EMPLOYMENT TRIBUNALS

Claimant: Mrs N Rashidi-Zakeri

Respondent: Birmingham City Council

Heard at: Birmingham Employment Tribunal by cvp

On: 2 – 18 August and 27 October 2021 with parties, 19, 20 and 24 August panel in chambers

Before: Employment Judge Cookson sitting with Mrs Outwin and Mr Simpson

Representation
claimant: Mr Brockley (counsel)
Respondent: Miss Hands (counsel)

JUDGMENT having been sent to the parties on 3 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This claim relates to the treatment and dismissal of Mrs Rashidi-Zakeri ("the claimant") who was deputy head teacher of Springfield Primary School ("the School"). She was dismissed by Birmingham City Council, the respondent, giving redundancy as the reason for her dismissal, with effect from 31 May 2018. The reason for dismissal is one of the matters in dispute in this case.

2. The claimant brought claims of unfair dismissal, including that her dismissal was automatically unfair because she has raised protected disclosures; race discrimination and religious belief discrimination; and detriment because the she has made protected disclosures, on 13 November 2018 following a period of early conciliation from 29 August 2018 until 13 October 2018. The claims were initially brought against the Governing Body of the School but at a preliminary hearing before Employment Judge Choudry on 26th February 2019, it was agreed the correct respondent is the respondent which employed staff at the School at the relevant time. That hearing identified the background

to the claims and made a number of preliminary directions. in particular for the provision of further information about the discrimination and protected disclosure claims. A further preliminary hearing was held on 29 July 2020 before Employment Judge Camp which further clarified the claims and issues.

3. It is necessary for these written reasons to record in brief terms the difficulties for this employment tribunal panel which had been created through the conduct of the respondent and its' representatives. Orders were made by Employment Judge Camp at the hearing of the 29th July 2020 including, amongst other things, that witness statements were to be exchanged between the parties on the 15th February 2021. That did not happen. It was clear from the evidence given to us by all of the respondents witnesses that in fact they were not contacted at all by the respondent's representative about giving evidence at this tribunal hearing until very recently. Witness statements were exchanged only days before the hearing.

4. Perhaps not surprisingly when witnesses were given such late notice of this hearing, they already had existing commitments and as a result it was necessary for us to deal with witnesses out of the usual order in order to accommodate their availability. This was done with the agreement of the claimant's counsel, Mr Brockley. He noted in his submissions that this meant that the tribunal hearing did not deal with the evidence in order anticipated by s136. It is not clear if this intended as a criticism. The panel considered his submissions and we did not find that we faced the difficulty suggested. It is not unusual for witnesses to be heard out of order and tribunals do not often make a decision about the shifting burden of truth as a preliminary matter in a discrimination claim after the claimant's evidence. We proceeded in the way that we did in order that this hearing could go ahead because of witness availability. Getting on with the case is what the claimant wanted. This is a claim which was lodged in 2018 and it relates to events going back sometime before that. As an employment tribunal panel, we considered that it was in the interest of justice and in accordance of the overriding objective for us to hear this case as best we could rather than adjourn and relist with the inevitable long delay that would have ensued.

5. We have weighed the evidence which we were provided with and we have applied the appropriate evidential burdens to that evidence insofar as this has been necessary. We do not consider that the order in which we heard the witness evidence made any difference to how we applied those tests or to what our conclusions were.

6. In short, we did the best that we could in the circumstances.

7. What remains of some concern however, is that there was a preliminary hearing before Employment Judge Lloyd in June 2021 at which an application was made to postpone this hearing because it was said that the respondent had not had enough time to track, contact and engage the relevant witnesses. Although a number of the respondent witnesses are no longer employed by the respondent it was clear that they were readily contactable, and their contact details would be known to the respondent. Despite this we were told by all of the witnesses that they were not contacted by the respondent in a timely

manner. In the course of this hearing we requested an explanation for the situation and in particular why representations had been made to Employment Judge Lloyd which did not appear to be consistent with what the witnesses told us. We did not receive any explanation for this from the respondent.

