EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Wright		**(1) Cardinal Newman Catholic School** **(2) Ms C Jarman**

Heard at: London South Employment tribunal
On: 14, 15, 18, 19, 20 & 21 October 2021 In chambers on 2 & 3 December 2021

Before: Employment Judge Hyams-Parish
Members: Mr P Adkins and Ms D Sanderson-Estcourt

Representation:
For the claimant: Mr T Dracass (Counsel)
For the respondent: Mr D Soanes (Solicitor)

RESERVED JUDGMENT

It is the **unanimous** judgment of the employment tribunal that:

(a) The following claims are well founded and succeed against the first respondent to the extent set out in Part E of the reasons below:

(i) Unfair dismissal

(ii) Victimisation

(iii) Discrimination arising from disability

(b) The claim of failing to make reasonable adjustments fails and is dismissed.

(c) All claims against the second respondent are dismissed upon withdrawal by the claimant.

REASONS

A. CLAIMS AND ISSUES

1. Given the withdrawal of claims against the second respondent, any reference from this point to the second respondent shall be to ("CJ").

2. By a claim form presented to the tribunal on 22 February 2019, the claimant brings the following claims against the respondent:

   (a) Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA")).

   (b) Victimisation (s.27 Equality Act ("EQA")).

   (c) Failing to make reasonable adjustments (s.20/21 EQA).

   (d) Discrimination arising from disability (s.15 EQA)

3. It was agreed at the outset of the hearing that the questions which the tribunal needed to answer in order to determine the claims are as follows:

Unfair dismissal (s.98 ERA)

(a) Has the first respondent proved a potentially fair reason to dismiss the claimant?

The reason relied on by the respondent is capability, or in the alternative, some other substantial reason.

(b) Did the first respondent act reasonably in dismissing the claimant for the reason given?

Discrimination arising from disability (s.15 EQA)

(c) Did the respondent treat the claimant unfavourably?

(d) The unfavourable treatment relied on by the claimant is as follows:

   (i) Suspending the claimant on 20 June 2017 and keeping that suspension in place, including failing to review the claimant's suspension.

(ii) On 6 & 28 November 2018, and since, removing the claimant from his role of head of mathematics.

(iii) On 7 May 2019 onwards, threatening to dismiss the claimant if he did not accept the High Performance Coach ("HPC") role.

(iv) On 7 May 2019 onwards, requiring the claimant to meet performance management objectives before being allowed to return to his normal role.

(v) On 31 May 2019, dismissing the claimant, with an effective termination date of 31 August 2019.

(e) What was the reason for the unfavourable treatment ("the something")?

(f) The "*something*" relied on by the claimant is as follows:

(i) The claimant having pursued his earlier complaints tenaciously.

(ii) The claimant having voiced his feelings and views to others in circumstances where his communications and interactions etc. were impaired or informed by autism.

(iii) The claimant's absence on 1 and 4 December 2014 and his reporting of the same. On those occasions, the claimant was experiencing palpitations and increased anxiety.

(iv) The claimant's stance on being line-managed by Ms Kelly, an appraisal, and teaching PSHEE. In particular, the claimant was experiencing regular heart palpitations at the time.

(v) The claimant's reduced ability to cope with unexpected change.

(vi) The claimant's limitations in terms of teaching across several different classrooms and his sensory needs.

(vii) The claimant's reduced attendance at school during a phased return.

(viii) The claimant's reduced ability to deal with line management.

(ix) The claimant's reduced ability to deal with "firefighting" issues and timetable changes.

(x) The claimant's reduced ability to understand the emotions of other people and reduced ability with communication and social interaction.

(xi) The claimant's preference to reduce lesson 1 sessions replacing them with lesson 6 sessions

(g) Did the above "*something*" arise in consequence of the claimant's disability?

(h) Was the treatment a proportionate means of achieving a legitimate aim?

(i) The legitimate aim relied on by the respondent is the need to have "*an effective and capable subject lead of maths who has a functioning and not damaged relationship with the head teacher and senior leadership team*".

Victimisation (s.27 EQA)

(j) Did the claimant do a protected act?

(k) The claimant relies on the following protected act(s):

(i) Supporting a colleague, SH, in connection with discrimination grievances and related employment tribunal proceedings.

In particular:

(a) Attending meetings with SH in April, May, June and August 2014 in connection with his grievances/appeals.

(b) Providing a witness statement in connection with SH's employment tribunal claim.

(c) Attending the employment tribunal in April 2015 to give evidence in SH's case.

(ii) Raising a first grievance in June 2016 which included complaints of victimisation and "discrimination, bullying or harassment"

(iii) Attending and making statements at a grievance hearing on 19 July 2016 in furtherance of his victimisation, discrimination, bullying or harassment complaints.

(iv) Submitting a grievance appeal letter on 21 October 2016, and a letter to CH and Brighton & Hove City Council HR, including complaints of, and in furtherance of, his victimisation, discrimination, bullying or harassment complaints.

(v) Emails to IK dated 15 and 17 November 2016 in furtherance of his victimisation, discrimination, bullying or harassment complaints.

(vi) Making representations at four meetings with Ms E between 13 March 2017 and 5 May 2017 including complaints of and in furtherance of his victimisation, discrimination, bullying or harassment complaints.

(vii) Submitting a Data Subject Access Request ("DSAR") dated 7 April 2017 in furtherance of his victimisation, discrimination, bullying or harassment complaints, in particular seeking evidence of this.

(viii) Speaking to MM on 13 June 2017 in furtherance of his victimisation, discrimination, bullying or harassment complaints.

(ix) His telephone call to Ms V on 25 August 2017 in furtherance of his victimisation, discrimination, bullying or harassment complaints, including his DSAR relating to evidence of this.

(x) His re-submission of his DSAR on or around 12 September 2017 in furtherance of his victimisation, discrimination, bullying or harassment complaints, in particular seeking evidence of this.

(xi) Raising a second grievance dated 17 September 2017, which included complaints relating to disability discrimination due to failures relating to his mental health, discrimination, bullying or harassment.

(xii) Making statements during the investigatory meeting on 26 October 2017 in relation to his previous victimisation, discrimination, bullying or harassment complaints and his DSAR seeking evidence of this.

(xiii) The claimant's attendance and statements at the grievance hearing on 1 December 2017 in furtherance of his discrimination, bullying or harassment complaints.

(xiv) Instructing solicitors to write to the first respondent submitting a grievance on 8 January 2018 and a grievance appeal on 13 May 2019 which included (and in furtherance of) complaints of disability discrimination and victimisation.

