her office for a response. She described herself as upset and anxious and told the Tribunal she had been up all night "sick with worry". Mrs Shine came in and asked her for the key to the medical cabinet. The Claimant told the Tribunal that, a while later, Mrs Hand and Mr Akhurst (Deputy Headmaster) came in and Mrs Hand told

her that she did not look well and should go home, but – she said – Mr Akhurst said that was the Claimant's decision. He then told the Claimant that speaking to the inspectors was unnecessary and ill advised. Mr Doble then joined the meeting and told her that if she wanted to go home, she should complete a "legal form". After that, according to the Claimant, the meeting became heated. Mrs Shine came back and again asked for the keys to the medical cabinet in a tone that implied the Claimant was deliberately hiding them. The Claimant then left before the inspectors arrived.

37. Mrs Hand said in evidence that the Claimant looked very unwell and had clearly been crying. She gave a very different account of the conversation and denied telling the Claimant to go home or that Mr Doble referred to any legal form (which Mr Doble also denied). There was discussion round the Claimant's email, but there was no hiding of keys or files and nor did the Claimant suggest there was any concealment of information. She also made the point that she had no idea of what was happening in the police investigation in respect of the Claimant. It remained her belief, shared by Mr Doble, that there were no concerns about current pupils, no complaints about staff and no obligation to disclose the Child X matter to the inspectors. Mr Doble explained why they were not disclosing.

38. Again, there is a completely opposed version of events. From the Claimant's own self-description, she was not in a good state and admitted that she probably looked "under the weather". If she had been up all night sick with worry, "under the weather" is probably an understatement. It is obvious that she had an entirely different view of what the inspectors should be told to the School, but that does not mean the School was incorrect, nor that it was concealing evidence by acting in a way consistent with its view.

39. As to this meeting, it would not be surprising if Mrs Hand had suggested that she go home, but the Tribunal found that it preferred the version of events as recalled by Mrs Hand and Mr Doble. Their account is consistent with how they had responded up to that point. The Tribunal also had great difficulty in believing that either Mrs Hand or (especially) Mr Doble would have treated the Claimant in the way she describes. The Tribunal's impression of both of those witnesses from their testimony was that they were trying to be supportive colleagues during an extraordinarily difficult time. On balance, the Tribunal again found that the Claimant's recollection of that meeting was unreliable, perhaps again because she was very distraught.

40. Specifically, the Tribunal did not find anything sinister about Mrs Shine asking where the keys to the cabinet were to be found. In fact, the Claimants' willingness to perceive this innocent question as a deliberate attempt to undermine her is perhaps instructive as to how she had begun to view all of the School's communications with her.

41. Following the ISI inspection, the Claimant had intermittent periods of sickness absence. It was the Claimant's case that, from December 2017,

she was faced with "*increasingly aggressive communications and diminishing support*". The Tribunal did not find any of the communications to which it was taken showed aggression on the part of the School and nor did it find a lack of support.

42. One way in which the Claimant believed that she was not being provided with support was over her legal fees. Mr Johns told the Tribunal that there was increasing concern about the extent of the legal fees that the Claimant was incurring, with no proper explanation and no attempt to seek approval in advance. Given the Tribunal's finding that it was never agreed that the School would pay these fees on an open-ended basis, the Tribunal found this to be a reasonable concern. The School is a charity and the governors had a responsibility to ensure that funds were being spent appropriately.

43. It was not the Claimant's fault, but her solicitor Mr Jones was not good at providing regular invoices and, after the initial costs estimate, did not seek prior approval for further fees. The Tribunal found the School's attempts to obtain information from Mr Jones reasonable. By early March 2018, unpaid fees of £7,688.16 had accrued and the Board decided that someone needed to speak with the Claimant about its concerns and the way forward.

44. Mr Johns wrote to the Claimant on 29 March 2018, pointing out that the total of legal fees so far was £18,346.34. The School had also paid £640 for psychotherapy services. Mr Johns said that, going forward, either legal fees needed to be pre-authorised or capped at £300 plus VAT per month. He said that counselling remained available provided it was at a reasonable and proportionate level. This had also been communicated in a meeting with the Claimant on 28 March.

45. The Claimant was very upset at being told of this. She said that she felt shocked, embarrassed and let down, including because the invoices had not been paid. The Tribunal has some sympathy with the Claimant, in that it did not doubt that she genuinely believed that the School would just keeping paying whatever Mr Jones invoiced for as long as necessary. However, that was not a reasonably held belief and the School's concern over fees was justifiable in the circumstances.

