THE EMPLOYMENT TRIBUNALS

Claimant: Mr S Watson
Respondent: Stanley Learning Partnership

Heard at: Newcastle Hearing Centre **On:** 11 and 12 January 2022 and 3 and 4 February 2022

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person
Respondent: Mr G Vials, solicitor

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the Employment Rights Act 1996 is not well-founded; and his complaint, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act cannot be wellfounded and is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. He also relied upon written statements from the following individuals, whose evidence was accepted on behalf of the respondent without their needing to attend the hearing and give oral evidence: Mr I Driver; Mr R Black; Mr S Robinson.

3. The respondent was represented by Mr G Vials, solicitor who called the following employees of the respondent to give evidence on its behalf: Mr M Stewart, Chief Executive Officer of the respondent and Executive Headteacher of Greenland

Community Primary School ("the School"); Mr M Tallentire, Operations Director of the respondent; Miss A McGurk, Teacher at the School; Miss E McKeown, Class Teacher at the School; Mrs AKE Armstrong, Phonics Lead at the School; Miss AM Lewis Acting Head Teacher of the School.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements. I also had before me a bundle of documents that had been compiled by Mr Vials comprising in excess of 530 pages, which by consent was added to during the hearing. The majority of those documents were agreed but 18 pages in the bundle (518-527) had been disclosed to the claimant late on the day before the commencement of the hearing. The claimant objected to the late disclosure, which Mr Vials explained was attributable to an administrative error on the part of his firm. Having considered the documents during an adjournment I decided that they should be admitted as they were relevant to the issues in this case, necessary for the fair determination of those issues and their admission would not disadvantage the claimant. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in that bundle. In addition, the claimant had produced a small bundle of documents (to which no objection was taken on behalf of the respondent) the page numbers within which are referred to below with the prefix "C".

The claimant's claim

5. The claimant's claim is that, by reference to section 95(1)(c) of the Employment Rights Act 1996 ("the Act") he had terminated his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct, hence he had been constructively dismissed; and, by reference to sections 94 and 98 of the Act, that dismissal had been unfair.

6. The respondent's response was that it denied that the claimant had been dismissed but contended, in the alternative, that if he was dismissed the reason was the potentially fair reason of "some other substantial reason", and that by reference to section 98(4) of the Act, the dismissal was fair.

The issues

7. The issues to be determined at this hearing are as follows, the references to "the respondent" being read to include, also, relevant employees acting on its behalf:

> 7.1. Did the actions of the respondent either separately or cumulatively amount to a breach of any of its express contractual obligations to the claimant?
>
> 7.2. If not, did the actions of the respondent either separately or cumulatively amount to a breach by the respondent of the term of trust and confidence that is implied into all contracts of employment: i.e:

7.2.1. Did the respondent conduct itself in a manner that was calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between it and the claimant?

7.2.2. If so, did the respondent have reasonable and proper cause for doing so?

7.3. Was the breach a fundamental one: i.e. was it so serious that the claimant was entitled to treat the contract of employment as being at an end?

7.4. Did the claimant, at least in part, resign in response to the breach: i.e. was the breach of contract a reason for the claimant's resignation?

7.5. Did the claimant affirm the contract before resigning: i.e. did the claimant's words or actions show that he chose to keep the contract alive even after the breach?

7.6. If the claimant was dismissed, what was the reason or principal reason for the dismissal: i.e. what was the reason for the breach of contract?

7.7. Was that reason a potentially fair reason by reference to section 98(1) of the Act?

7.8. By reference to section 98(4) of the Act, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

8.1. The respondent is a multi-academy charitable trust that is responsible for running and maintaining seven schools in County Durham, one of which is the School. It is a large employer and has fairly significant resources including access to a Human Resources Department.

8.2. The claimant initially worked for the respondent on an agency basis. From 8 January 2018 he became employed by the respondent as a Teaching Assistant ("TA") working at South Stanley Junior School (112). He was contracted to work 37 hours' work each week, his working hours being 08.30 to 16.15 each day.

8.3. In July 2018 the claimant sustained a serious injury to his lower right leg and was absent from work for over six months. When he was well enough to

return it was agreed that the claimant would move to the School, which is a modern building on one level with easy access, wide corridors and dedicated parking, and is accessible by wheelchair. The claimant began working at the School as a TA on 3 September 2019.

8.4. The claimant was well-regarded within the School community and appears to have brought a wealth of experience to bear in his work coupled with linguistic and musical talents. This is borne out by a remark by Miss Lewis in her letter of 10 June 2021 in which she accepted his resignation, "you made a demonstrable positive impact on the children's educational experience". Likewise, Mr Stewart's evidence was that the claimant was a very wellrespected colleague who completed his contractual obligations very well and went above and beyond. The claimant being a good employee was reciprocated by the respondent: for example, throughout his absence after his accident he was paid enhanced sick pay despite only having a contractual entitlement for only a few weeks and the respondent paid the fees for his HLTA course. In evidence the claimant said that he did not dispute that he had a "fantastic relationship with senior members", he was "over the moon with the treatment received" and became a "very good friend of Miss Lewis and Mr Stewart". He said that things changed, however, after he became aware of the appointment of CC to the School staff to which I return below.

8.5. Unfortunately, the lower part of the claimant's injured leg required amputation on 20 January 2020 and, after period of absence, he returned to work in March 2020 not long before the first national 'lockdown' in relation to the Covid-19 pandemic.

8.6. In consequence that 'lockdown' the School was closed to pupils unless they were vulnerable or the children of key workers, and from time to time risk assessments were undertaken and various measures were introduced to further 'social distancing' within the School including the introduction of 'bubbles' and limiting access by staff and pupils to particular rooms and corridors.

8.7. At the end of Summer Term 2020 Miss Lewis proposed allocating the claimant to Class 13 (described as being a relatively small "nurture group" of children with Special Educational Needs ("SEN")) as she thought that given the small pupil numbers he would be able to move around the classroom more easily using his crutches. The claimant agreed and from September 2020 worked with that Class supporting the Class Teacher, CG, who was responsible for planning, marking and assessing pupils' work and had overall responsibility for their progress.

8.8. It was agreed that the claimant would pursue the Higher Level Teaching Assistant ("HLTA") qualification, the fees for which were funded by the respondent. Interestingly, although nothing turns on the point, the evidence of the respondent's witnesses was that it had paid half the fees but the claimant was clear that although he had offered to pay half the respondent had insisted

on paying the full fees. The key difference between a TA and a HLTA is that, having undertaken additional training, the HLTA is able to take on greater responsibility including covering classes and, importantly, planning and teaching their own lessons. The claimant contends that he planned, prepared, assessed and marked pupils' work but I accept the evidence of the respondent's witnesses that it was the class teacher, CG, who had responsibility for those aspects, albeit a TA might mark work and prepare and adapt planning under her direction but any such preparation had to be uploaded on the School system, which the claimant accepted the had never done. In this connection I note that the claimant was unable to provide any copies of the lesson preparation he said that he had done explaining that when he left the School he did not take his personal computer drive and did not have the foresight to download his preparation etc or copy the work of the children that he had assessed. I accept that he might not have been able to do that in the circumstances in which he says he left the School but I am surprised that he did not have anything at all at home to support his contentions and had not asked the respondent for access to his personal drive.

8.9. Miss Lewis wrote to endorse the claimant's HLTA course application (281). She referred, amongst other things, to the claimant being "an exceptional member of staff who consistently goes above and beyond for the children in his care. He has often taken a whole class for extended periods of time". He "works very well with his colleagues and plans lessons alongside his class teacher. He has a lot of input into the work and activities set for the children he supports". "He works tirelessly to ensure all of our his [*sic*] planning, marking and assessment is up-to-date, rigorous and effective." In cross examination Miss Lewis explained that most of this document was based on what the claimant and a colleague had told her he had done at South Stanley Junior School because he had not done any of this at the School; she added that there was no way he could have done that in three weeks. She continued that at South Stanley the claimant had worked with a small group of Year 6 pupils with special needs and had delivered planning, mostly done by the class teacher, in the afternoon. I repeat the observation I made at the hearing that I consider for Miss Lewis to have written in those fairly glowing terms on that limited basis was 'sticking her neck out' somewhat.