(xv) Submitting an Acas Early Conciliation on 4 January 2019 and a tribunal claim on 22 February 2019 and thereafter pursuing the current claim.

(l) Did the respondent subject the claimant to a detriment?

(m) The detriments the claimant relies on are as follows:

(i) Suspending the claimant on 20 June 2017 and keeping that suspension in place (including failing to review the claimant's suspension).

(ii) On 6 & 28 November 2018, and since, removing the claimant from his role of head of mathematics.

(iii) On 7 May 2019 onwards, threatening to dismiss the claimant if he did not accept the HPC role.

(iv) On 7 May 2019 onwards, requiring the claimant to meet performance management objectives before being allowed to return to his normal role.

(v) On 7 May 2019 onwards, refusing to deal with the claimant's grievance appeal.

(vi) On 31 May 2019, dismissing the claimant (with an effective termination date of 31 August 2019).

(n) If the claimant was subjected to a detriment, was it because the claimant did a protected act, or the respondent believed the claimant would do or had done a protected act?

(o) Was the protected act done in bad faith?

Failing to make reasonable adjustments

(p) Did the respondent apply a provision, criterion or practice ("PCP") to the claimant?

(q) The PCP(s) relied on by the claimant are as follows:

(i) A requirement to work from multiple classrooms.

(ii) A requirement to be at work early in the morning.

(iii) A policy of free parking (i.e. undesignated).

(iv) A requirement to reach performance management objectives before returning to his Subject Lead role.

(v) A requirement to reset/rebuild relationships before returning to his subject lead role.

(r) Did the above PCPs put the claimant to a substantial disadvantage in relation to a relevant matter compared to persons who are not disabled?

(i) His increased anxiety levels.

(ii) His sensory needs.

(iii) His sleeping difficulties.

(iv) His reduced ability to deal with unexpected change.

(v) His reduced ability with communication and social interaction.

(s) The adjustments which the claimant says were reasonable and should have been made, but were not, are as follows:

(i) Allowing the claimant to return to his role of subject lead with the following core practical adjustments:

(a) Ensuring that the claimant only needed to work from 1-2 classrooms, and not room NF5.

(b) Ideally, reducing lesson 1 sessions and replacing them with lesson 6 sessions.

(c) Designating a parking space for the claimant.

(d) Allowing a phased return to work.

(ii) The following supplementary adjustments:

(a) The claimant to attend training on coping strategies.

(b) Awareness training, for management and/or colleagues, or at least staff to be provided with the claimant's "autism profile".

(c) Additional ad-hoc support, if necessary, from his line manager, e.g. extra line management meetings/informal catch ups.

4. It is worth noting at this point that the claimant was dismissed with notice on 31 May 2019. As stated above, his claim form was presented on 22 February 2019. The claimant was given permission to amend his claim form to add complaints arising after the claim form was submitted, up to and including the dismissal, hence why they are included in the above list of issues.

5. In the list of issues prepared by the parties, the respondent had invited the tribunal to consider whether the discrimination claims had been brought within the permitted time limits. However, there was no questioning of witnesses on this issue and the representative for the respondent confirmed in his closing submissions that the time point was not being pursued. He therefore accepted that the discrimination claims had been brought in time, on the basis that there was a continuing act.

B. THE HEARING

6. This hearing was a hybrid hearing. Everyone attended the hearing centre apart from the claimant and Ms Davyson, who participated remotely using CVP.

7. The parties had agreed a timetable which the tribunal was happy to adopt.

8. There were no preliminary applications to be determined by the tribunal.

9. The tribunal spent the first day reading witness statements and relevant documents in the document bundle which extended to 1754 pages. References to numbers in square brackets below are references to pages in the hearing bundle.

10. Statements were provided by the following witnesses:

(a) Marcus Wright ("the claimant").

(b) Katie Davyson, teacher employed by the first respondent ("KD")

(c) Rachel Ingram, maths teacher employed by the respondent.

(d) Carrie Anne Stares, a maths teacher formerly employed by the respondent.

(e) Claire Jarman, deputy head teacher during the period when the claimant was employed, now head teacher of the respondent ("CJ").

(f) Tim Williamson, chair of governors with the respondent until September 2019 ("TW").

(g) Des McGuckian, at the time of the claimant's dismissal, a governor of the respondent ("DM").

11. The respondent consented to the statements of Ms Stares and Ms Ingram being read by the tribunal without the need for them to attend the hearing.

12. Ms Davyson attended and gave evidence at the hearing, as did the claimant and all three respondent witnesses. The witness evidence was concluded on the morning of the sixth day.

13. Both representatives provided written submissions which were supplemented by oral submissions on the afternoon of the sixth day. The tribunal considered these submissions very carefully when reaching its conclusions below, including case law referred to. If a particular case referred to in those submissions has not been specifically referred to below, this does not mean that the tribunal did not consider it.

14. Following the hearing, the tribunal received further submissions on one point from the representative for the respondent. The representative for the claimant was given the opportunity to respond to this. The tribunal confirms that both additional submissions were taken into account when reaching its conclusions below.

15. As there was too little time to deliberate and provide the parties with a decision at the conclusion of the hearing, the tribunal informed the parties that judgment would be reserved.

C. FINDINGS OF FACT / CHRONOLOGY

16. The tribunal decided all the findings referred to below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that the tribunal failed to consider it. The tribunal has only made findings of fact necessary for it to determine claims brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

17. The respondent is a state maintained catholic secondary school.

18. Until his dismissal, the claimant was employed by the respondent as its head of maths. He started working for the respondent in September 2005.

19. At the time of the claimant's dismissal, the headteacher of the respondent was JK. The senior leadership team (SLT) included JK and the deputy head teachers (PM, AK and CJ).

20. The respondent accepts that the claimant was disabled within the meaning of the EQA. In terms of knowledge, the respondent certainly had knowledge of the claimant's atrial fibriliation by December 2014. They accept they had knowledge of autism and anxiety in November 2017 and June 2017 respectively.

21. The claimant was contracted to work full-time (which for a teacher equates to 1265 hours over 95 days each year, from Monday to Friday during term time). Normal hours were from 8.25am to 3.10pm. There were five core periods per day, plus a sixth period, which was normally for sixth form classes. In return for teaching period six, teachers were given a blank (non-teaching) period included in their timetable. During this blank period teachers did not need to remain on site.

22. The claimant was given flexibility to have more sixth periods than first periods to allow for his sleeping difficulties. As such, in the years leading to his suspension, he normally had a blank period at the start of the teaching day, arriving at 9.30am to start the second lesson at 9.40am.