8. There is a further matter in the submissions which we highlight in this introductory section. In paragraph 20 of this submission Mr Brockley refers to what he describes as "*a smoking gun which reveals the objective which the respondent was seeking to secure (and which C submits impacts profoundly upon the facts which the ET must find). He says "It is tolerably clear, on the basis of the documentary and witness evidence, which is before the ET that on a day between 15.9.17 and 2.10.17, R decided that it wanted to ensure that C's employment should be terminated. Not only is there evidence before the ET (from C, directly in the course of cross-examination[443 – penultimate paragraph]) that Balbir Helate had offered C 30,000 to terminate her employment but the fact of such an intention is also seen within the email from Emdad Noor, dated 28.9.17 (which preceded C's actual suspension on 2.10.17) in which it was indicated that C did not wish to accept any settlement [411-412]. There is further, arguably independent evidence of such a motivation which may be yielded from a consideration of the emails sent by GA to Adrian Lennox- Lamb, within her email of 1.2.18 in which she wrote: "..The previous suspension in similar circumstances may provide an alternative explanation for her current suspension other than that it was racially motivated. Both Heads may have been inexperienced and simply wanted her to leave given the adverse OFSTED comments on the legacy Senior Leadership Team..*"

9. This is not the claim the claimant presented to the employment tribunal. It is not the case put forward in her witness statement and we have received no application to amend the claim. For that reason we did not make any determination on this submission.

10. The tribunal gave the parties an oral decision in this case on 27 October 2021. It was explained that those reasons would seek to explain the reasons for our decision in brief terms with an explanation of the key factual findings in relation to each legal claim. Even though the decision was given in brief terms giving the oral judgment took some considerable time. The claimant made a request for the written reasons the same day. Unfortunately, due to judicial workload and a spell of illness, the preparation of these reasons took longer than the judge would have wished. It is to be stressed that in the event of any differences between the reasons given here and the reason given on the day, the reasons here are to take precedence as the panel's full reasons for our decisions are set out below.

Application to admit documents

11. In the course of the hearing the respondent made an application to admit additional documents. That application was considered. We accepted into evidence one document (referred to below) because there was no objection from the claimant but we refused to admit into evidence a longer document because we accepted the claimant's objections to that document and found that it was in accordance with the overriding objective to allow the respondent

to introduce that document at such a late stage in the proceedings. Reasons were given at the relevant time for that decision and are not repeated here.

Documents considered

12. In reaching our Judgment the Employment Tribunal considered the following documents:

    a. A bundle of documents prepared by the respondent;
    b. The evidence given in the claimant's witness statement and her oral evidence;
    c. The evidence in witness statements and given orally by the respondent witnesses: Mr Grover, Mr Diamond, Miss Higgins and Miss McNab;
    d. Written and oral submissions made by Mr Brockley and Miss Hands.

Findings of fact

13. We have made our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence. We have made findings of fact in matters which were relevant to the legal issues before us.

14. The claimant was appointed as Deputy Head Teacher of the School on the 1st September 2013. At the time of this hearing she was 63 years of age. In her witness statement she describes herself as being of Iranian ethnicity and/or national origin and she is a non- practicing Muslim. The claimant moved from Iran to the UK in around 1979 and qualified as a teacher in 1994. She was successful in taking her professional qualifications for headship in 2011.

15. The precise dates of the claimant's employment were not provided to us for the claimant's earlier employment with the respondent, but it was not disputed that she had continuity of employment of more than 20 years. her earlier employment but that does not appear to be in dispute. No contract of employment for this or any earlier position was produced to us by either party.

16. The circumstances of the School are material in this case. It is described by OFSTED as a larger than average primary school with approximately 700 students and a three- form entry. The overwhelming majority of the children are of Pakistani heritage. The claimant in her evidence said that 99% of the children of Pakistani heritage but we prefer to rely on the figure given in the OFSTED Report which records that that 80% of the children are of Pakistani heritage with a significant number of other children from other minority ethnic backgrounds. A significant majority of the children have English as an additional language. We were not provided with the precise details of the background of staff, but it was common ground that the school has a diverse staff from a range of ethnic religious backgrounds.

17. When the claimant joined the school, the headteacher was a Mr Webb. It is

clear that the claimant did not have an entirely smooth relationship with him. Documents in the bundle of documents and the claimant's witness statement refer to some dispute that she had with him and the School's governing body. We were told about earlier grievances which the claimant had raised but none of them appeared to be directly relevant to the claims before us.