8.10. To assist the claimant achieve the HLTA qualification Miss Lewis organised his timetable to allow him time each Wednesday afternoon away from his duties as a TA so that he could spend that time on his studies for which he was allowed to use her office. She explained in oral evidence that she was under the impression that the course started that September 2020 and that if she had known that it was not until October she would not have given the claimant that allocation from the start of term. On relevant the timetable (206) Miss Lewis showed that time allocation for the claimant as "PPA" (Planning, Preparing and Assessing), which she accepted was in error. On the basis of her oral evidence it seems to me that it should have been designated, for example, 'study time'. Miss Lewis explained that the claimant could not be allocated PPA

because PPA is an entitlement of teaching staff. No TA or HLTA, with one exception, receives PPA as all sessions are planned by the class teacher. The exception was Miss McGurk, a very experienced HLTA, who was allocated a Friday afternoon for PPA because she planned, delivered, marked and assessed the class of pupils that she taught every morning.

8.11. The claimant was successful in achieving the HLTA qualification of which he was notified by email on 18 February 2021 (253). There is no evidence to corroborate the claimant's account in his witness statement that on 18 December 2020 he was telephoned by his tutor to say that he had successfully passed the course. Indeed, Miss Lewis disputed this on the basis that it was not until 16 December that she and others were interviewed by the HLTA assessor who had told her that the interview notes and the claimant's coursework would have to be forwarded to the qualification body for moderation and it would be well into January before it could be said whether or not he had passed. In cross examination, the claimant changed his account to that he had been told in December that he had "provisionally passed". The claimant also stated that on 18 December he went immediately and told Miss Lewis that he had passed but she denied that and, indeed, the school was closed from 17 December.

8.12. In July 2020 Mr Stewart spoke to a colleague from another primary school who told him that he was concerned about a staffing restructure at his school due to budget pressures. Mr Stewart responded that the School might have a HLTA position but the individual would need a specific skill set, being a Year 6 role with experience of teaching Standard Assessment Tests ("SATS") assessments. The colleague told him that the HLTA at his school, CC, was looking to move to new employment to avoid potential redundancy and she appeared to have the requisites and experience needed at the School.

8.13. At about this time, Miss McGurk agreed that she would move from her HLTA role with Years 5 and 6 to become an unqualified teacher. Thus, there was a need to recruit a replacement who would need to have extensive Year 6 experience to plan, deliver and assess the Year 6 curriculum, undertake preparation for SATS exams (which would require involvement in the necessary paperwork in September) and administer the tests to individuals and classes. Miss Lewis considered whether there were any internal employees who would be suitable for the role but there were not as no one had the relevant qualifications or experience including in relation to administering SATS. As Miss Lewis answered in cross examination, the claimant was nowhere near the level the School was looking for. He did not meet the essential criteria of qualifications, two years' experience with Year 6, experience with and involvement in planning SATS and had not received training on the administration of SATS. She continued that he was nowhere near Miss McGurk and the School was looking to replace her, "We needed another Allison McGurk who could do all that without needing training"; it would take the claimant years to get that experience. Similarly, Mr Stewart said that the claimant did definitely not have the skills and experience to undertake CC's role; he would expect

multiple years' experience. He continued that the claimant had never completed work as a HLTA, was not qualified at the time of the appointment and did not meet the essential criteria of qualifications or experience in respect of reporting to SATS. I accept the evidence of these two witnesses. Even on the claimant's own account, at the time of the appointment of CC he was not qualified as a HLTA, he did not suggest that he met the other essential criteria, he had only worked as such for at most one year and when he returned to work in March 2020 (i.e. some time before the respondent approached CC) he said that he was only capable of working as a TA and undertaking those duties because of his amputation. On a point of detail in this connection the claimant accepted in cross examination that he was not aware of the assessment reporting arrangements or of the 49-page DfE Guidance in that regard because he was "never involved". In this connection also, I reject the claimant's submission that he stepped into the posts that two senior colleagues (one a deputy headteacher, the other a non-qualified teacher) had vacated in Class 13 or that his responsibilities as a TA in relation to that Class meant that he was operating at their level.

8.14. In September 2020 the respondent approached CC. On 11 January 2021 she submitted an application form, was interviewed by a panel of three persons and received a conditional offer of appointment. School staff were informed of her appointment by email on 19 January 2021. A statement of employment particulars was issued on 20 February 2021 and she took up the position of HLTA that day.

8.15. Although the claimant knew and respected CC he was shocked by her appointment as there had been no notification and (he wrongly believed at the time) no application form or interview. In cross examination the claimant accepted that he had been "wrong that there was no application process or interview". As he wrote in his witness statement "…. despite my being qualified and having operated in the role as a HLTA for 4 months, I was not given the opportunity to apply for the role given to [*CC*]. This is contrary to my rights, especially in terms of my being disabled." The claimant expanded upon this point in oral evidence: he explained, "My contract of employment was as a TA but I had been used as at HLTA for a year. I believe I had the right to have the opportunity to be considered and it was a breach of contract that I was not allowed".

8.16. The claimant's evidence regarding him operating as a HLTA lacked clarity. In his witness statement he wrote that he had operated in that role for 4 months but in cross examination said that he had been working in that role for 7 months and 5 months, although he did not take the salary, and later that he had worked for more than a year at HLTA level. He stated, however, that when he returned to work in March 2020 he was only capable of working as a TA and undertaking those duties because of his amputation although he said that prior to that he had had the role of HLTA. On the evidence available to me I am satisfied that the claimant did work at a high level (as is to be inferred from the

positive comments made about him by many of the respondent's witnesses, Mr Stewart stating that he went "above and beyond") and had the talents and broad experience of life that made him an asset to the School. That said, I am also satisfied that claimant was never more than a TA as provided for in his contract of employment and did not undertake the higher level responsibility of a HLTA. Like Mr Stewart, I too find it "difficult to accept that a recent qualified TA would be put into an HLTA role and certainly not with such an important year group", as was his evidence.

8.17. The above being so, I am not satisfied that the claimant had, as he asserts, any "rights" to be given the opportunity to apply for the role in respect of which CC was successful. She met the essential criteria of the post, which claimant did not. Further, I am not satisfied that, contrary to the claimant's contention, it was a breach of contract that he was not allowed the opportunity to apply.

8.18. In the circumstances of the appointment of CC the claimant spoke to Miss Lewis; I assume on that day, 19 January 2021. There is a stark conflict of evidence as to the content and outcome of that discussion. The claimant's evidence is that Miss Lewis mollified him by explaining that, subject to budgets allowing and the SEN unit continuing, he would take over the lead role in Class 13 not only on an afternoon but also in the mornings, and he agreed to feed back to her what his expectations might be in terms of salary. He nevertheless accepted that "nothing was set in concrete". Miss Lewis maintained that the claimant had informed her of his disappointment at the appointment of CC and of his wish to remain with Class 13. She said that she had responded that there was lots in the pipeline and although she agreed that she would keep his name "in the hat" she could not offer him anything at that time. Miss Lewis told the claimant to keep their conversation confidential. There is no record of this discussion but there is reference to it in the notes of a meeting held on 5 February 2021 referred to below (247) where it is recorded that Miss Lewis had responded that she would bear the claimant's wish to remain with Class 13 in mind but that she could not make any decision about where staff would be deployed, "There were too many variables – and it was common practice that these decisions were made much later in the year". I am satisfied that a headteacher would not commit to the deployment of staff so far in advance of the commencement of an academic year and note that even on the claimant's evidence, any indications by Miss Lewis were subject to conditions. On these bases, I prefer the evidence of Miss Lewis in this regard. Nevertheless, whatever was said in this meeting I accept as a fact that the claimant took from it some reassurance as to his future prospects at the School.