46. Staying with payments by the School and in particular counselling, Mr Johns wrote again on 6 June. In much the same way as with the legal fees, the Claimant was asked to communicate with the School in advance if she wanted the School to fund further counselling. The Claimant characterised this as the School withdrawing funding for counselling, but that is incorrect.

47. The Tribunal heard a lot of evidence about what the Claimant characterised as a lack of support, but it was quite difficult to know exactly what she was looking for, given that she had a very negative view of almost any communication from the School from the time after the ISI inspection. For example, on 15 April 2018, the Claimant emailed the School to say that her GP had advised to stay at home. Mrs Hand sent an email asking if she could do anything to help. The Claimant characterised this email as,

"*completely contradictory and inappropriate*" and said it added to her stress and her faith in the School was eroded by Mrs Hand's behaviour. However, on any reading, the email was kind and caring; unfortunately, such was the Claimant's perception by this stage that she could not see that.

48. In summary, the Tribunal did not find that the documentary evidence showed the School behaving unreasonably and it accepted the witness evidence from Mrs Hand, Mr Doble and Mr Johns that they were doing the best they could in a difficult set of circumstances.

49. There was a great deal more evidence about the legal fees; on the one hand, the School's attempts to find out what it was paying for, on the other the Claimant's continuing distress that these fees were not being met without question. Matters came to a head in July 2018 when the Claimant sought pre-authorisation to speak to Mr Jones and, by letter of 13 July, Mr Johns refused that request. He said, "*The reason for this is that we have been informed relatively recently, as you have been advised by Jon Akhurst and Jan, that the Police do not anticipate being in a position to move this forward for quite some time I cannot therefore see the benefit of contact being made at this stage*".

50. The Tribunal found that was a reasonable position for Mr Johns to adopt, given that there had been no movement from the police since the interview the previous year.

51. This led the Claimant to raise a grievance, which was set out in an 8-page letter of 4 September 2018. To place that in the context of her attendance at the School, she was declared unfit to work on 28 August 2018 and never returned to the workplace.

52. The grievance had 4 sections:

    (i) "Investigation by the police.
    (ii) November 2017 school inspection.
    (iii) Non-payment of my legal costs; your requests for me to give you information about my discussions with Euros Jones and your curtailing of my being able to have access to Euros Jones, for which you will meet my costs.
    (iv) Bullying and harassment."

53. It also set out her desired outcomes, which included paying for her legal fees and counselling fees without limitation.

54. The School's Head of Human Resources, Dr Brumwell, appointed Mrs Nikki Annable. Mrs Annable was a Human Resources Director and independent of the School. The Tribunal did not consider that the fact she and Dr Brumwell knew each other professionally through, for example, attendance at HR forums, meant Ms Annable was in any way compromised.

55. Mrs Annable said that she understood the three key areas of the grievance to be those at (i) to (iii) above. Her evidence was that she did not include bullying as a specific heading, because she understood it to be alleged throughout and it was part of her investigation. Whilst accepting her evidence, the Tribunal felt it would have been clearer to stick to the headings used by the Claimant. Perhaps inevitably, the Claimant felt that element of her grievance had been omitted.

56. Mrs Annable obtained statements from Mrs Hand, Dr Brumwell and Mr Akhurst. She chose not to obtain statements from Mr Doble and Mr Johns. It was decided by Dr Brumwell that the Claimant's husband could accompany her to the grievance meeting with Ms Annable and this took place on 11 December 2018. After the meeting, she obtained some further information from Dr Brumwell about training records, legal fees and the Claimant's job description, as well as a statement from Mrs Shine. She did not give the Claimant an opportunity to comment on this statement. Although the Tribunal accepted her evidence that it was not determinative, again it felt it would have been better to let that happen.

57. Mrs Annable did not uphold the grievance and her reasoning was set out in a letter of 10 January 2019. In summary, she considered that the Claimant had received sufficient training to carry out her role at the medicals. She found that the School's conduct during the ISI inspection was reasonable and she did not conclude there was an ongoing obligation to pay legal fees. She advised the Claimant of her right to appeal. Having said that bullying underscored the other three allegations, Mrs Annable did address it separately in the outcome letter and did not uphold that allegation either.

58. The Tribunal found that this was an outcome that Mrs Annable was reasonably entitled to reach on the evidence before her. She did an adequate job, but given the Claimant's many concerns, would have been wiser to speak with Mr Doble and Mr Johns as well. As Mr Bryant demonstrated, there was at times an inconsistency between the grievance letter, the evidence and the outcome letter, but not such – on the Tribunal's finding – to undermine the overall adequacy of the grievance process. Of course, the proper challenge would have been through an appeal and the Tribunal did not agree that the grievance process was so flawed as to rule out any appeal.