23. The claimant's main responsibility as head of mathematics was to oversee the development and delivery of maths within the school. Key responsibilities included:

    - Line management and development of maths teachers (approximately 20 in total). The claimant had direct line management of five maths teachers. Direct line management for the remainder was undertaken by senior maths teachers who effectively acted as deputy heads of the department. The claimant managed those deputies.

    - Senior leadership responsibilities including attending leadership meetings and assisting key stage leaders with planning curriculum delivery.

    - Teaching maths (60-65% of his time).

    - Updating and managing the scheme of work for all students.

    - Monitoring data of all students.

24. Between 2010 and 2014, the claimant reported to PM, with whom he had a good working relationship. From September 2014 until February/March 2016, the claimant reported to AK.

25. Until May 2015, DW was employed by the respondent as its Director of Finance and HR.

26. In January 2014, a colleague of the claimant, SH, was employed on a fixed term contract due to end in August 2014. He applied for a permanent role at the school but due to his sciatica, was not permitted to attend the interview as the respondent deemed him unfit to do so. SH requested that he be permitted to participate in the interview process using Skype, but this request was refused. Another candidate was appointed.

27. SH subsequently complained by raising a grievance in April 2014, alleging that the respondent had discriminated against him on the grounds of age.

28. A second grievance was raised in the same month, adding disability discrimination to his complaints, due to the failure to make reasonable adjustments. Both grievances were not upheld.

29. A second position then became vacant. SH applied for the position and was interviewed with one other candidate. The other candidate was successful.

30. SH raised a third grievance complaining of victimisation in June 2014. He complained that the reason he was not successful was because he had raised two grievances following his first unsuccessful application.

31. SH brought an employment tribunal claim against the respondent which was heard over a number of days between April and July 2015. The judgment, with written reasons, was sent to the parties on 15 September 2015.

32. The claimant assisted SH with his grievances against the respondent and gave evidence in support of SH at the tribunal hearing. Both the tribunal judgment and the claimant's witness statement for SH's tribunal case were included as documents in the bundle for this case.

33. It is clear from the judgment that the complaints of discrimination arising from the first interview process were directed towards mainly JK and DW. The tribunal at SH's hearing found JK and DW to be the "*least impressive*" of all the witnesses and commented that DW gave a "*completely distorted view of the comparative performances*" of SH and the successful candidate. The tribunal found DW and JK to be an integral part of the second recruitment process. The tribunal concluded that SH's first grievance "*got under his [JK's] skin to such an extent that it clouded his*

judgment and professionalism". For this reason, SH's claim of victimisation succeeded, whilst all other claims failed.

34. It is clear that the claimant was heavily involved in supporting SH to challenge the respondent on their decisions, beyond simply assisting him at the grievance hearings. His evidence to the tribunal at SH's hearing was not helpful to the respondent because it set out why SH was clearly the better candidate, leading the tribunal to consider why SH had not been selected.

35. The respondent accepted that the assistance given to SH by the claimant, in the form of those matters at paragraph 3(k)(i) above, are protected acts within the meaning of s.27(2)(b) and (c) EQA.

36. On 5 December 2014, the claimant received a letter from the respondent informing him that there would be an investigation into his misconduct, namely a deliberate refusal to obey lawful instructions. The first related to the claimant's non attendance at an event held at the Brighton Dome on 1 December which he was required to attend; the second was that he left the school without authorisation on 4 December. The claimant says he was unwell on both occasions which was the reason for his non-attendance and leaving early from school.

37. On 8 December 2014, the claimant's doctor wrote to the school explaining that on both occasions the claimant had been suffering from atrial fibrillation. He was subsequently signed off work due to this condition and work place stress on 15 December 2014.

38. The claimant was referred to occupational health ("OH") and attended a meeting on 12 January 2015. The report dated 12 January 2015 [461] referred to a diagnosis of atrial fibrillation and that it became worse when stressed and anxious. The report made a number of recommendations including an early resolution to the ongoing disciplinary investigations, a review of his workload, allowing him to leave work early where necessary, a review of his line management support, and a referral for cognitive behavioural therapy.

39. The investigation into the above disciplinary allegations was conducted by CJ. CJ had initially recommended informal counselling rather than formal disciplinary action. She had sought advice which suggested that the allegations were not nearly serious enough to justify dismissal.

40. CJ showed her initial report to JK who thought it was too lenient. CJ was asked to investigate further allegations about the claimant, namely lying to his then line manager, AK, about his non-attendance at the Brighton Dome event, and speaking rudely to a teacher. The further allegations were investigated and disciplinary action recommended by CJ. However, the

tribunal were firmly of the view, having listened to CJ in evidence, that she did not think disciplinary action was the correct course to take.

41. By letter dated 10 February 2015 [474] the claimant was invited to a disciplinary hearing to answer the following allegations:

- Failing to attend the Brighton Dome event.
- Failing to report his absence from the Dome event to a member of the SLT.
- Being dishonest with his line manager when asked about his attendance at the Dome event.
- Failing to follow proper procedures when leaving school on 4 December 2014.
- Leaving school as an act of defiance.
- Speaking to another member of staff in a rude and disrespectful manner.

42. The letter stated that the allegations were so serious that if he were to be found guilty of any of them, he could be dismissed.

43. The claimant was suspicious that such action was being taken, particularly so long after the events in question.

44. Following the disciplinary hearing, the claimant was given a written warning dated 17 March 2015 [538] for lying to his line manager about his attendance at the Dome event, and for speaking to JK in a "*disrespectful and inappropriate manner*".

45. The claimant subsequently appealed against the warning. That appeal was heard in July 2015, but the original decision was upheld [619].

46. At around this time, in or around July 2015, the claimant had a meeting with AS and AK about the respondent undertaking a stress risk assessment. He claimed to have been suffering stress as a result of what he considered to be bullying by DW.

47. From January 2015, the claimant was line managed by CJ. The change was a strategic one following an OFSTED report suggesting that the Maths and English departments should be managed by the same person.

48. CJ was a very supportive line manager to the claimant. They had a good working relationship, speaking on a regular basis via text and phone.

Formally there were line management meetings once a fortnight and they met informally as and when required.

49. On 26 April 2016, the claimant found a document in his pigeonhole at work which was a three-page extract from the school handbook on which his name was listed with a black cross next to it, indicating that there were concerns about his performance. The claimant took this to be evidence that he was being targetted. He showed AK who suggested he speak to JK. JK could not explain the document but confirmed that he had written the comments. The claimant was concerned that the other two people with comments next to their name did have "capability issues" in his view, but that he did not.