8.19. The claimant informed, FH, whom he trusted to be discreet, that he was to take over the lead role in Class 13. He assumed that FH would keep this information to himself but he did not and his sharing it with others caused considerable friction amongst other staff who thought that the claimant had been given preferential treatment in being told where he would be deployed in

the next academic year. The claimant's evidence was that from this day onwards his life changed in the School: he was chastised over matters he had nothing to do with, demoted from his role and had a HLTA brought in over him to run the class, had his planning time removed from the timetable, was given an after-school club to run every day and was met with silence from other staff. As he said in oral evidence, he had "gone from hero to zero" and had become a "pariah", "I was being shunned". It was put to the claimant that the respondent did not accept that he had been shunned but if he had been it was due to his own actions and he responded, "I accept that". In contrast, Mr Stewart's evidence was that in the relevant period he would be in the School on two or three occasions a week and spoke to the claimant regularly – brief conversations in passing involving the niceties with people you respect. He did not notice and was not made aware of the claimant having been coldshouldered at all. He had noted nothing different in the claimant's demeanour or the staff shunning him. Although that evidence of Mr Stewart was based on fairly limited visits to the School during the relevant period I do accept that he was alert to matters that might have been affecting his colleagues and that was his perception.

8.20. As a result of a number of matters having been raised with Miss Lewis she convened an informal fact-finding meeting with the claimant on 5 February 2021. This was an informal meeting in accordance with the respondent's Disciplinary Policies (70). Miss Lewis was accompanied by Mr Tallentire (246). The issues she wished to discuss with the claimant were related to the claimant having:

8.20.1. indicated his intention to speak to Miss Lewis about breaches in the Covid-19 risk assessments;

8.20.2. hugged a child from Class 13 who had visited School reception;

8.20.3. caused unrest among staff by informing a colleague that the next academic year the claimant would be in charge of Class 13;

8.20.4. not followed Covid-19 risk assessment protocols by entering the staff room at times other than his designated times.

8.21. According to the notes of the meeting (246) it commenced with the claimant raising matters that he wished to mention although he made it clear that he did not wish to raise an official grievance. The notes record that these matters included a staff member (GS) disregarding risk assessment protocols and his general attitude towards the claimant; comments amongst staff about a colleague returning from maternity leave to "her" Class 13; Mrs Armstrong having spoken to him inappropriately about photocopying phonics books but doing the same thing herself; his disappointment regarding the appointment of CC as he felt that he had been overlooked. In these respects, Miss Lewis explained the circumstances relating to the appointment of CC and stated that she would look into the other matters.

8.22. As to the above matters that Miss Lewis wished to raise with the claimant:

8.22.1. he denied hugging the child, which Miss Lewis said that she would check on the CCTV;

8.22.2. he also denied speaking to anybody about working in Class 13 as he said he would never have discussed the matter with anyone;

8.22.3. he accepted that he had sometimes broken the 'bubble' introduced in the risk assessment protocols but emphasised that he was not the only one, and Miss Lewis responded that in the circumstances isolated beaches would not be investigated further but all staff would be reminded of the protocols and would be informed that spot checks would be introduced.

8.23. With regard to the last of the above three points, the claimant accepted in cross examination that he had broken the Covid rules by being in the staff room at the wrong time and using the wrong corridor (but added that there had been slippage by others), and accepted that it was reasonable for Miss Lewis to raise these matters with him, as she had raised a similar issue with GS who had also admitted using a corridor in breach of the protocols.

8.24. Although there is no record of this point in the notes of the meeting, I am satisfied that another subject that was raised was the claimant using the disabled toilet in the Key Stage 1 corridor, which was outside his 'bubble'. Neither Miss Lewis nor Mr Tallentire accepted that there had been such a discussion at this first meeting but I am satisfied that there was as that is the only reasonable explanation for it being recorded in the notes of the following meeting on 12 February that further to the staffroom issue raised the previous week, "this focused not on the Toilet Break for SW …." (251). I am satisfied that it would not have been recorded in relation to this second meeting that something did not focus on a toilet break unless the issue of a toilet break had been raised at the first meeting. Additionally, Mr Tallentire accepted in answering a question from me that not having recorded the discussion at the meeting on 5 February about the claimant accessing toilets was "potentially omission" and he "potentially should have made mention of toilet breaks". In this regard, the claimant's evidence was that at the meeting on 5 February Miss Lewis had raised the subject of using the disabled toilet in the Key Stage 1 corridor, which was outside his 'bubble'. He was extremely upset at this and pointed out that other staff also used that toilet. He explained that he used that toilet as the only other disabled toilet that he could fit his wheelchair into is in the reception area and is constantly used by pupils and staff, and he had found that toilet to be engaged or filthy. The claimant had not previously raised his concerns about this facility with any of the School's managers. In evidence, Miss Lewis explained that the issue was not the claimant's use of the toilet (which he could have accessed along the Key Stage 2 corridor then through the art store cupboard) but his use of the Key Stage 1 corridor, which was outside his 'bubble'. I accept that evidence.

8.25. I interject at this point that in asking questions of Miss Lewis concerning the toilet the claimant seemed to suggest that what is often referred to as a disabled toilet should be available for the exclusive use of people with disabilities. I commented that if he was making that suggestion I did not agree as it was my understanding that an accessible toilet was simply a toilet that was accessible to and had facilities suitable for people with impairments. Late in the afternoon following this matter having been raised the claimant sought to draw my attention to government guidance on disabled toilets. I responded that I really did not consider that to be relevant to the issues in the case. Overnight, however, identified a publication from the Department for Education dated March 2015 headed, "Advice on standards for school premises". The following morning I asked the claimant if this was the guidance to which he had referred and he confirmed that it was. He drew my attention to a footnote that stated as follows:

> "The requirements of Part M of the Building Regulations will be satisfied if any wheelchair user does not have to travel more than 40m horizontally to reach an accessible toilet. With young pupils the travel distance may need to be less."

I confirmed that I had already noticed that footnote but queried why it was a footnote to a section headed, "Facilities for disabled pupils" and did not seem to relate to staff such as the claimant noting that there was a different section of the document headed, "Toilets and washing facilities [f]or staff", which primarily stated that facilities for staff may also be used by visitors". Perhaps understandably, the claimant was not able to clarify this point and did not pursue this issue any further.

8.26. As set out above, at the meeting on 5 February the claimant denied speaking to anybody about his conversation with Miss Lewis regarding working in Class 13 in the following academic year. The evidence in his witness statement was that he could not remember that but "I did say that I had talked with someone". I do not accept that evidence not least because in cross examination the claimant accepted that his witness statement might be wrong explaining that he was in such a dreadful state he "inadvertently said, "No"" but "to err is human". After that meeting had concluded the claimant spoke to Mr Tallentire. He acknowledged that on reflection he had spoken to FH and had told him that he thought he would be running Class 13 next year, which FH had openly discussed with others as he was not aware it was confidential. Also after that meeting Miss Lewis spoke separately to GS (248) and Mrs Armstrong (249) about the matters that had been raised relating to them.

8.27. An incident occurred on 10 February 2021 when there was a large fall of snow causing the claimant concern as to potential difficulties he might face on his journey home and he was given permission to leave early. At lunchtime the claimant entered the staffroom and asked DM if she would cover his afterschool club that afternoon. Miss McKeown responded that DM would not be able to provide cover as she had a broken shoulder. The claimant's evidence is that

she continued, “I’m sure you’ll be fine, you’ve got your other leg now. You’ll be able to drive and anyway I’m not staying, I’ve got things to do”. Miss McKeown denied making that statement and her evidence was corroborated by Miss McGurk whose evidence the claimant did not challenge. It is always difficult to make a determination of such conflicts of evidence but if only on the basis that the evidence of one of the respondent’s witnesses in this regard was corroborated by the unchallenged evidence of the other, on balance, I prefer their evidence.

8.28. A follow-up meeting was convened between Miss Lewis, Mr Tallentire and the claimant on 12 February 2021. According to the notes of that meeting (250) the following matters were discussed:

8.28.1. The CCTV footage had shown that the claimant had not hugged a pupil but it had raised concerns as to whether the claimant had left the class unsupervised when he went to the School reception. The claimant first respondent that he had left the class with DM but when Miss Lewis noted that she was also visible on the footage the claimant said that he could not recall and would have to check his notes and then said it must have been CR. This raised further concerns for Miss Lewis as CR was in a different Covid-19 ‘bubble’. In this regard Mr Tallentire accepted in cross examination that Miss Lewis had referred to the claimant endangering the life of CR given that she had long-Covid, which he explained he had not recorded in the notes as it was a confidential matter involving CR. In evidence the claimant said that he took great exception to this suggestion by Miss Lewis and in his submissions referred to this as being the “worst accusation”. Ultimately, however, at the meeting Miss Lewis only reminded the claimant always to find cover from within his ‘bubble’ at which the claimant stated that he felt that this was like a ‘witch-hunt’. CR later Miss Lewis that the claimant did not leave the class with her.