59. The Claimant chose not to appeal. Instead she resigned with immediate effect by letter of 22 January 2019. She gave 5 reasons:

    (i) She had not been formally trained for the role she had to perform at the medicals.
    (ii) As a result of this failure, she was investigated by the police.
    (iii) Her legal fees should have been paid without restriction.
    (iv) She was bullied and harassed.
    (v) The School's actions during the ISI process caused her great distress.

60. She also said that her grievance had been dismissed without proper consideration of the points she raised.

The law

61. For any disclosure to be protected it must come within the definition in the Employment Rights Act 1996 s.43B(1):

    "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following…"

62. C relies on sub-sections (b) (legal obligation) and (f) (concealing information).

63. There is helpful guidance in ***Chesterton Global Ltd v Nurmohamad*** [2018] ICR 731, CA:

    "Those provisions were subject to some exegesis by this court in Babula v Waltham Forest College [2007] ICR 1026. Two points in particular are emphasised in that case, though in truth both are clear from the terms of the section itself:
    (1) The definition has both a subjective and an objective element: see in particular paras 81–82 of the judgment of Wall LJ. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in subsection (1). The objective element is that that belief must be reasonable.
    (2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of Babula's *case, where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B(1) . There was in fact at the time no such offence, but it was held that the disclosure none the less qualified because it was reasonable for the employee to believe that there was."* (Underhill LJ at para. 8).

64. In order for a claim of constructive dismissal to succeed, four conditions must be met. First, there must be a breach of contract by the employer. In this case, the implied term relied upon by the Claimant is that of mutual trust and confidence. The test for the tribunal is therefore: *"whether the Respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence."*

65. Secondly, the breach must be sufficiently important to justify resignation, or else be the last in a series of incidents which justify her leaving. If it is a 'last straw' which is relied upon, then the question is whether the cumulative series of acts taken together amount to a breach of the implied term. Although the final straw may be relatively insignificant it must not

be utterly trivial; it must contribute something to the breach of the implied term (see ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35, CA).

66. Thirdly, the employee must leave in response to the breach and not for some other, unconnected, reason. Finally, the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise she may be deemed to have waived the breach and agreed to vary the contract.

Submissions

67. The Tribunal received written submissions from both counsel, which in Mr Bryan's case ran to 60 pages. They each made oral submissions. The Tribunal does not intend setting out the substance of their respective submissions, as it is reflected in the findings and conclusion, but was grateful to both counsel for the care with which they presented their respective cases.

68. In his written submissions, Mr Bryan referred the Tribunal to 17 authorities. The two that the Tribunal found most helpful (also referenced by Mr Curtis) were: ***Omilaju v Waltham Forest London Borough Council*** and ***Chesterton Global Ltd v Nurmohamad***, as mentioned above. However, although there is no need to set them out here, it looked carefully at the all of the case law references that were provided by counsel.

Conclusions

69. The whistle-blowing claim. The Tribunal first considered the alleged qualifying disclosures and asked itself whether, on the evidence, they satisfied s.43B. There were three alleged disclosures, as set out at paragraphs 12-14 of the Particulars of Claim and set out here for ease of reference:

(i) On or around 27 November 2017 the Claimant asked Mrs Hand why she had been omitted from the list and said that the inspectors ought to be told about the incident alleged by Child X and the ongoing investigation. Mrs Hand replied that because Child X had left the School the inspectors did not need to know about it and referred to Child X's files being 'pulled'.

(ii) On 29 November 2017 the Claimant was asked to meet Mr Doble, Mrs Hand and Mrs Shine**.** Part-way through the meeting, Mrs Shine was asked to leave. The Claimant then asked why the Child X matter was not being reported to inspectors and why she was not allowed to tell them herself. Mr Doble said there was no need for them to know.

(iii) On 30 November 2017 at 07·51 (the morning of the inspection) the Claimant emailed Mrs Hand to inform her (1) that she had been advised not to engage in an inspection process which was not

transparent and (2) that when she met the inspectors she would mention that she was waiting for a resolution in an ongoing case involving an ex-pupil which she was not at liberty to discuss in detail.

70. The first and second of these alleged disclosures involve the Claimant asking questions, save that she expresses the opinion in the first that the inspectors should be told about Child X. It is difficult to see how this could be construed as disclosing information tending to show etc. Similarly, in the third, the Claimant is saying what she has been advised and what she intends doing. The disclosure of information, if she had made one, would have been to the inspectors.

71. In evidence, the Claimant was vague about this part of her claim. She said that she was not thinking about whistle blowing at that point and, in fact, there was not a point where it came to mind that she might be a whistle blower. She did not know if there was any public interest and the Tribunal was not convinced she understood the relevance of this requirement.