18. On 12th to 13th May 2015 there was an OFSTED Inspection. Although the school had been rated as good in previous inspections, this inspection identified very significant failings. In consequence the school was rated as inadequate in all areas of inspection

19. The summary of key findings identified that the School's senior leaders had failed to tackle weaknesses in teaching and pupil achievement, arrangements for checking teachers were found to be inadequate. Criticisms were made by OFSTED of the senior leadership team which included the claimant, the School's teachers and the governing body. The criticisms of the senior leaders of the school included that they had failed to tackle weaknesses in teaching and pupils' achievement, that arrangements for checking teachers' work was inadequate and teachers were not told what they needed to do. Other criticisms were that teachers had low expectations for pupils achievements and they did not plan suitable activities for pupils of different abilities or children with different levels of ability in English, teachers' marking was poor and inconsistently completed, some teachers did not encourage or give girls the chance to participate fully in lessons, there were issues with the behavior of a significant minority of pupils. The report noted that governors had raised concerns about pupil's achievement, but they had not held senior leaders sufficiently to account. It is clear this was school that was in trouble and which was failing its students although OFSTED did note some strengths including that the claimant had accurately identified specific weaknesses and the actions that need to be taken to improve teaching in the school.

20. The claimant had been in post as Deputy Headteacher for 18 months at the time of that report. It was suggested by the claimant that because she had only been in post this long, she should not be accountable for the failings of the School. The panel accepted however that the criticisms made by OFSTED of the senior leaders included the claimant. We accepted the respondent's witness evidence that 18 months is a long time in the education of primary school age children and as a result the performance of School leaders is assessed over relatively short periods of time.

21. In light of the adverse inspection findings, the School was placed in "special measures". We accepted the evidence of Mr Diamond who was the respondent's Executive Director of Education from May 2015 to the end of August 2018, that it is usual for a headteacher for a school in special measures to resign or be dismissed and that it would be common although not inevitable that all of the leadership team would leave a poorly performing school in such circumstances.

22. When a school is placed in special measures it is usual for external support to be provided to seek to improve performance. In this case the School was partnered with an academy trust. A new interim head was appointed, Mr Paul

Smith. The claimant had raised grievances about him, but none were relied on in the course of this claim.

23. On the 17th December 2015 OFSTED identified that the special measures monitoring which had been put into place was not fit for purpose and the inspectors identified that School leaders and managers were not taking effective action towards the removal of special measures. They concluded that the Local Authority Statement of Action was not fit for purpose. The school was instructed not to appoint any new qualified teachers before the next monitoring inspection. One of the criticisms which was made was that the School was overusing supply teachers to cover classes for permanent staff. OFSTED identified that this was unsustainable for cost reasons. The interim report identified that senior leaders in the School were not using their time well enough to influence and improve teaching and learning in their respective areas of responsibility and did not spending enough time in classrooms. That was a criticism made of all of the leaders, including the claimant.

24. Matters improved somewhat over the coming months. On the 16th and 17th March 2016 the School was inspected again on an interim basis. The monitoring inspection report on that occasion identified that leaders and managers were taking effective action towards the removal of special measures and that the statement of action was now fit for purpose. The Employment Tribunal accepted Mr Diamond's evidence that although to some extent that was a positive indication, the monitoring inspection at that time would not have involved the sort of in-depth assessment of teaching that happens during a full inspection. In other words that positive sign did not mean that the school had necessarily improved to a sufficient extent.

25. On the 1st September 2016 a new interim headteacher was appointed, Mr Maneer Samad. We did not receive any evidence from Mr Samad but it was common ground between the parties that Mr Samad is a Muslim. Again, it was clear that the claimant did not have an easy relationship with her new headteacher. Shortly after his appointment the claimant raised a grievance about the way that she had been treated by Mr Samad and a maths consultant visiting the School.

26. On the 14th October 2016 the claimant was suspended from her employment by Mr Samad in relation to an issue with SATs testing which dated back to 2014. Allegations had been raised that the claimant had instructed two teachers to repeat SAT's testing which would have a breach of the testing regime. Whilst the claimant was suspended from her duties the two teachers who were involved were not suspended. The claimant alleges this was an act of race discrimination. We were not offered an explanation for a failure to bring a complaint about that alleged discrimination until these proceedings.

27. On 29th April 2017 the claimant wrote to the respondent to raise concerns about what had happened. Confusingly that letter, which is found at page 373 of the bundle of documents, is dated 29th April 2016. However, it is clear that date is incorrect. In the second paragraph of the letter the clamant referred to her suspension from work which happened in October 2016 and she referred to a forthcoming disciplinary hearing in May 2017. This letter refers to

admissions made by the teachers who had not been suspended in connection with the SATs testing. The letter set out the background to the National Curriculum assessment process and the legal processes set out in the National Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) Order 2003 and the similarly named Order relating to the Key Stage 1 Assessment Arrangements and identified the process which must be followed by the Standard and Testing Agency ("STA") if there is an allegation of malformation. In her letter the claimant raised a concern that neither the respondent nor the School's governing body had reported the allegations which had been made about the SAT's Testing to the STA. She then went on to suggest that a biased investigation was being conducted with the aim of achieving her dismissal.