8.28.2. The claimant apologised for having had a conversation with another member of staff regarding his deployment with Class 13 but he thought that their conversation had been in confidence.

8.28.3. Miss Lewis reported that certain staff had acknowledged that they had walked down a corridor in breach of the risk assessment and she would issue a whole school reminder.

8.28.4. Mrs Armstrong had denied that she had spoken rudely to the claimant about photocopying but had been firm in that she considered that he had wasted his time in compiling resources that had already been done.

8.28.5. The meeting concluded with Miss Lewis and Mr Tallentire expressing their satisfaction that all the issues that had been raised had been looked into but claimant stated that he was unhappy that it appeared

that he was at the centre of everything and reiterated that he felt it was a witch-hunt.

8.29. In line with the last of the above five points regarding the satisfaction of Miss Lewis and Mr Tallentire, following the meeting no further action was taken in connection with any of the issues that she had thought it necessary to raise with the claimant.

8.30. Despite the claimant's evidence that he was aggrieved at how Miss Lewis had conducted this meeting he did not raise his concerns with senior managers explaining in cross examination that had he done so it would be swept under the carpet and it was a "very incestuous, nepotistic and cronyist environment"; neither had he raised a formal grievance because he was convinced that after the investigation he would receive a full apology.

8.31. The claimant had covertly recorded the meetings on 5 and 12 February explaining that he had had the "foresight" to do so but that was inconsistent with his oral evidence that, at the first meeting, after 15 minutes he became concerned and set his 'phone to record as he felt that he "was in a position of pseudo-interrogation". Be that as it may, he said that the recordings had been lost when he had damaged his 'phone while paddleboarding.

8.32. Mr Tallentire took manuscript notes of each of the above meeting on 5 and 12 February. He did not type them up, however, until September after the respondent received notice of the claimant's complaint to this Tribunal, which was some seven months later. His evidence was that the typed notes are accurate but the claimant challenged that and I am satisfied that there were some instances of inaccuracy. Those include, as noted above, first that Mr Tallentire accepted in answering a question from me that not having recorded the discussion at the meeting on 5 February about the claimant accessing toilets was "potentially omission" and he "potentially should have made mention of toilet breaks" and, secondly, that he had not recorded the remark made by Miss Lewis about the claimant endangering the life of CR given that she had long-Covid. Mr Tallentire also accepted that he had endanger I accept the point made by Mr Vials in submissions, however, that any issue in the minutes could not have formed part of the claimant's decision to resign because they were not typed up or available until after his resignation. Surprisingly, Mr Tallentire said that having typed up the original notes that he took at the meetings he had destroyed them. I consider that it was remiss of him to have done so as, by then, he knew that claimant had presented his complaint. Similarly, however, the claimant said that he made notes of the recordings he made of the meetings but had discarded them, albeit long before he decided to bring the claim.

8.33. There was also conflict between the evidence of the claimant and Mrs Armstrong as to the run in they had on 3 February 2021. The claimant's evidence was that despite the School having purchased expensive software to allow teachers to access certain books, and share them with their pupils the resource was still unavailable. He had therefore photographed pages from

books and downloaded the images so that they could be shared with pupils during online learning sessions. Mrs Armstrong had come to his classroom and had spoken to him in a totally inappropriate manner accusing him of having infringed copyright. “She was both brusque and abrupt”. The claimant took issue with the manner in which he had been spoken to by Mrs Armstrong, a senior member of staff. The evidence of Mrs Armstrong was that it was the claimant who entered her class and proudly presented her with a PowerPoint resource containing a number of pages from phonic books that he had spent his own time creating. She questioned why he had taken the time to do so when a selection of sample resources were available on the School’s online portal to which everyone had access and the full resources were to be available over the next few weeks; not least because she had already spoken to him about this. She said that the claimant was visibly upset by her comments and stormed out of the classroom slamming the door as he left. She had followed him to placate him but he became quite aggressive and raised his voice so she asked him not to speak to her in that manner. This conflict of evidence is not helped by Miss Lewis apparently having misunderstood the point that the claimant had photographed pages from books as the issue she raised with him at their meetings in February related to his having photocopied pages from books, which was not the issue and the claimant said was done by many staff members. On balance, given the clarity of Mrs Armstrong’s oral evidence (what she said rather than the way in which she said it) and the fact that her evidence broadly accords with her explanation to Miss Lewis when they spoke on 5 February, only two days after the event in question, as is recorded in the note of their meeting (249) I prefer the evidence of Mrs Armstrong.

8.34. On 2 March 2021, in line with her usual practice Miss Lewis sent an email to staff (254) attached to which were details of the after-school provision (256) and the revised timetable for the term (257). The claimant was to remain in Class 13 with CR, another TA, working alongside him in the afternoons.

8.35. The claimant had received that email but had not opened it as he was “not a slave” to IT. When he arrived at School the following day, 3 March, he found copies of those two documents on the shared desk in the Class 13 room. The claimant read the timetable as showing that he had been removed from his lead role in Class 13 and placed under CR. In cross examination he accepted that Miss Lewis could assign and redeploy staff as a management decision but he did not accept that she could do so without prior consultation or the good manners to talk to him. He described his removal from the position he had been fulfilling without discussion as being “callous”. He said that he had no idea why the papers were on the desk although he accepted that a possible explanation was that it had been CG who had put them there as they shared that desk. His evidence was that he felt that he had been ‘taken down at peg’ for having had the audacity to question Miss Lewis. The claimant’s contention was that it is to be inferred from the initials of CR being shown above his initials on the timetable that she was to work “above” him, he had been “demoted”. In this connection he referred to other timetables (C1, C3 and C5) that show his initials above

those of other colleagues which he said meant that they worked supporting him. In oral evidence he confirmed that he had not been told this but that it was his "deduction". I am not satisfied that the evidence before me, particularly the oral evidence in answers to questions, supports the claimant's contention in this respect; rather, as Mr Stewart said, the initials show who is working where and when rather than any seniority between them. The claimant also saw on the timetable that what he considered to be his planning time had been removed.

8.36. From the after-school club document he saw that he had been allocated five after-school clubs and was the only qualified assistant with so many clubs to run apart from DM but she had been doing that for a number of years. The claimant's evidence was that being allocated five clubs was punitive action due to his rocking the boat regarding the appointment of CC. I am not satisfied that his contention in that is accurate especially given that his contractual working hours were to 16.15 each day and the clubs finished at that time; and in August 2020 when the claimant was allocated after-school clubs only on Monday, Tuesday, Thursday and Friday he informed Miss Lewis that Wednesday was "no issue" if she needed some cover (525). The important point, however, is the claimant's contention that allocating five clubs to him was punitive action. On the basis of the evidence before me, including what I have found above in relation to the meeting between the claimant and Miss Lewis on 19 January, I am not satisfied that this did amount to any form of punishment of the claimant.

8.37. The claimant's evidence, which I have no reason to doubt, was that he stared at the documents becoming more and more upset and began to cry; he described it as a "catastrophic event". He said that it was obvious to him that he was being mercilessly punished for having raised the matter of CC's appointment without due process being followed and had spoken about Miss Lewis' plans for him in the forthcoming academic year. He "felt betrayed and humiliated" by Miss Lewis.

8.38. The claimant left his Class 13 and walked some 24 metres along a corridor past other classrooms to Class 12 where he informed CC that he was going to see Miss Lewis and asked her to cover his class, which she did. The claimant said that it would take 10 seconds to cover that distance but Miss Lewis said that she had timed it at 49 seconds. The claimant's evidence was that he did not leave his class unattended as he left the classroom door open and at all times could see if anyone went in or out of the Class 13 classroom. It is clear from the layout plan of the School (528), however, that after he had left the classroom the claimant could not see the pupils inside, all of whom had special needs, and that the Class 13 classroom has two doors onto two different corridors only one of which might have been visible to the claimant. The second door could have been used either by a person entering the classroom or by one of the pupils leaving the classroom. Mr Tallentire described these as being "safeguarding concerns". Be that as it may, I am satisfied on the basis of even the claimant's evidence that he did leave his class unattended when he went to speak to CC. The evidence of Miss Lewis was that the claimant should not have

done that but could either have contacted her or the office using the mobile ’phone or asked a pupil in the class to fetch another staff member.