50. In June 2016, the claimant submitted a grievance [655]. In it he wrote the following:

> ***The details of my complaint are:***
>
> ***A. I received a document in my pigeonhole on 26th April 2015. It was a three paged document, taken from the staff handbook. A copy of this has been sent to DM, JK and AK. On the top right hand corner was a key written by the Head teacher (his own admission in front of AK and SD) I have a big black cross against my name.***
>
> ***This has confirmed my belief that there has been a deliberate and sustained attempt to undermine me, due to my involvement in supporting a colleague at a tribunal, which has had a detrimental impact on my health. The two related grievances are:***
>
> ***B. After a report was received from Occupational Health, it was agreed that there would be a 'Stress Risk Assessment' but this has not been properly completed and my concerns have been disregarded. The initial meeting was in June 2015 with AS and AK. AK gave me a half-completed document on around October 2015 to briefly look at. I was told this would be finished off and then discussed together. I was subsequently given an unfinished draft on 16th May 2016. Neither mentioned my concerns about bullying that I had referred to specifically at the meeting, nor is there confirmation that these concerns were passed on to the head teacher.***
>
> ***C. I was subject to an investigation meeting and formal hearing in December 2014/February 2015 and believe that there was unjustified interference in the process by both DW and JK and that HR advice was not heeded.***

51. The grievance was considered by CH. Apart from the part of the grievance relating to the stress risk assessment, the grievance was not upheld.

52. The claimant was not happy with the conclusion of his grievance or how it had been dealt with, and therefore he appealed against the outcome [697]. In addition he wrote to CH and LH giving further details of the complaint

and his feelings at the time. This was referred to during the hearing as the "*Dear Cathy*" letter [711].

53. CJ saw this letter and provided her comments to it. The tribunal accepted the claimant's evidence that CJ had encouraged the claimant to write it and thought he should be compensated for what had happened to him.

54. As the appeal was progressing, the claimant asked to meet with the then chair of governors, IK, to discuss his complaints. Emails were exchanged about this in mid November 2016 [707].

55. In February 2017, SM (Vice Chair of Governors) appointed DE (external HR Consultant) to carry out an investigation into the claimant's allegations of bullying by DW.

56. At about the same time, the claimant requested a referral for an autism assessment as he wanted to know whether he was autistic. He suspected he was, not least because it had been suggested to him on several occasions both outside and inside of work that he might be autistic, due to behaviours which they had observed. The claimant said he needed to understand if what others thought about him was right and whether this affected his mental health.

57. The claimant met with DE on four occasions between 13 March 2017 and 5 May 2017 to discuss his complaints of bullying and victimisation by DW, which included reference to being bullied because he supported SH [783].

58. On 7 April 2017, the claimant submitted a data subject access request ("DSAR") [742] with the encouragement and support of CJ. He did this in order to find out whether there was any evidence that DW and JK had taken a particular stance or attitude towards the claimant because he had supported SH with his grievance and employment tribunal claims.

59. On 14 June 2017, the claimant was contacted by his union representative asking whether he wished to consider reaching agreement with the respondent to terminate his employment in return for a financial settlement. Clearly, the union representative had spoken to the school before contacting the claimant. The claimant was very surprised to receive this email.

60. Shortly after the above email, the claimant received a report from DE dated 9 June 2017 [779]. The tribunal concluded that this was not a very helpful report, not least because it did not reach any conclusions or resolve any issues. The reason DE gave for this was that DW could not be interviewed. Indeed it seems the only person to be interviewed, apart from the claimant, was JK.

61. On 20 June 2017, the claimant was asked to meet with chair of governors, TW. The tribunal concluded that by this stage TW had been told by JK in clear terms that the claimant had to leave and that he could not work with him any more and did not want him employed at the school. JK's attitude to the claimant was neatly summarised in a statement he provided during a later disciplinary investigation conducted by JS, in which JK said:

> ***Over the last three years Marcus has taken up a disproportionately large amount of my time and the time of other school leaders and governors. His repeated resort to subject access requests, grievances and the continual, largely unspecified, allegations of bullying has reduced my capacity and the capacity of other members of the senior leadership team to address the wider needs of the school and its students.***

62. Importantly the tribunal did not think it was his support of SH that was the cause of the deterioration in the relationship, but rather the claimant's tendency to keep raising complaints, taking up JK's and other people's time.

63. TW went into this meeting to make the claimant an offer of a financial settlement in return for him leaving which, given the amount of the offer, TW clearly thought the claimant would accept. When the claimant said he wanted to stay at the school, TW was not happy as the meeting did not go the way he wanted. The tribunal accepted that the meeting became heated at one point and that TW became frustrated and angry at the claimant.

64. As the claimant was not prepared to accept a settlement and leave, he was suspended, with effect from the date of the meeting, pending a disciplinary investigation into whether he could continue to work at the school due to an irretrievable break down in relationships between the claimant and JK/SLT.

65. The claimant gave the following evidence in relation to the suspension in his witness statement:

> ***I was devastated by the suspension as despite my complaints I loved my job. I was trying to get to the truth and receive some acknowledgment in order to move on. I had become fixated on the issue and therefore pursued it tenaciously, which relates to my Autism. I had used the formal processes that were available to me, with the support of CJ in particular. My autism affects the way I communicate and I was not conscious of the fact that my behaviour was being perceived in this way, particularly as I had support at various stages from members of the SLT and governors, who were listening and encouraging me to raise my concerns.***

66. Shocked by what had happened, and in an attempt to try and resolve matters and change the direction the school was going, the claimant

withdrew his DSAR and made it clear that he would drop his complaints about DW.

67. On 28 June 2017, SM wrote to the claimant to inform him that his appeal against the grievance outcome (paragraph 52 above) was unsuccessful.

68. On 29 June 2017, co-opted Governor, JS wrote to the claimant to inform him that she had been appointed as investigating manager to look into those allegations referred to at paragraph 64 above.

69. Seeing that his attempt to resolve matters had not been successful and that the respondent intended to pursue disciplinary action, the claimant made a further DSAR on 12 September 2017.

70. On 17 September 2017, the claimant raised a second grievance [911]. The claimant complained about TW's conduct at the suspension meeting and the school's alleged failure to abide by its duty of care in light of the claimant's health problems, in particular his mental health and the fact that he had been suicidal. The claimant said that the suspension meeting showed no regard for this.