28. In the course of this hearing the respondent produced the outcome from the claimant's disciplinary hearing which followed, conducted in May 2017. It was not clear to the panel why this document had not been disclosed earlier as it would appear to have always been a relevant document. This document was however admitted into evidence in the absence of any objections from Mr Brockley. The outcome letter records the decision taken by a disciplinary committee held on the 22nd May 2017 which records that on the balance of probability the allegations against the claimant had not been proven. The letter sets out the committee's reasons for that decision as being:

    a. There was insufficient evidence linking the claimant to the allegations due to a weak and inconclusive investigation;

    b. Key potential witnesses had not been interviewed and insufficient evidence had been gathered from administrative staff at the school;

    c. Technical evidence had not been sought, for example checking the dates of data sent to the STA or handwriting analysis.

    d. There had been insufficient attempts to contact Mr Webb who had been the head of the School at the relevant time of the STAs testing.

    e. That the STA had not been informed of the allegations early enough which could have had avoided the weaknesses in the process noted.

    f. Finally, the committee noted its concerns about the equality of the process regarding to others who admitted malpractice (i.e. the teachers who had not been suspended) and how they had been dealt with.

29. Not surprisingly in light of that outcome, the claimant's suspension from work was lifted and on the 28th June 2017 she received a letter confirming that informing her that arrangements would be made for the claimant to return to work on the 29th June 2017, a few weeks before the end of that summer term.

30. By the end of the 2017 summer term and the beginning of the autumn term in September 2017, the School had 33 children who were classified as "missing in education". This means that children were not attending school with any explanation from parents or any agreement with the headteacher that they could be taken out of school for some reason. The claimant explained that

there was a common issue at the School with parents taking children to Pakistan over the summer and so removing their children before the end of term and returning after the beginning of the new term to enable them to avoid the most expensive flights.

31. The panel accepted the claimant's evidence that this was a common problem at the School but we also accepted the evidence of the respondent's witnesses, particularly that of Mr Grover, the new interim head at the school at that time, that this was not something which should had been tolerated by the senior leadership team at the School. Not only is the consequence of children missing the end of and beginning of terms that they miss education, but particular safeguarding concerns arise where children are being taken out of the country and their whereabouts are unknown. Mr Grover told us that he was concerned about this because the claimant appeared to be untroubled about the missing children. The claimant expressly denied that this was true, but the claimant also told us that children going missing in education was something which she regarded as being outside her control and in any event, children would return in due course. This panel concluded that the claimant regarded children being missing in education was simply part of life at the School. We accepted that Mr Grover's concerns about the claimant's attitude were well founded.

32. In August 2017 Mr Grover was appointed as the new Interim Head taking over from Mr Samad. He told us that he had a number of meetings with Ms Pat Smart before his appointment. Ms Smart was he chief executive of the Create Partnership, an academy trust, and she a member of the respondent's Education Partnership which assists schools regarded as failing. As a result of those discussions when Mr Grover began he had some knowledge of the claimant and her ethnic background as non-British although he disputed that he knew any specifics about that or about her religion. We accepted that.

33. Mr Grover met with the claimant on the first of the inset days at the beginning of the new school term in September 2017. In discussions with Ms Smart, Mr Grover had identified that there was a particular issue with safeguarding within the school because of the number of children missing in education and it was agreed with Ms Smart that an employee of the Trust, Lorna McNab, would be seconded to the School as a deputy head teacher to assist Mr Grover with a focus on safeguarding because she had particular expertise in relation to safeguarding procedures. It had also been determined that the School would convert to an academy and it was expected that this would take up much of Mr Grover's time so, in the short term, the School would need additional senior leadership support.

34. There was a meeting between the claimant, Mr Grover and Miss McNab on 5th September 2017 at which the role and responsibilities of the claimant, as the appointed deputy headteacher in the school, and Miss McNab as the newly seconded deputy headteacher were discussed. Notes of that meeting were sent to the claimant and Miss McNab on the same day. These brief notes record that the claimant was to be responsible for student's attendance and punctuality, along with a number of other matters including community engagement, curriculum duties and cover and so on, and Miss McNab would have particular responsibility for safeguarding and child protection. Both the

claimant and Miss McNab would hold the title of Designated Safeguarding Lead, that is the person with key safeguarding responsibility within the School. This was a role which previously the clamant had undertaken. It is clear to this panel that it was a role that the claimant took some pride in holding.