8.39. The claimant did not seek out Miss Lewis or another member of the Senior Leadership Team (as the School procedures required if he was intending to leave the premises) but left the School premises. In doing so he passed three colleagues none of whom brought to the attention of Miss Lewis that they had observed him in distress. The claimant says that he remembers nothing until arriving at the home of a former military colleague some four hours later. He described himself as having suffered a full dissociation mental breakdown for which he has since received clinical psychological treatment and been prescribed medicines. The claimant had not, however, produced any medical evidence to corroborate that evidence. He explained that he took the decision that he was not going to have his medical history raked over by the likes of Mr Vials as it was an embarrassing and traumatic time of his life.

8.40. On being informed that the claimant had left the School premises Miss Lewis attempted to contact him. Her evidence, which was credible, was that she made two ’phone calls but when neither was connected she sought advice from the respondent’s Head Office. She was told to try contacting the claimant half an hour later, which she did but the call was disconnected after the second or third ring, which she construed as the claimant maybe deliberately ignoring her calls; which it transpired was correct. She reverted to Head Office and spoke to Mr Tallentire who said that he would take over the job of locating the claimant. He managed to speak to the claimant’s wife and his evidence was that she informed him that her husband had been sent home from School and was upstairs in bed.

8.41. The claimant had produced screenshots of call logs of the mobile ’phones of him and his wife for 3 March 2012. That in respect of the claimant (511) shows him receiving a call from the School (number ending 2147) at 09:51, which he did not answer explaining in oral evidence that he saw that the call was from Miss Lewis and he could not stand talking to her. The log in respect of the claimant’s wife (512) shows her receiving one call from the School Office at 13:14 (which, by default, shows number ending 6700) and making three calls between 14:50 and 14:55 to Mr Tallentire’s direct line (number ending 6702), which he had given her during the earlier call. These records are inconsistent with the evidence from the respondent’s witnesses as to the numerous occasions on which someone from the School or the School Office attempted to contact the claimant. Various suggestions were made in this respect including that a call is not logged if the ’phone is switched off (Mr Tallentire) or that the ’phone does not receive a call because of a poor signal (the claimant). Without any technical evidence on this point I decline to make any finding of fact. Suffice it to say that given the evidence of the respondent’s witnesses as to the several attempts that had been made to contact the claimant (sometimes numerous times by one of the witnesses, Mr Tallentire, in the presence of another, Mr Stewart) and the claimant having declined to answer

the call that was made to him by Miss Lewis at 09:51, I prefer that evidence. There is a further anomaly regarding these calls that I am unable satisfactorily to address. Mr Tallentire's evidence (which was confirmed by Mr Stewart) was that it was he who telephoned the claimant's home at 13:14 and spoke to his wife who told him that the claimant was at home in bed and asked why he had been sent home. In contrast, the evidence from Mr Black, which the respondent decided not to challenge, is that the claimant arrived at his home in Wark "at lunchtime" on that day. Suffice it to say in this connection that I am satisfied that Mr Tallentire did receive reassurance from the claimant's wife sufficient for the School managers to conclude that it was unnecessary for them to continue in their efforts to contact the claimant.

8.42. The claimant submitted three successive fit notes covering his absence from 3 March 2021 to 15 June 2021 (258, 261, 264 and 276) each of which cited "stress and anxiety" plus, in the case of the second Note, "rib injury". The respondent sought to follow the usual sickness absence procedure and Miss Lewis invited the claimant to attend an attendance management interview (265) but he replied that he felt unable to be involved at that stage, stating that he was supported in that by his psychologist and GP (266). Miss Lewis asked the claimant to complete a Wellbeing Questionnaire (269), which he failed to return, and made a referral to Occupational Health. In oral evidence the claimant explained that it seemed ludicrous to engage in a process with the people who were the root cause of his problems and he had been advised by his GP not to be in touch with anyone at the School. Even Occupational Health was all part of the same structure and he did not feel he could engage with that structure; from his perspective it was all part of the same machine. He confirmed, however, that there was nothing more that the respondent could have done in accordance with its procedures.

8.43. Just before May half-term the claimant's wife telephoned Miss Lewis saying that she wanted to collect certain of his belongings. Miss Lewis asked if the claimant was returning to school and his wife replied that Miss Lewis needed to speak to him. Miss Lewis therefore asked the claimant's wife to bring a list of the possessions the claimant wished to have returned and she would gather them together, which she did. The claimant denies the inference that at this time he had no intention of returning the School explaining that he simply wanted the return of his valuable items.

8.44. The claimant resigned from his employment by email dated 1 June 2021 giving three weeks' notice. In oral evidence he said that he had "hung on to going back" but decided that he could not. He said that there was not a further act on the part of the respondent that led him to resign but he knew that his relationship with Miss Lewis and possibly Mr Tallentire was irreconcilable and he "could not imagine going back into the workplace where those scarred relationships were at the fore". Indeed he could not imagine a relationship with Mr Stewart either as there would be a complete closure of ranks in favour of Miss Lewis "Miss Lewis and Mr Stewart in my eyes are one and the same". He

denied that his resignation was due to his sick pay being about to reduce to 50%.

8.45. That email from the claimant was received during the school holidays and Miss Lewis replied on her first day back at work, 10 June 2021. Amongst other things, she accepted the claimant's resignation notwithstanding that one month's notice of termination was required. Thus the claimant's last day of employment was Friday, 18 June 2021.

8.46. On 1 July 2021 the claimant formally commenced new employment with MJM Flooring Ltd doing estimates for flooring contracts two days a week; although he explained in cross examination that he had attended three training days with his new employer at the end of June 2021.

Submissions

9. After the evidence had been concluded, the claimant and Mr Vials made submissions, which addressed the issues in this case.

10. In this respect I record that at the end of the penultimate day of the hearing, with only submissions to come the following morning, in accordance with the overriding objective, I sought to give the claimant guidance as to the issues that he needed to address in this case. It became apparent during the submissions that he made that he had understood and possibly researched further the points that I had made.

11. It is not necessary for me to set out the respective submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to by Mr Vials, and the parties can be assured that they were all taken into account in coming to my decisions. That said, the key points in the representatives' submissions are set out below.

12. On behalf of the respondent, Mr Vials made submissions by reference to a document that he had produced headed, "Written Submissions" in which he referred to many leading authorities in this area of the law. His submissions included the following:

12.1. For the reasons set out in his written submissions, including that on a number of occasions the claimant had accepted that he had been dishonest, the evidence submitted by the claimant was not credible.

12.2. The claimant's claim should be dismissed on the basis that there was no repudiatory breach of contract. The claimant has tried to suggest that the respondent acted unreasonably but that is not the correct test. The respondent was entitled to raise concerns about the claimant's conduct, such as breaching the Covid rules and him discussing next year's staffing allocation with others. It was entitled to allocate the claimant to a class suited to the needs of the School

and to allocate the claimant after-school clubs within his contractual working hours. It was also entitled to appoint CC to a role for which the claimant was not qualified or experienced; for it to do so would not be a breach of the claimant's contract.

12.3. When the claimant found a copy of the staff rota on the desk on 3 March he was wrong to construe his initials being second as a demotion as that is not reflected in the evidence which shows other TA's one above the other, which does not denote line management. The claimant was wrong to leave his class unattended, which he accepted was serious and potentially gross misconduct, and wrong to leave the School without notifying anyone in senior management. Nevertheless, the School was understandably concerned and more than fulfilled its obligations to him by making a series of telephone calls. The claimant then commenced sick leave and confirmed that there was nothing else that the respondent could have done. He ultimately resigned at the point when he was about to go on to half pay and started new employment

12.4. Any alleged 'last straw' was entirely innocuous and not capable of contributing anything to earlier acts.

12.5. As the claimant's complaints all relate to events occurring before 3 March 2021 and he accepts that after that date there was nothing the respondent could have done, he had delayed too long from the beginning of March to his resignation on 1 June 2021 and affirmed any purported breach by continuing to be paid.

12.6. The claimant did not resign in response to any alleged breach. He made his decision to leave on 3 March and was never going to return. That is clear from his wife coming for his personal belongings on 24 May.