71. On 10 November 2017, the claimant attended a further OH review [966]. In the report there was a recommendation for mediation, followed by a phased return to work. In particular, she recommended that the claimant begin with administrative and teaching tasks, with line management duties being phased in later. She also noted that the claimant was awaiting a formal diagnosis of Asperger's as this had been raised by the claimant during the meeting.

72. On 16 November 2017, the claimant was formally diagnosed with an Autistic Spectrum Condition (Asperger's Syndrome) [1644].

73. The claimant was sent a copy of the investigation report prepared by JS following her investigation in which she concluded that the relationship between the claimant and the SLT had broken down [985]. She recommended disciplinary action instead of mediation.

74. On 1 December 2017, the claimant attended a grievance hearing with the then vice chair of governors, KC. This was in connection with the claimant's second grievance referred to at paragraph 70 above [1103-1112].

75. On 5 January 2018, the claimant received notification from KC that the second grievance had not been upheld.

76. On 9 February 2018, JK invited the claimant to attend a mediation [1148]. The disciplinary hearing was postponed.

77. On 17 January 2018, the respondent arranged a further OH referral for the claimant [1136].

78. In June 2018, the respondent arranged for ES, Employment Training Consultant of the National Autistic Society (NAS) to carry out an assessment on the claimant to explore adjustments for his return to work as head of maths [1185]. As part of the assessment, ES met with JK, CJ, PM and other teachers. CJ sat down with the claimant at the end of the assessment and assured him that the day had gone very well. Nobody gave ES any indication that a return to work was unlikely to take place.

79. On 2-3 July 2018, the claimant attended a two-day mediation facilitated by the Brighton & Hove Independent Mediation Service.

80. ES produced a final report dated 21 July 2018 [1200] following her work with the school. The report recorded a number of recommendations concerning the claimant's head of maths role, which she had discussed with the claimant and CJ during the assessment.

81. The claimant met with CJ on 21 September 2018 to discuss a number of the recommendations arising from the NAS report in order to enable him to return to work. The claimant said this was a positive meeting. The key practical adjustments to come out of the claimant's meeting with CJ were: a phased return, a preference for lesson 6 sessions instead of lesson 1 (to help with the claimant's sleeping difficulties). Also discussed was the suggestion that lesson 1 could be phased in, a parking space could be provided, and only teaching from 1-2 classrooms. The discussion was clearly on the premise that such adjustments would be made to the claimant's head of maths role. He was not told anything by CJ to indicate anything other than that.

82. On 6 November 2018, the claimant received an email from CJ saying that she had thought further about matters and proposed that the claimant return to a completely different role, that of HPC [1239]. In evidence CJ said she had pitched this role to JK and TW. The tribunal accepted that this was accurate, but that it was only after CJ being told by JK that the claimant returning to his old role was not an option. The tribunal concluded that this was the most likely explanation for CJ having had a meeting about the claimant returning to his old role on 21 September 2018, and then changing her position by 6 November 2018. The tribunal concluded that CJ was in a difficult position; on the one hand she had sympathy for the claimant and was in all likelihood supportive of the claimant returning to this old role; but on the other she was faced with a head teacher who did not want him to return to that role. It is clear that the claimant had concerns about the new role, the appearance that it had less responsibility and was therefore a demotion, and the consequential impact on his career.

83. On 15 November 2018, the claimant's solicitors wrote to CJ expressing their concerns about the proposed HPC role.

84. On 3 January 2019, JK emailed the claimant to suggest a further mediation session to discuss the above letter and other matters.

85. On 8 January 2019, the claimant raised a third grievance complaining about the proposal to remove him from his head of maths role and require him to take on the new HPC role [1251].

86. The claimant attended grievance meetings on 5 March 2019 and 5 April 2019 chaired by DM [1304].

87. On 30 April 2019, DM followed up with the formal grievance outcome [1392] which essentially required him to accept the HPC role until such time that he was ready to return to his normal role. The following are relevant extracts of this letter:

> ***Proposed Resolution***
>
> ***I am satisfied that it would not be sensible for the school to allow you to return straight away into the role of Subject Leader.***
>
> ***I agree with CJ's reasons for proposing the HPC role as a reasonable adjustment - and I set out those reasons in Annex D.***
>
> ***……***
>
> ***I believe that, before you can come back as Subject Leader, that mutual trust needs to be reset and built up over time. A move into the HPC role would allow this to happen.***

88. On 5 May 2019, the claimant wrote to DM stating that he wished to appeal his decision. This appeal was actually sent on 13 May 2019 [1408].

89. DM replied to the claimant on 7 May 2019. In his letter, DM said the following:

> ***While I am sorry that you do not wish to accept my proposal, I would like at this stage to make something very clear. As you were informed before our meetings', if agreement could not be reached on your return to school, other options will need to be considered. Part of the purpose of my investigation was to determine whether you should be allowed to return to the school at all - either as Subject Leader or as High Performance Coach, My conclusion was that you should be allowed to return to the school as High Performance Coach with a view to possibly transitioning back into the Subject Leader role over time.***
>
> ***I am conscious that you mentioned in your email that you were unable to talk to your solicitor last week. Therefore please take until 13 May 2019 to consider the proposal. If you don't accept the proposal by 13***

> ***May 2019, then I will recommend to the Governing Body that your employment should be terminated. Whilst my conclusion was that you could potentially return to the Subject Lead role over time, that was contingent on you returning in the first instance to the High Performance Coach role, while rebuilding relationships and achieving appropriate performance management targets.***

90. There followed correspondence from the claimant's solicitors in response to the above.

91. DM invited the claimant to meet with him on 17 May 2019 to discuss the issues raised in recent correspondence. That meeting in fact took place on 23 May 2019, but in the meantime, DM sent a response to a number of points raised by the claimant's solicitors.

92. The meeting on 23 May 2019 appears to have been an attempt to persuade the claimant to accept the HPC position that he had been offered. DM wrote to him again following the meeting inviting him to reconsider and accept the HPC role.

93. There followed further correspondence leading up to 30 May 2019 when the claimant was placed under some pressure to accept the HPC role. The tribunal concluded that the reason for this was because there was a deadline to provide notice to the claimant, if that is what was to happen, by 31 May 2019 or the respondent would have to have given a much longer period of notice (an additional term, being 12 weeks).