35. The claimant told us that over the summer she had worked on a monitoring system to address issues of attendance. That was introduced at the start of term, but it seems that the system she introduced was flawed because it was populated with incomplete data. This was significant because there was a particular child, referred to in this judgment as Child AA, who failed to return to school at the start of term. For whatever reason AA was not included in the new database that the claimant had set up with the assistance of an administrative assistant and she was then using to identify the children who had not returned. This was to prove significant because it meant the claimant did not identify Child AA as a child who might be missing in education.

36. On the 7th September 2017 Mr Grover sent an email to the claimant asking her to confirm that she had made a "safe and well" visits to all students who had been absent for the first three days of the new term and he also asked her to email the names of students that she had contacted during those three days regarding their absence and to indicate if she had received a response from the parents and to explain the outcome of her "safe and well" visits. Mr Grover asked for this to be done on the evening of the 6 September and said that he expected the information on 7 September.

37. The claimant sent an email to Mr Grover in reply in which she said that she could not get any attendance data from the administrative assistant, Sunita Kundrai, on the 7 September because Ms Kundrai had been covering for the receptionist who was off work due to illness. The claimant told Mr Grover that she would provide the information on afternoon of the 8th September.

38. Mr Grover's reply was somewhat terse. He told the claimant that this "was simply not good enough". The claimant felt that was unacceptably rude. Mr Grover pointed to the claimant's email as evidence of what he regarded as an unacceptably laidback approach to the issue of safeguarding. In course of her cross-examination the claimant sought to argue that, in essence, she was in the hands of Ms Kundrai because she did not have access to the computer systems. However, this panel would it implausible that the claimant who had responsibility for safeguarding would not have been able to access attendance records or could have arranged access if she had wanted it. The claimant made clear to us that she regarded this as being role of the administrative assistant, but the tribunal found that to be an unsatisfactory response given the primary responsibility for these matters lay with the claimant. In the circumstances we concluded that Mr Grover had good reasons to require the information he had requested to be treated as a priority.

39. In the course of her cross examination the claimant also alleged that Mr Grover had shouted at her in front of others about this. Mr Grover denied this. We accepted Mr Grover's evidence. The claimant had raised frequent grievances in the course of her employment if she disagreed with how the various headteachers had treated her. Nowhere in any of her grievances about Mr

Grover did she raise a complaint about Mr Grover shouting at her and humiliating her in front of other staff and we consider that if this had happened the claimant would have raised it somewhere alongside her other complaints..

40. In the meantime, the relationship between the claimant and Miss McNab had not developed well. Miss McNab told us that the claimant was rude to her and would ignore her. Miss McNab us that because she was new in the School and would only be there for a limited amount of time, she decided that it would be best to "step back" and have as little to do with the claimant as she could. The claimant felt she had been supplanted by Miss McNab. It is clear that being the Designated Safeguarding Lead was something which the claimant took extremely seriously and regarded as an important part of her role. Although she still held that title, safeguarding was now being led by Miss McNab. The claimant not happy that that, although there is no evidence that she raised that with Mr Grover at the time this had been discussed in their meeting on the 5th September. The claimant felt demoted and threatened which Miss McNab fairly accepted in her evidence was an understandable reaction in the circumstances. Equally Miss McNab felt that the claimant had behaved rudely towards her and her reaction to the claimant's behaviour towards her was also understandable in the circumstances. It is clear there was a certain amount of mutual hostility between the two women but there was no evidence from which we conclude that that this rose from anything but mutual antipathy and professional rivalry between them.

41. As noted, AA had not returned to school at the beginning of term. A letter was sent to the School to say that that he was still in Pakistan. Mr Grover asked Miss McNab to take the lead on this case. Miss McNab told us that on receipt of an unsigned letter, reportedly from the child's mother, she tried phoning the home landline number recorded in AA's records but got no reply. She visited the address on the AA's file and was told by the child's grandfather that he had gone to Pakistan following a family bereavement. He had been due to return for school, but his mother was now ill and so their return to school had been delayed. In consequence he would be back in school on either the 11th September or 12th September, depending on flights. Miss McNab decided to wait to see if this happened.

42. AA did not return on the 11th September. In terms of the contested evidence we heard about what happened next, we preferred the evidence of Ms McNab who we found to be a straightforward and credible witness despite Mr Brockley's criticisms of her.