12.7. If the Tribunal considers the claimant was dismissed, any dismissal was fair having regard to section 98(4) of the Act.

13. The claimant made submissions including those set out below. I have not included many of the criticisms he made of Mr Vials' submissions but took them into account in coming to my decision. Other key points the claimant made were as follows:

13.1. I was not given the opportunity to apply for a position for which I was qualified and had been fulfilling for one year. What changed at School was that I challenged the Head and became persona non grata. I was de facto demoted, ostracised and became the subject of spurious and malicious allegations.

13.2. I am simply not in a position to pinpoint one act as a final straw. There were many things not least of which is the betrayal. I accept that in strictest terms of the word "contract" of appointment that the respondent, although it behaved badly, has not strictly breached the terms of the original contract as a TA and, therefore, I have difficulty in satisfying the first two limbs of the Denning judgment. However, I understand that a contract can also be defined as a verbal

agreement and in this case agreement was made for me to step up and cover a fully qualified deputy headteacher who had just resigned and an experienced non-qualified teacher who was about to go on maternity leave. By stepping into the posts they had vacated I maintain I was operating at their level. When I stepped into Class 13 it was for a year and therefore formed the basis of my contract and became the norm. Therefore, I assert that the respondent did breach the contract by denying me the opportunity to formalise my grade by parachuting in CC; and it was a significant breach.

13.3. That was then compounded, making this a significant breach, by removing me from the post I had been fulfilling, unilaterally and without consultation – and then punishing me by removing the normal day-to-day aspects of my job; I was forced out. The respondent removed my PPA, increased my duties, accused me of serious breach of Covid rules and breaching copyright regulations by photographing books, which was commonplace, subjected me to derisory remarks regarding my prosthetic leg and denied my statutory access to the nearest available accessible toilet on the basis of a spurious Covid-19 rule. The worst was an accusation that I endangered the life of CR.

13.4. After a period of sickness, as soon as I was well enough I made the decision that I could not go back to work and resigned because of the significant breaches that had occurred. On advice from my GP and Clinical Psychologist I chose not to engage with the respondent on the basis that it had a good chance to impact detrimentally on my mental health.

13.5. The submissions by Mr Vials were inaccurate and included a blatant lie. He had attempted to rewrite this in an Orwellian manner.

13.6. I was in a state of dissociation following a full mental breakdown with no access to the ’phone. No one has suggested what I could have done. They seem to have no empathy whatsoever.

13.7. Mr Tallentire had adopted an amateur gumshoe approach saying that he had found on Google that calls are not logged if a ’phone is switched off but if he had looked further he would have found that calls are not connected if there is no service and I was in Wark where there is a very poor service.

13.8. The minutes of the meetings in February were concocted seven months after the event. They were sanitised and cleansed to ensure that anything that was damaging to the respondent was removed.

The Law

14. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law being primarily the statutory law set out below and relevant case precedents in this area of law many of which were relied on by Mr Vials.

15. The principal statutory provisions that are relevant in this case are to be found in the Employment Rights Act 1996, which (with some editing so as to be relevant to the claimant's complaint) are as follows:

> ***"94 The right.***
>
> *(1) An employee has the right not to be unfairly dismissed by his employer."*

"95 Circumstances in which an employee is dismissed.

> *(1) For the purposes of this Part an employee is dismissed by his employer if*
>
> *……*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
>
> ***"98 General.***
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for 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.*
>
> *…….*
>
> *(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."*

Application of the facts and the law to determine the issues

16. As in any case involving a claim of constructive unfair dismissal, the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the Act that he had resigned in circumstances where he was entitled to do so by reason of the respondent's conduct: commonly referred to as constructive dismissal.

17. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that he was indeed dismissed rather than simply resigned, the claimant has to show four particular points as follows:

17.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

17.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

17.3. If so, the claimant resigned in response to that breach.

17.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

18. To establish the required breach of contract, the claimant relies not upon a breach of express terms of his contract of employment but upon on a breach of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. As was said in Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347,

> *"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*
>
> *"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract." "Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract"*

19. It is clear from the final paragraph in the above excerpt that with regard to the second of the above factors in Western Excavating (ECC) Limited, in general terms, a breach of the implied term of trust and confidence "will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract": see Morrow v Safeway Stores plc [2002] IRLR 9 applying the decision in Woods.

20. The decision in Malik v BCCI [1998] AC 20 is summarised by Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228 thus:

> "*This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,*
>
> *'. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'. Lord Steyn emphasised, at p53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '*"

21. Similarly, in the decision in Sharfudeen v TJ Morris Ltd t/a Home Bargains UKEAT/0272/16 it was stated that an employment tribunal, "must be satisfied that the employee has lost that trust and confidence as a result of the conduct on the part of the employer that was without reasonable and proper cause; a question that is to be answered by the ET objectively (see also, Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168) not simply by applying a range of reasonable responses test": see also Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA.

22. Clearly, therefore, unreasonable conduct alone will not suffice: see Claridge v Daler Rowney Ltd [2008] ICR 1267, EAT. Likewise, it is insufficient that a decision might be unreasonable, it must be shown to be irrational under the more stringent Wednesbury principles: see Braganza v BP Shipping Ltd [2015] UKSC 17 and IBM United Kingdom Holdings Ltd v Dalgleish [2018] IRLR 4.

23. It is also well-established that, "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment": see Lewis v Motorworld Garages Limited [1985] IRLR 465. In this case the claimant relies upon such cumulative conduct on the part of the respondent and what is sometimes referred to as the 'last straw' doctrine. This was explored in Omilaju v Waltham Forest London Borough Council [2005] ICR 481, CA in which it was said of a final straw as follows:

> "*it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant*."

24. I also remind myself, however, that the last straw itself can be sufficient to be a repudiatory breach (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978).

25. In light of the guidance that I draw from the above authorities I come to consider the matters relied upon by the claimant as cumulatively amounting to a breach of the term of trust and confidence that is implied into all contracts of employment.

26. First, however, I record that even accepting that the claimant was without legal representation I did find it difficult to identify key matters in his claim including the starting point of the cumulative conduct upon which he relies and the final act or last straw in that cumulative conduct.

27. As to the starting point, in his witness statement, having set out his evidence regarding him having approached Miss Lewis on what I have assumed to have been 19 January 2021 about the appointment of CC, he continued, "from that date onwards my life changed in the school". I am satisfied that having only just referred to that meeting, "that date" means the date of that meeting: i.e. 19 January 2021. In cross examination, however the claimant suggested that "that date" meant the date upon which FH told other colleagues what the claimant had told him about him taking over the lead role in Class 13. Chronologically, there might not be a significant difference between the dates of those two events (given that Miss Lewis raised the FH matter with the claimant at the meeting on 5 February) but it is nevertheless notable that the claimant is unclear as to when he says that his relationships within the School began to change and, therefore, what was the cause of that change.

28. The claimant's evidence as to an event that constituted the last straw similarly lacked clarity. In a document that the claimant produced in light of what was fed back to him by an ACAS officer headed "Additional Information" (40) the claimant stated, "The final straw came when, in a callous, insensitive act, documents were casually left on my desk on the morning of 3rd March 2021 removing me, mid-term from my post in Class 13 and over-burdening me with additional duties." (44). In the claimant's evidence before this Tribunal, however, he referred to Miss Lewis having raised the issue regarding his use of the disabled toilet as being the "straw that broke the camel's back", albeit adding, "I can't say that one issue led to my resignation". Given this contradiction as to what was the last straw, towards the end of the claimant's evidence I specifically sought clarity on this point by asking what he said had been the last straw that had caused him to resign. He responded, "The thought of trying to go back into school and trying to have the relationships I'd previously had – I couldn't face it." I asked the claimant in what way that had been caused by the respondent. He responded, "The cumulative effect of all the things that had happened to me and the tremendous psychological blow I had on the 3rd March – I couldn't face the prospect of having that happen to me again – and the total breakdown of my relationship with Miss Lewis. I couldn't put myself in a position in which I could harm and damage myself again. There was no way I could go back in there". This answer broadly accords with paragraphs 46 and 47 of the claimant's witness statement, excerpts from which are as follows:

> "As I became gradually more and more able I have come to realise how poorly I have been treated, bullied and harassed, the victim of many failures to follow

due process and above all, betrayed by the very people who have a duty of care towards me – the senior team at Greenland Community Primary School".