94. On 30 May 2019 at 03.00 the claimant wrote to DM by email as follows:

> ***Dear Des***
>
> ***I am willing to return to the HPC role at first instance In order to transition back to my permanent Subject Lead role. As you know, I feel that I should be allowed to come back to my Subject Lead role straight away, with the reasonable adjustments requested. However, I feel that I have no choice as you have threatened to dismiss me otherwise. I stand by my grievance appeal therefore I am working "under protest" in that respect. However, please note my return is in the spirit of full co-operation, in the genuine hope that I will be treated fairly, with proper protections in place, so that I can return to my Subject Lead role in the foreseeable future.***
>
> ***Regards,***
>
> ***Marcus***

95. On 30 May 2019 at 15.27, DM wrote to the claimant in the following terms:

> ***Marcus,***
>
> ***I think you can understand why I asked the question as your email slated that you would be working "under protest'", but also that your***

> ***'return is in the full spirit of co-operation'. I think these two statements seem to conflict with each other?***
>
> ***Additionally - and just for clarity on my part – I assume from your email below that you will be continuing with your outstanding Tribunal Claim?***
>
> ***Regards***
>
> ***DM***

96. Asked by DM what the claimant meant by the term "under protest" the claimant sent DM a further email which said as follows:

> ***I do not mean to cause any concern whatsoever. As you know I had raised a grievance and appeal and I do have an outstanding Tribunal claim. The claim does not go away as I have the right to pursue this whilst employed and not be victimised because of it. However, as I said below, please be reassured that my return is in the spirit of full co-operation in the genuine hope that I am allowed back to my Subject Lead role. It was a very difficult decision, but I have made it now. All I want is my career back and I hope this works out.***

97. By email dated 31 May 2019 at 12.49, the respondent wrote to the claimant terminating his employment. That letter said as follows:

> ***While you have accepted the offer to return as High Performance Coach, the conditions under which you have done this indicate that this grievance Is not resolved in your mind (in particular that you would be 'working under protest' in that role) and that it will continue to be an issue for you should you return to CNCS. I do not believe that this represents a satisfactory position for either you or the School. I am particularly mindful of the factors outlined in your National Autism Society Workplace Assessment and your Occupational Health reports, which indicate that this is not in your best interest.***
>
> ***I feel that, in spite of our best efforts, we have now exhausted all avenues in terms of trying to find a mutually acceptable resolution to the ongoing areas of disagreement. Therefore your employment Is being terminated in accordance with the notice provisions in your contract of employment, which means your employment will end on 31 August 2019.***
>
> ***During this period you are not required to attend work and will remain on suspension. You will receive your pay and benefits for the remainder of your notice period. During your period of suspension, you should not contact anyone at the School without the prior permission of the Headteacher or myself.***
>
> ***I consider your legal representative's letter of 13 May 2019 to be your appeal against the decision to dismiss. I will inform the Vice Chair of Governors' of your appeal in order to allow for the appointment of an Appeals Manager.***

98. The respondent decided to treat the letter referred to at paragraph 88 above as an appeal against dismissal. By a letter from GS (appeal panel chair) dated 13 December 2019, the claimant was informed that his appeal against dismissal had not been upheld [1483].

D. LEGAL PRINCIPLES

Unfair dismissal (s.98 ERA)

99. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) ERA says as follows:

> ***(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

100. What is clear from the above extract of the ERA is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the tribunal must consider whether the respondent acted fairly in treating that reason as the reason for dismissal. For this

second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

101. The reason for dismissal is a set of facts known to, or beliefs held by, the employer which causes them to dismiss the employee: ***Abernethy v Mott Hay and Anderson [1974] ICR 3231***. It is the factor(s) operating on the mind of the decision-maker which causes them to take the decision to dismiss, or what 'motivates' them to do what they do: ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748***.

102. On the other hand, the burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

103. In this case the respondent relies on some other substantial reason ("SOSR") (s.98(1) ERA) or capability. As long as it is not a s.98(2) reason, any reason for dismissal, however obscure, can be pleaded on grounds of SOSR, with the proviso that it must be a *substantial* reason and thus not frivolous or trivial; and must not be based on an inadmissible reason such as race or sex. However, while the reason for dismissal needs to be substantial, it need not be sophisticated — merely genuine.

104. Breakdowns in working relationships and trust and confidence between employees and their colleagues/employers can amount to fair reasons for dismissal. In ***Ezias v North Glamorgan NHS Trust 2011 IRLR 550*** the EAT held that the claimant's complaints about his colleagues were excessively frequent, unacceptably detailed and unrelenting to an extreme degree. The employer dismissed the claimant on the ground that there had been a fundamental breakdown of trust and confidence between him and his colleagues, which were in large part due to his actions. In ***McFarlane v Relate Avon Limited 2010 ICR 507*** Mr Justice Underhill said that the tribunal needed to focus on the employee's conduct rather than simply his personality. He also said that despite the fact that "*loss of trust and confidence*" has often been relied on in SOSR cases, employers (and tribunals) should be cautious when using this terminology, which originally arose in the context of constructive dismissal. Mr Justice Underhill stated that referring to trust and confidence in this context was 'unhelpful' as in almost all cases where an employee is dismissed for something he or she has done, the employer will have lost trust and confidence in him or her. It was more helpful to focus on the employee's specific conduct rather than use such general terminology.

105. In ***Iceland Frozen Foods Ltd v Jones***, it was said that the function of the employment tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If

the dismissal falls outside the band, it is unfair.

106. In ***Sainsburys Supermarket Ltd v Hitt*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.

107. Finally, in ***London Ambulance NHS Trust v Small*** the court warned that when determining the issue of liability, a tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the tribunal must not "substitute its view" for that of the employer.

Discrimination in consequence of disability (s.15 EQA)

108. Section 15 EQA provides as follows:

> ***(1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

109. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the respondent treat the claimant unfavourably because of an (identified) 'something'?; and (ii) did that something arise in consequence of the claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the respondent have knowledge of the causal link between the 'something' and the disability.

110. If section 15(1)(a) EQA is resolved in the claimant's favour, then the tribunal must go on to consider whether the respondent has proved that

the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification "*is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET"*. The Court of Appeal in ***Grosset [2018] EWCA Civ 1105***, upheld this reasoning, underlining that the test under s 15(1)(b) EQA is an objective one according to which the tribunal must make its own assessment.

111. In terms of the burden of proof, it is for the claimant to prove that he has been treated unfavourably by the respondent. It is also for the claimant to show that 'something' arose as a consequence of his disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. Where a prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on s.15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving a legitimate aim.