43. Miss McNab was not going to be in school the next day so she told the claimant to check that AA was back the next day. At the claimant's request she gave the claimant a post-it note with AA's name and address on it. Ms McNab was asked in cross examination why such an informal process was used for such an important task. She explained that this was only intended to be a prompt for the claimant, the point was she had given the claimant an instruction. Ms McNab explained that in the school she had worked in her previous role she would use a system called CPOMS which would have recorded as an action to be taken but this system was not available at the School at the time. We accepted that Ms McNab was under any obligation to provide any written

instruction to the claimant. We received no evidence of written instructions being required if action was to be taken to follow up an absence.

44. Child AA did not return to school the next day as promised by his grandfather. The claimant says that she asked Ms Kundrai to check if he was in school, but she performed no other checks. Ms Kundrai told the claimant that he was in but that was incorrect. When the claimant and the administrator had input data into the new database they had missed AA and we were told this was the source of the mistake. The panel found that explanation somewhat difficult to accept as any reasonable excuse. The claimant could have checked with AA's teacher. She could have checked the School's electronic attendance register. Her failure to do is consistent with Miss McNab's evidence that the claimant had been irritated to be told what to do by her. The following day on the 13th September Miss McNab asked the claimant if AA was back and was told yes, he was. Miss McNab told us that the claimant did this in a rather dismissive way and seemed irritated to be asked. We accept that this conversation did take place and we found Miss McNab's evidence about the claimant's dismissive attitude to be credible and plausible in light of the relationship between the two women. In essence the claimant's personal antipathy towards Miss McNab led to her failing to pay sufficient attention to AA's safeguarding.

45. On the 14th September while reviewing records with Ms Kundrai the claimant realised that there was a mistake in the database and that AA was not on the list. The claimant said that at this point she and Ms Kundrai went to visit the AA's home address and were told that information about the child's whereabouts had already been provided to Miss McNab. The claimant told us that she found this embarrassing but the panel could not see why. AA's family had provided misleading information to Miss McNab or had not updated the School about a change of circumstances. Any criticism was an attempt by them to deflect the School. At this point AA was formally identified as being absent from the School.

46. On the evening of the 14th September 2017 the claimant emailed her trade union representative, Mr Noor, to raise concerns about how she was being treated by Mr Grover. Her email alleged that that Mr Grover was trying to repeat the behaviour of previous headteachers to bully and demote her. The coincide of timing suggests the claimant did that because she realised she had made a serious mistake in relation to AA and was anticipating being criticised.

47. In the meantime Miss McNab reported what had happened to Mr Grover. She also made a formal "missing education" report in relation to AA. On the 15th September Mr Grover held an investigation meeting with the claimant. When she was told that there was to be a meeting, the claimant asked if she should have a trade union representative with her. There was a short adjournment while it was arranged that the representative of another trade union, a Miss Edwards, would attend with the claimant.

48. Mr Grover asked the claimant about what happened with AA and in particular put to the claimant that she had told Miss McNab that AA was back in school. The claimant denied that she told Miss McNab that. Mr Grover was dissatisfied with the claimant's answers. He had required the claimant to provide a list of

the children who had not returned to school and that list had not included AA. Despite that on the 14th the claimant had conducted a visit to see why child AA was not in school and he had then been identified absent by the claimant. We accepted that Mr Grover had good reason to have suspicions that the claimant had not done what she was supposed to, creating the risk that a potentially serious safeguarding matter had been created at the School, although Mr Grover failed to clearly articulate that in writing to the claimant.

49. Mr Grover told the claimant that the matter would be investigated and that he was considering whether to suspend the claimant or not but for the time being she would be placed on paid leave. The claimant was expressly told that she must not conduct her own investigations. Despite that following the meeting there was a discussion involving the claimant, Ms Kundrai and Ms Edwards during which Ms Kundrai was asked about what had happened in relation to AA. Before us the claimant was adamant that it was not her who had asked Ms Kundrai for information but Ms Edwards who had asked for confirmation that she had told the claimant that the child was back in school.

50. On Thursday 28th September 2017 Mr Noor the claimant's trade union representative wrote to Ms Balbir Helate to raise a complaint that the claimant was being discriminated against and that she was being victimised which Mr Noor related to the claimant raising a grievance, "blowing the whistle" and "seeking to defend herself" after returning to the deputy headship role. Ms Helate is an employee relations consultant who provides HR guidance to senior leaders in schools about staffing procedures.