Therefore after taking advice from contacts within the military, ACAS and friends and former colleagues I decided to bring a case of constructive dismissal against the SLP. I duly resigned on 1st June 2021 …"

29. Also relation to the final straw, the claimant explained in oral evidence that after he had left the School on 3 March he had "hung on to going back" but decided that he could not. Importantly in this connection, he continued that there was not a further act on the part of the respondent that led him to resign. Finally on this point, as set out above, in making his submissions the claimant stated as follows, "I am simply not in a position to pinpoint one act as a final straw. There were many things not least of which is the betrayal."

30. Against the above background, I now turn to address the acts relied upon by the claimant. In this regard, I first record that I also found it somewhat difficult to identify precisely what were the individual elements that the claimant considered came together to establish the cumulative course of conduct, which entitled him to resign and claim to have been constructively dismissed. To address that, I take as a structure a combination of the matters referred to in paragraph 15 of the claimant's witness statement and certain of the matters to which he referred in his submissions set out above.

31. I first address the matters contained in paragraph 15 of the claimant's witness statement and in the paragraphs immediately following that paragraph 15 given that the final sentence of that paragraph states, "Details of these events are as follows:"

I was first chastised for matters which I had nothing to do with

32. I take this first point in paragraph 15 to be a reference to the matters that Miss Lewis raised with the claimant at their meeting on 5 February 2021, namely as follows:

The claimant having hugged a boy

32.1. As the claimant accepted in cross examination I find that it was perfectly reasonable for Miss Lewis to look into a complaint that had been drawn to her attention to the effect that the claimant had broken the Covid-19 protocols within the School. As such, I am satisfied that for Miss Lewis to have raised this matter cannot constitute the respondent acting without reasonable and proper cause or in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant. As such, it cannot be or contribute towards a breach of the implied term of trust and confidence. In respect of this matter and several others below, as was said in the decision in Spafax Limited v Harrison [1980] IRLR 442, "Lawful conduct is not something which is capable of amounting to a repudiation."

32.2. Similarly, the actions of Miss Lewis in looking further into this allegation, deciding that it was without foundation and therefore not taking any further

action cannot be or contribute towards a breach of the implied term of trust and confidence.

32.3. Arising from this is the point that when the claimant said at the meeting on 12 February that he must have asked CR to cover his class Miss Lewis responded that this raised further concerns as CR was in a different Covid-19 'bubble' and referred to the claimant having endangered her life. As mentioned above, at the hearing, given his military background, the claimant took great exception to this comment; it was "the worst" accusation. At most, however, I find that this was a clumsy remark for Miss Lewis to have made but that it did not itself constitute or contribute towards a breach of the implied term of trust and confidence.

The claimant having caused unrest among staff by informing a colleague that the next academic year the claimant would be in charge of Class 13

32.4. As I have found above and the claimant accepted, at their meeting on 19 January Miss Lewis told the claimant to keep their conversation confidential. He did not do so. In the circumstances it was reasonable for Miss Lewis to have pursued this point with him and, once more, for her to do so cannot constitute or contribute towards a breach of contract.

The claimant having not followed Covid-19 risk assessment protocols by entering the staff room at times other than his designated times.

32.5. Appropriate safety measures had been introduced into the School in an attempt to minimise the impact of the pandemic. Miss Lewis had become aware that the claimant had breached such measures by entering the staff room at other than his designated times. I find that it was quite proper, therefore, for her to have raised this matter with claimant and, again, for her to have done so cannot constitute a breach of contract. I also note that in cross examination the claimant accepted, first, that he had broken the Covid rules (although explaining in evidence that it was only to collect a bottle of drinking water and others did far worse) and, secondly, that it was reasonable for Miss Lewis to raise such matters with him. Additionally, Miss Lewis did not chastise the claimant for this but responded that isolated beaches would not be investigated further although all staff would be reminded of the protocols and would be informed that spot checks would be introduced, which I again consider to be reasonable conduct on behalf of the respondent.

The claimant having photocopied/photographed books

32.6. I have found above that I prefer the evidence of Mrs Armstrong in this connection: namely, that she had spoken firmly to the claimant about him having produced unnecessary resources, and did so not least because this was the second occasion that she had spoken to him about this. Once more,

therefore, I find this was done with reasonable and proper cause and cannot be or contribute towards a breach of contract.

The claimant using the disabled toilet in the Key Stage 1 corridor

32.7. As stated above, I accepted the evidence of Miss Lewis that the issue in this connection was not the claimant's use of the accessible toilet but the fact that he again breached the Covid protocols in the School by using the Key Stage 1 corridor when an alternative means of access could have been along the Key Stage 2 corridor then through the art store cupboard. For similar reasons to those set out above, I am satisfied that this was also a matter that it was reasonable for Miss Lewis to raise and cannot amount to or contribute towards to a breach of contract.

Demoted from my role

33. This second matter in paragraph 15 of the claimant's witness statement relates to his assertion that he had been working as an HLTA but was then demoted to the role of TA and, further, that he "had an HLTA brought in over me, to run the class". That person was CR and I accept the evidence of the respondent's witnesses that she was not a HLTA but, like the claimant, was a TA. The claimant also accepted in evidence that his inference that the initials of CR being shown above his meant that she was to work above him and he had been demoted was only his deduction. I am satisfied that that inference and that deduction were misplaced and are outweighed by the clear evidence of the respondent's witnesses that the positioning of initials on a timetable did not indicate any seniority between them.

34. In the circumstances of CR not being a HLTA and not having been brought in over the claimant "to run the class", this contention of the claimant is not well-founded and this matter cannot constitute or contribute towards a breach of contract.

Planning time removed

35. This is the third of the matters in paragraph 15 of the claimant's witness statement. I have found above, that I accept that (except in relation to Miss McGurk for the reasons set out above) PPA is an entitlement of teaching staff only and no TA or HLTA receives PPA. Clearly Miss Lewis was in error in showing on the timetable that the claimant had been allocated PPA when she should have referred to him being given that time for the purposes of his studies. I accept, however, that that was the real purpose of Miss Lewis having given the claimant Wednesday afternoons 'off timetable' and, therefore, it was reasonable for her to have withdrawn that study time from the claimant once he had completed his training for the HLTA qualification. That being so this element, once more, cannot constitute or contribute towards a breach of contract.

I was given an after-school club to run every day

36. In relation to this final matter in that paragraph 15, I first record that I accept the submission made by Mr Vials that the term "after-school club" might be somewhat misleading as it could be taken to indicate some form of overtime, voluntary or otherwise. The contrary is the case, however, as the claimant was employed to work from 08.30 to 16.15 each day and the after-school clubs ended at 16.15. In this regard also, it is notable that the claimant accepted in cross examination that Miss Lewis could assign and redeploy staff as a management decision and could allocate his working time as it was considered best suited the needs of the respondent.

37. The fact that Miss Lewis could allocate the claimant's time does not, of course, necessarily mean that for her to do so was reasonable if her reasoning was, as the claimant asserts, to mete out punitive action due to his rocking the boat regarding the appointment of CC but, as explained above, I have found that allocating five afterschool clubs to the claimant did not amount to any form of punishment.

38. In the above circumstances, therefore, I again find this matter did not amount to Miss Lewis conducting herself without reasonable and proper cause and, therefore, it cannot constitute or contribute towards a breach of contract.

39. Moving on from paragraph 15 of the claimant's witness statement, I turn to address the submissions that he made so far as they are relevant to identifying what were the individual elements that the claimant considered established the cumulative course of conduct upon which he relied.

I was not given the opportunity to apply for a position for which I was qualified and had been fulfilling for one year.

40. I have set out at some length above my findings in relation to this matter and it is not necessary to repeat them here in similar detail. Suffice it to say that I accepted the evidence of Miss Lewis and Mr Stewart that the claimant was not qualified for the position that was offered to CC, neither did he have the required skills and experience to undertake that role. I repeat that the claimant did not suggest that he met all of the essential criteria, accepted that at the time of the appointment he had not obtained the HLTA qualification and was only able to suggest that he had undertaken certain aspects of the HLTA role for a very limited period time and not following his return to work in March 2020. As he said himself in his witness statement, "My contract of employment was as a TA but I had been used as at HLTA for a year."