Victimisation (s.27 EQA)

112. Section 27 EQA provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***
>
> ***(a) bringing proceedings under this Act;***
>
> ***(b) giving evidence or information in connection with proceedings under this Act;***
>
> ***(c) doing any other thing for the purposes of or in connection with this Act;***
>
> ***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***
>
> ***(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.***

113. The test to be applied here is threefold:

a) Did the claimant do a protected act?

b) Did the respondent subject the claimant to a detriment?

c) If so, was the claimant subjected to that detriment because he had done a protected act, or because the employer believed that he had done, or might do, a protected act?

114. Here the most important decision to be made by the tribunal is the "*reason why*" the respondent subjected the claimant to a detriment. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the detriment is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

115. A person claiming victimisation need not show that the detriment meted out was *solely* by reason of the protected act. As Lord Nicholls indicated in ***Nagarajan v London Regional Transport 1999 ICR 877, HL***, if protected acts have a '*significant influence*' on the employer's decision making, discrimination will be made out. ***Nagarajan*** was considered by the Court of Appeal in ***Igen Ltd & ors v Wong and other cases 2005 ICR 931, CA,*** a sex discrimination case. In that case Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather "*an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial. The crucial issue for the tribunal to determine is the reason for the treatment — i.e. what motivated the employer to act as it did? But it is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor".*

116. Whilst the same burden of proof applies in such cases, namely that the claimant must prove sufficient facts from which the tribunal could conclude, in the absence of hearing from the respondent, that the claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "*reason why*" because that is the central question that the tribunal needs to answer.

Failing to make reasonable adjustments

117. A claim for failure to make reasonable adjustments is to be considered in two parts. First the tribunal must be satisfied that there is a duty to make reasonable adjustments; and only then must the tribunal consider whether that duty has been breached. Section 20 EQA deals with when a duty arises, and states as follows:

> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
>
> ***……***
>
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

118. Section 21 EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

119. In determining a claim of failing to make reasonable adjustments, the tribunal therefore must ask itself three questions:

(a) What was the PCP?

(b) Did that PCP put the Claimant at a substantial disadvantage because of his disability, compared to someone without that disability?

(c) Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

120. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the respondent to make.

121. The burden is on the claimant to prove facts from which this tribunal could, in the absence of hearing from the respondent, conclude that the respondent has failed in that duty. The claimant therefore has to prove that a PCP was applied to him and that it placed him at a substantial disadvantage. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

122. It is a defence available to an employer to say "*I did not know, and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the claimant.

123. To test whether the PCP is discriminatory or not, it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment

of a particular employee. The words '*provision, criterion or practice*' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not *necessarily* one: ***Ishola v Transport for London 2020 ICR 1204, CA.***

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

Was the claimant unfairly dismissed?

124. The tribunal looked first at whether the respondent had proved a potentially fair reason to dismiss the claimant, within the meaning of s.98(1) ERA. The respondent argued that the reason for the claimant's dismissal was capability or some other substantial reason (breakdown in working relationships/personality clash).

125. The tribunal concluded that the reasons for dismissal put forward by the respondent at this hearing were not the real reasons. On the evidence, the tribunal did not have any difficulty arriving at the conclusion that the real reason the claimant was dismissed was because he would not accept the HPC role unconditionally. DM did not like the fact that the claimant said he would agree to work in the new role "*under protest*" and that he would still continue to pursue his employment tribunal claim. Had the claimant not said both those things, and accepted the role unconditionally, he would not have been dismissed and would have remained employed by the respondent. Even had that been the some other substantial reason relied on by the claimant, it would not be within the band of reasonable responses to dismiss an employee for a reason which effectively amounted to victimisation.

126. The tribunal found the respondent's contention that the claimant was dismissed on the grounds of capability to be without merit; there was simply no evidence upon which the respondent could genuinely and reasonably have concluded that the claimant was not capable of performing his job (medically or otherwise). Whilst there may well have been some adverse comments about the claimant from unnamed members of his team, this was not nearly enough for the respondent to genuinely conclude the claimant was incapable of performing the head of maths role.

127. The tribunal rejected any suggestion that a relationship breakdown with JK and/or the SLT was the cause of dismissal. For his own reasons, JK did not want the claimant to work at the school and certainly did not want him to return to his head of maths role. The respondent's case as to breakdown in relations was undermined by its own case and the fact that the school was in fact willing to continue to employ the claimant in the HPC role. The tribunal could not quite understand the logic of the respondent's argument

given that the claimant would ultimately have been answerable to JK. Whatever problems there were with relations with JK and or the SLT was clearly capable of being fixed; that is clear from the fact that DM spoke to the claimant about spending time in the HPC role for a period before returning to his normal role. The tribunal concluded that whilst there were problems, they were not substantial.

128. Without a potentially fair reason, the dismissal was inevitably unfair. The circumstances of this case and the reasons for the dismissal, also left the decision to dismiss the claimant falling significantly outside the band of reasonable responses. No reasonable employer would have dismissed the claimant in these circumstances, particularly as the reason for dismissal amounted to victimisation. The tribunal noted there was a complete failure by DM to take into account the NAS report, which the respondent had commissioned, or the many OH reports, to determine what extent the claimant's behaviour may have been impacted by autism.

129. The claim of unfair dismissal is therefore well founded and succeeds.

Victimisation

(a) Dismissal – Paragraph 3(m)(vi) above

130. Given the tribunal's above findings, it also follows that the dismissal was an act of victimisation. The tribunal was in no doubt that the claimant's dismissal was significantly influenced by the fact that the claimant wished to proceed with the tribunal claim that had been presented to the employment tribunal in February 2019. The respondent conceded that this was a protected act.

131. This allegation of victimisation is therefore well founded and succeeds.

(b) Suspension – Paragraph 3(m)(i) above

132. Turning to the decision to suspend the claimant, this was a decision made by TW. The tribunal concluded that TW would have known that the claimant assisted SH with his employment tribunal claim. It is likely that he knew about the grievances brought by the claimant, at least in broad terms, and would have known JK's views about the claimant. However, listening to TW in evidence, the tribunal was of the view that the decision would have been his, and his only, and he was not significantly influenced by JK or any previous grievances brought by the claimant. TW suspended the claimant because he did not accept the offer made by the respondent and wanted him off the premises pending an investigation. The tribunal was not satisfied that those matters at paragraphs 3(k)(i)-(xiii) above influenced that decision, whether signficantly or at all.

133. For the above reasons, this allegation fails and is dismissed.

(c) Removing the claimant's head of maths role – Paragraph 3(m)(ii) above

134. This was CJ's decision but would have been influenced by JK, and to a lesser extent, TW. The tribunal concluded that there was insufficient evidence for it to conclude that this decision was significantly influenced by those matters at paragraphs 3(k)(i)-(xiii).