51. The email sets out the claimant's version of events relating to AA. That account is different from the version of events given to us by Miss McNab in some significant respects. For example, the claimant and Mr Noor said that Miss McNab left the post it note in the claimant's office and the claimant never saw it. Miss McNab was clear in her evidence that she had gave the instruction to the claimant verbally and then, at the claimant's request, wrote the details on the post-it note. We preferred Miss McNab's account. Mr Noor also complained that the claimant had not been provided with the information which was available to Miss McNab about the child's whereabouts and Mr Noor said *"Sunita [Kundrai] confirmed to Mrs Zackeri that the boy had returned to school. This information was verified in front of Jo Edwards when Mrs Zackeri was waiting to see the new Interim Head on the 15th September 2017"*. If the conversation had happened before the claimant and Miss Edwards met with Mr Grover the panel found it implausible that when Mr Grover said she was not to conduct her own investigations neither of them said "but we have already spoken to Ms Kundrai". The panel doubted that Mr Noor's account about this was accurate.

52. In her evidence before us, the claimant was adamant that it was Miss Edwards who had asked Miss Kundrai the question, but the natural reading of the information which Mr Noor provided to the respondent suggested that the question was asked by a claimant in the presence of Miss Edwards. On two occasions he says specifically that the information was "verified in front of Jo Edwards" suggesting that Miss Edwards was acting as a witness for the claimant. In Mr Noor's version of events the claimant admits that she told Miss

McNab that the child was in school but excuses that as being based on the incorrect information which she had been provided with by Ms Kundrai. This was a different version of events to the one which had been given to Mr Grover in the meeting when the claimant had insisted that she had not told Miss McNab that AA was not in school. The panel found the claimant's evidence about what happened to be inconsistent and her answers about that were vague and evasive. We doubted what she was told us was truthful.

53. In his email Mr Noor stated that the claimant could not be responsible if she was provided with the wrong information by the administrator. This same point was made to the tribunal by the claimant, but as a panel we found that to be somewhat disingenuous. The administrator was a junior member of staff. It was the claimant was the school leader with responsibility for attendance. The information held on the electronic register used by teachers showed that AA was not in school. Ms Kundrai's mistake seemed to have arisen at least in part through the claimant's creation of a flawed database but the key point was that Miss McNab had asked the claimant, not Ms Kundrai, to check whether AA was in school. This was the claimant's responsibility. The tribunal panel found the claimant's refusal to accept any responsibility for the risk by failing to identify AA's absence reflected badly on her understanding of her role and responsibilities as the Deputy Head Teacher with responsibility to attendance and was inconsistent with her having a significant understanding of the importance of the role of Designated Safeguarding Lead.

54. On the 2nd October 2017 the claimant was formally suspended. The letter of suspension said that the purpose of the suspension was to enable investigations to take place into the allegation that the claimant had neglected her duties as the deputy head teacher responsible for student attendance and did not act appropriately to safeguard the student who was missing from education. The letter told the claimant that suspension is a neutral act, but she was warned that the outcome of the investigation into the allegations could lead to a disciplinary hearing because this may be regarded as gross misconduct.

55. Mr Brockley pointed to the delay between the incident, the meeting on 15 September and the suspension and suggested that the wording of the letter was evidence of an ulterior motive for the suspension. Mr Grover told us that what had prompted the claimant's suspension some two weeks after the incident had happened was finding out that there had been a conversation with Ms Kundrai on the 15th September despite his express instruction that the claimant was not to carry out her own investigation. We accepted Mr Grover's evidence about that. It was consistent with the timing of the email from Mr Noor which informed the respondent for the first time that that discussion had taken place. Although the suspension letter was not explicit about that we accepted that Mr Grover had thought that the broad wording was sufficient to explain the reason. We did not find any basis for reading into this the significance that Mr Brockley attached to it.

56. On the 12th October 2017 the claimant submitted a formal grievance against Mr Grover to Miss Julie Young, chair of the School's Interim Executive Board. That grievance alleged that she has been treated differently and discriminated against on the grounds of her race and religion. She repeated Mr Noor's