41. In the circumstances, as I have already found, I am neither satisfied that the claimant had any "rights" to be given the opportunity to apply for this role nor that it was a breach of contract that he was not allowed the opportunity to apply. Once more, therefore, this matter cannot constitute or contribute towards a breach of contract.

I challenged the Head and became persona non grata. I was de facto demoted, ostracised and became the subject of spurious and malicious allegations.

42. I have addressed above the allegations of demotion and becoming the subject of spurious and malicious allegations. As to challenging Miss Lewis, it is right that the

claimant went to see her (I have assumed, on 19 January 2021) but even his own evidence that he "queried why I had not been afforded the opportunity to apply for the HLTA job" stops somewhere short of him having "challenged" Miss Lewis and her authority. Be that as it may, for the reasons set out above, I have found that I prefer the evidence of Miss Lewis as to what happened at this meeting, albeit I repeat that I do accept that the claimant took from it some reassurance as to his future prospects at the School.

43. There remains the claimant's assertion that he became persona non grata and was ostracised; and, in similar vein, as he said in evidence became a pariah and was shunned. It is always difficult to make a finding as to how an individual perceives the conduct of others towards him or her. In this regard, I repeat that, somewhat surprisingly, when it was put to the claimant that if he had been shunned it was due to his own actions he responded, "I accept that". Perhaps more to the point I have accepted above Mr Stewart's evidence that he neither saw nor was made aware of the claimant having being cold-shouldered and noted nothing different in his demeanour or the staff shunning him.

44. Understanding the risk of repetition, I am satisfied that this matter cannot constitute or contribute towards a breach of contract.

Removing me from the post I had been fulfilling, unilaterally and without consultation – and then punishing me by removing the normal day-to-day aspects of my job

45. In the above section of these Reasons relating to paragraph 15 of the claimant's witness statement I have addressed the majority of these points of removing the claimant from his post and removing him from what he described in his submissions as constituting the normal day-to-day aspects of his job. The exception is the claimant's submission that he was subjected to derisory comments about his prosthetic leg. That is a reference to the conflict of evidence between the claimant on the one hand and Miss McKeowan and Miss McGurk on the other in respect of which, for the reasons stated, I prefer their evidence.

46. Once more, therefore, I am not satisfied that this matter can constitute or contribute towards a breach of contract.

They seem to have no empathy whatsoever.

47. This relatively brief statement in the claimant's submissions refers to his assessment of what he saw as being the lack of support that he received from colleagues at the School after, in a state of dissociation, he left the School premises never to return, and during his sickness absence thereafter.

48. In this regard, the evidence before me in relation to the 'phone calls that senior managers at the School said they made or attempted to make to the claimant was far from clear and I repeat that, in the absence of technical evidence, I decline to make any finding of fact in this connection but for the reasons explained above I prefer the evidence of the School managers. Thus I am satisfied that there sufficient efforts were

made to provide the claimant with support in the immediate aftermath of him leaving the School, which only ceased when Mr Tallentire considered that he had received reassurance from the claimant's wife.

49. Thereafter, during the claimant's absence the respondent sought to follow its usual sickness absence procedure including inviting the claimant to attend an attendance management meeting and to complete a Wellbeing Questionnaire, and making a referral to Occupational Health. The claimant declined to engage in these processes for the reasons he gave. That was his choice but as he confirmed in cross examination there was nothing more that the respondent could have done in accordance with its procedures.

50. Moving on from my consideration of the acts relied upon by the claimant to establish the cumulative course of conduct, which entitled him to resign and claim to have been constructively dismissed, I make one more general observation. I have referred above to my finding that I accept that the claimant took from his meeting with Miss Lewis some reassurance as to his future prospects at the School. I consider that it is that reassurance that is, perhaps, at the root of the claimant's dissatisfaction and sense of grievance, which during the hearing was as obvious as it was intense. It is possible that the claimant misinterpreted what Miss Lewis said to him at their meeting and, from that starting point began to see everything that happened to him at the School (including, as he has put it, him being "de facto demoted, ostracised and became the subject of spurious and malicious allegations") in a negative light, the source of which being what he construed as the reaction of Miss Lewis and others to him raising the appointment of CC, and also arising from their meeting, his causing upset amongst colleagues by breaching Miss Lewis' confidence. That the claimant did construe matters in that way without, I am satisfied, any reasonable foundation in fact is, however, attributable to him and not the respondent.

51. In summary of the above findings in relation to each of the acts advanced by the claimant as establishing the cumulative course of conduct upon which he relied, I find that none of them amounted to the respondent or its employees acting without reasonable and proper cause or in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant. I am satisfied that the acts upon which the claimant seeks to rely, whether considered separately or cumulatively, cannot in themselves be or with others contribute towards a breach of the term of trust and confidence that is implied into all contracts of employment. I acknowledge that so as to avoid too much lengthy repetition I have not set out this amount of detail in relation to each of the above findings.

52. Linked to the above, is the matter of the final straw. As set out above, the claimant has variously referred to the final straw as being the act of leaving documents on his desk on the morning of 3 March 2021 and their content, Miss Lewis having raised the issue regarding his use of the disabled toilet and him being unable to face the prospect of returning to work although in that respect he continued that there had not been a further act on the part of the respondent that led him to resign. I am not satisfied that the third matter is capable of constituting a last straw but, in any event, with reference to the decision in Omilaju, I am not satisfied that any of these matters

contributes something to the alleged breach of contract such that it is "an act in a series whose cumulative effect is to amount to a breach of the implied term".

53. There remains only one final aspect of the claimant's submissions that I consider I need to address. That is that he clearly stated (which for obvious reasons I asked him to repeat) that he accepted that in strictest terms of the word "contract" that the respondent, although it behaved badly, did not strictly breach the terms of what he referred to as being the original contract as a TA and, therefore, he had difficulty in satisfying the first two limbs of the Denning judgment; i.e the decision in Western Excavating (ECC) Limited. That is obviously a significant concession. I accept that the claimant's concession related to a breach of his "original contract as a TA" but the difficulty for him is that that original contract is the only contract of employment upon which he was engaged and continued to be engaged throughout the entirety of his employment with the respondent. It is that contract, therefore, in respect of which the claimant conceded that there had not been a breach of contract and certainly not a repudiatory breach of contract on the part of the respondent. In this respect, I understand the claimant's comment that a contract can be a verbal agreement but, as a matter of law, it is difficult for a verbal agreement to outweigh the terms of a written agreement between the same parties unless there is clear evidence that that is their intention, which I have not found to be the situation in this case. Moreover, the claimant continued that the verbal agreement arose when he stepped up into the posts that a fully qualified deputy headteacher and an experienced non-qualified teacher had vacated whereafter he operated at their level but I have rejected that contention.

Summary

54. In summary, the question in issue in this case is whether, applying the approach of Lord Steyn in Malik, the respondent's conduct,

54.1. first, destroyed or seriously damaged the relationship of trust and confidence and,

54.2. secondly, was without reasonable and proper cause.

As Lady Hale noted in Gogay, "The test is a severe one".

55. In that context, for the reasons set out above, I am that satisfied, as to the first two factors in Western Excavating (ECC) Limited that the conduct on the part of the respondent did not constitute a breach of the contract of employment between it and the claimant amounting to a fundamental or repudiatory breach of that contract.

56. Given my decision thus far it is not necessary for me to address the final two issues in Western Excavating (ECC) Limited of causation and affirmation.

Postscript

57. It would be remiss of me to conclude without remarking that I have found this to be a difficult case, not because the issues are difficult, which they are not, but because the parties are at least agreed on one thing: namely that the claimant was a

valued member of staff at the School, to the benefit of the pupils and others in its community, and probably had an excellent future ahead of him especially having obtained his HLTA qualification. In such circumstances I consider it to be incredibly sad that events took the turn that they did and had what appears to have been a fairly significant impact on the claimant's health.

58. Such matters are not, however, amongst those that I have to bring into account in determining the issues that I have had to determine in this case, which are limited to applying long-standing legal considerations to facts as I have found them to be.

Conclusion

59. In conclusion, the judgment of the Tribunal is that the claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the Act is not well-founded. It follows that his complaint, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act cannot be well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 22 February 2022