135. This allegation of victimisation therefore fails and is dismissed.

(d) Threatening to dismiss the claimant – Paragraph 3(m)(iii) above

(e) Requiring the claimant to meet performance objectives before being allowed to return to his head of maths role – Paragraph 3(m)(iv)

136. The person responsible for each of the above is DM. The tribunal was not satisfied that DM was influenced by those matters set out at paragraph 3(k) above. It is not at all clear which of these matters he was aware of in any event. His reasons for threatening to dismiss the claimant if he did not accept the HPC role was simply stating fact; this is what he believed, or intended, would happen. Clearly by requiring him to meet objectives before returning to the role bought the respondent time to assess the situation before making any decision.

137. These allegations of victimisation therefore fail and are dismissed.

(f) Refusing the deal with the claimant's grievance – Paragraph 3(m)(v)

138. The tribunal concluded that the respondent dealt with the grievance appeal albeit under the guise of an appeal against dismissal. Importantly, they clearly did deal with the substance of the letter received by solicitors acting for the claimant dated 13 May 2019, which set out the grievance appeal. For these reasons, the tribunal concluded that the claimant suffered no detriment and therefore this claim of victimisation must fail.

139. The tribunal acknowledges that there was a dispute between the parties whether those matters at paragraphs 3(m)(ii)-(x) and (xii) above were protected acts within the meaning of s.27 EQA. Given our above findings that these matters were not a significant influence on the respondent's actions as far as the alleged detriments were concerned, the tribunal did not need to resolve this particular issue.

140. The tribunal was not satisfied that the claimant had acted in bad faith, as alleged or at all. The tribunal was satisfied that the claimant felt genuinely aggrieved and believed in the truth of his complaints.

Discrimination arising from disability

141. The tribunal considered the allegations of unfavourable treatment together. In broad terms, the tribunal concluded that the reasons for this treatment was the claimant's persistence in complaining, the continual raising of grievances, the requests for DSARs etc., and the *manner* in which he raised such matters. Even to the end, the claimant announced that if he accepted the HPC role, he would be "*working under protest*" and would continue with his tribunal claim, as of course he was entitled to do. The question for this tribunal is whether that persistence, or, as pleaded by the claimant, "*pursuing his complaints tenaciously*", and the manner in which he went about this, was the reason for the claimant's treatment and whether they arose in consequence of his autism and/or other disabilities.

142. The tribunal accepted that the effects of autism in any particular person can vary considerably, albeit there are some common traits. In an impact statement provided by the claimant, he described the effect of his disability as exhibiting the following:

> ***Rigidity: I suffer from rigidity of thought. I have a strong sense of needing to stick by what I feel is right or wrong. I have the need to tell people the truth about what I think. I have reduced ability to move on from past events or injustices. As such, I can be seen as inflexible/dogmatic.***
>
> ***Obsessional traits: I have a tendency to fixate on matters, e.g. I obsess about issues and I experience repetitive thoughts. I expect consistency in others. I am analytical about situations and I over think.***
>
> ***Social skills: I experience difficulty in social interaction and communication. I have a tendency to over-communicate/over share. I do not always understand boundaries. Other people often find me too much to handle. For example, because I drive my own agenda in conversations. I am aware that I am not particularly empathetic. I do not recognise other people's feelings very well. I probably come across as difficult and/or uncaring al times. I take things at face value and can misinterpret verbal information. I need clear and simple instructions. I find it more difficult to fit in with a wider community as opposed to a small group.***
>
> ***Increased anxiety/stress: I have a tendency to become anxious and panic. I can come across as emotional.***

143. It did not appear to the tribunal that the above statements were disputed; certainly the claimant was not challenged during cross examination about what he had written in his impact statement. The tribunal looked carefully at the evidence, the NAS report, all OH reports and concluded that the claimant's behaviours which led ultimately to him being dismissed, arose out of his autism, particularly taking into account that the law allows a broader approach can be taken by the tribunal when identifying a connection between the 'something' and the underlying disability.

144. The respondent relies on justification as a defence to this s.15 claim, the legitimate aim being "*an effective and capable subject lead of maths who has a functioning and not damaged relationship with the head teacher and senior leadership team*". However, for reasons which should already be clear from the above, the tribunal did not consider that the respondent acted proportionately. The tribunal could find no evidence that the claimant was not capable of performing his job. A more proportionate response may well have been to have managed the claimant's performance via a formal process, to assess whether the relationship could be improved. It was certainly in DM's mind that relations were capable of being restored because he told the claimant that in time he could return to his old job. As the tribunal has found already, it was not satisfied that the relationship with the SLT was damaged as alleged.

145. For all of the above reasons, the claim brought pursuant to s.15 EQA is well founded and succeeds.

Failling to make reasonable adjustments

146. The tribunal did not accept that the PCPs referred to at paragraphs 3(q)(iv) and (v) were in fact PCPs. Applying ***Ishola*** (see above) the tribunal concluded that these were isolated acts of alleged unfair treatment against the claimant, but not PCPs. In contrast, the tribunal was satisfied that those matters described at paragraphs 3(q)(i)-(iii) were PCPs and that they placed the claimant at a substantial disadvantage by virtue of his disabilities, compared to someone who is not disabled.

147. The difficulty the tribunal had with this claim is that it was not satisfied that there had been a failure to make the reasonable adjustments; there was no opportunity to do so because the claimant had not returned to work since being diagnosed with two of the three disabilities and the respondent being put on notice of them. The tribunal accepted that the respondent was certainly amenable to adjustments being made, and indeed adjustments had been discussed between the claimant and CJ during the period of his suspension. Had the alternative role been accepted without the conditions the respondent perceived that the claimant had imposed, then it is very likely that the adjustments sought by the claimant would have been made. The tribunal noted that this claim took very much a back seat compared to other claims, for reasons which are obvious, but it meant that part of the claim received much less focus and there was far less evidence from the claimant about it.

148. For the above reasons, this claim fails and is dismissed.

Remedy

149. In view of the above conclusion, a remedy hearing will be listed in due course. The parties should send in to the employment tribunal their dates to avoid for the next 12 months and indicate how long they think is needed to conclude the remedy hearing. They should also suggest some draft directions to enable preparation for the hearing to be concluded in good time.

150. The tribunal is mindful that it did not hear any arguments on contribution or polkey at the liability hearing. To they extent they are relevant and the parties wish to argue such matters, they can be dealt with at the remedy hearing.

……

Employment Judge Hyams-Parish
6 December 2021