72. The Tribunal concluded that these three alleged disclosures fell short of amounting to disclosures qualifying for protection under s.43B, as no "information" was actually disclosed, even taking the broadest and most purposive approach to that term. The Tribunal was also not satisfied that the public interest element was satisfied on the Claimant's own evidence.

73. If the Tribunal is wrong about that, it also concluded that – in any event – the Claimant suffered no detrimental treatment as a result of these three alleged disclosures. The alleged detriments are included within the alleged acts set out below, so there is no need to repeat them here. It follows that the claim in respect of the alleged qualifying disclosures is dismissed.

74. <u>The constructive dismissal claim</u>. As set out at paragraph 28 of the Particulars of Claim, there were 9 alleged acts which, taken separately or cumulatively, were said to breach the implied term of trust and confidence.

(i) *The School instructed the Claimant to attend the boys' medicals without the proper training, so exposing her to a risk which (through no fault of her own) ultimately materialised in the form of the police investigation.* The Tribunal did not find that the Claimant was inadequately trained.

(ii) *On 22 June 2017, when the Claimant attended the voluntary police interview, the solicitor instructed by the School refused to shake her hand, saying that she was not his client, and made a distasteful 'joke' about whether she had brought her toothbrush.* This is likely to have happened, but the Tribunal did not find any association between the solicitor's behaviour and the School, nor did it damage the Claimant's relationship with the School.

(iii) *On or around 29 November 2017 Mr Doble and Mrs Hand informed the Claimant that the School would not notify the ISI about the*

Incident involving Child X despite the Claimant repeatedly expressing the view that this was necessary, so giving the impression that (1) the School had no regard for the Claimant's views and (2) it was seeking to conceal a serious safeguarding matter from inspectors. The Tribunal found that Mr Doble and Mrs Hand did not say this during the conversation on 29 November.

(iv) *On the day of the inspection Mrs Hand disingenuously advised the Claimant to go home because she looked unwell, whereas the reality was that she wanted to prevent the Claimant meeting any inspectors.* The Tribunal found that Mrs Hand did not say this on 30 November. The Respondent did not want to prevent the Claimant from speaking with the inspectors; rather, Mr Doble and Mrs Hand genuinely did not see that it was necessary for her to do so.

(v) *On the same day Mrs Hand and Mrs Shine instructed the Claimant, repeatedly and in a bullying manner, to hand over the key to the filing cabinet in which the file of Child X was kept*. The Tribunal could find nothing wrong with Mrs Shine asking where the key to the cabinet was to be found.

(vi) *The School reneged on its agreement to pay the Claimant's legal costs.* There was never any agreement to pay the Claimant's legal fees ad infinitum. It was reasonable for the School to decide at a particular point that it was not going to pay anything further.

(vii) *The School repeatedly pressurised the Claimant to divulge details of her instructions to and discussions with her criminal solicitor, implying unjustifiably that she was exploiting the situation to take legal advice on unrelated matters at the School's expense. The School placed her In a catch-22 by demanding to know the specific reason she wanted to contact her solicitor (which was confidential and privileged), while, at the same time, professing that it did not want her to disclose anything she did not have to.* This allegation misstates the facts. The School reasonably wanted to know how the fees were being incurred; it was not seeking to know information that was confidential and/or privileged.

(viii) *From December 2017 onwards the School failed to adequately support the Claimant during the police investigation, displaying an attitude of ever-diminishing sympathy at a time when it should have been most sensitive to her and her health. This included withdrawing its commitment to fund counselling.* The Tribunal found that the School was, on the contrary, supportive towards the Claimant throughout. It did not withdraw funding, but asked the Claimant to agree to it in advance with the School.

(ix) *The School failed to deal with the Claimant's grievance in a fair and proper manner. This was the last straw*. The Tribunal had some criticisms of the grievance process. It felt that Mrs Annable could

have spoken to more individuals and also heard again from the Claimant after obtaining a statement from Mrs Shine. However, the Claimant could have brought an appeal against this outcome and raised these points and any criticisms of Mrs Annable's reasoning.

75. Given that the Tribunal did not conclude that any of the matters listed above amounted to acts that, taken separately or cumulatively amounted to or contributed to a breach of the implied term of trust and confidence, it is quite clear that any shortcomings in the grievance process were not themselves sufficient to entitle the Claimant to resign.

76. It follows that the claim for constructive unfair dismissal fails and the claim for "ordinary" unfair dismissal and wrongful dismissal also falls to the wayside.

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Employment Judge S Cheetham QC
Date: 23 February 2021