allegation that the first step of each interim headteacher who had come to the School since the departure of Mr Webb had been to undermine, harass and bully her in an attempt to "get rid of her ..using unfair processes". The claimant alleged that the respondent was allowing the School leadership team to treat her in a discriminatory way. The claimant pointed to discrimination because she said no investigation was being conducted into Ms Kundrai or Miss McNab and went to assert that because Mr Grover had only suspended her, he had already made up his mind about the guilt or innocence of the others before any investigation to establish the facts had taken place and that this was evidence of discrimination. She also asserted that the failure to suspend the other members of staff could lead to contamination of evidence and raised concerns about the fact that her access to her emails had been suspended. The claimant raised the possibility that the reason for Mr Grover's alleged discriminatory conduct was because she is older or because "she is a Persian woman who does not deserve to be his deputy headteacher" and suggested there could be no other reason for Mr Grover choosing to treat her so differently. As evidence of that the claimant pointed to a discussion which had taken place between Mr Grover and the claimant about teaching for five mornings per week which Miss McNab had not been asked to do. In terms of race and religion, the claimant pointed to the fact that Miss McNab is British African-Caribbean and Christian. It was common ground between the parties that Ms Kundrai is not Christian and is of South Asian ethnic origin although we were nor provided with evidence which enabled us to make more precise findings about her background.

57. In the grievance the claimant also objected to the appointment of Jackie Deasey as the disciplinary investing officer. The claimant asserted that was not appropriate because Miss Deasey was well known to the claimant and the school staff. The claimant asserted that her investigation would be prejudiced by her relationships with the school staff including Ms Kundrai.

58. On the 30th October 2017 Miss Young wrote to the claimant to acknowledge her grievance and the objection to Ms Deasey being the investigator. That letter identifies that because the disciplinary process was already underway this aspect of the grievance would be passed to Ms Deasey but because allegations had been raised of unfair treatment, discrimination, bullying and harassment against Mr Grover that would require an investigation under a separate Dignity at Work Policy and therefore a second and separate investigation was to be established to look at that complaint.

59. On 13th November 2017 Mr Noor wrote to Miss Young in reply to her letter. This repeated many of the allegations already made and asserted that because discrimination had been raised the grievance would have to be addressed and resolved before the disciplinary investigation could proceed with a repetition of the concerns raised about Ms Deasey acting as the investigating officer.

60. In the background at this time the school was in the process of converting from a maintained school under local authority control to an academy, which is essentially a state funded independent school. Mr Diamond gave us evidence which we accepted about the somewhat unusual position that such conversions create. Although the local authority is the employer of the school staff, staffing decisions at schools are taken by the governing bodies of schools not by the

respondent – that is because of legislation intended to remove any political influence over school staffing decisions. In terms of the new academy, decisions about the workforce structure are determined by the new multi-academy trust (often called a "MAT") not the respondent or the existing school governing body. We also received evidence on the significance of those differences in terms of the senior leadership team. Instead of all leadership activity being undertaken by a school leadership team, one of the key differences is that many of the leadership and management activity will be undertaken by the MAT away from the School which in turn affects the need for senior managers and leaders in a school. Mr Grover and Mr Diamond explained to us that the headteacher of local authority primary school will have responsibility for matters such as budget and leadership matters which will not fall within the remit of a head teacher at an academy primary school because those things will be dealt with by the MAT, typically by the executive head of the academy group.

61. It was part of Mr Grover's seconded role to recommend a new structure to the MAT. In turn this was then adopted by existing interim board of the School. On the 5 December 2017 the recognised trade unions were sent a "Section 188 notice" under the collective redundancy legislation to initiate the statutory collective consultation process, informing the trade unions of the removal of 14 posts from the existing structure with a creation of 13 new posts. The posts being deleted included the headteacher post, which would be vacant on conversion because Mr Grover's appointment was an interim one, and the claimant's post of deputy headteacher. The Section 188 notice set out the business case explaining the proposal, the rationale and a budget plan.

62. The Section 188 notice explained that the proposed method of selecting employees to be dismissed would be through seeking volunteers for redundancy and provisional selection of assessment undertaken by senior leadership. Employees would be selected for jobs in the new structure against the relevant new job descriptions and person specifications using interview assessments tests and skills audits. Any employee who was not successful in being appointed to a new post would be referred to the redundancy committee to consider possible dismissal. The notice states the procedure to be used in the event of redundancy would be the Redundancy Procedure adopted by the School's governing body.

63. The section 188 notice also identified how the effects of any redundancy would be mitigated. It explained that the school (and Mr Diamond explained that the notice should have referred to the employer, that is the respondent) has no jurisdiction to deploy redundant employees to vacancies in other schools. The notice says that the school will endeavor to liaise with local headteachers and other contacts in Birmingham for any suitable vacancies in the area and request that they consider displaced staff for any vacancies that may arise.

64. On 6th December 2017 the claimant was informed by Mr Grover that the formal redundancy consultation process had begun, and she was sent a copy of documentation which had also been shared with staff. She was not invited to a meeting.

65. On 20th December 2017 Mr Grover sent the claimant the skills audit, the job description and person specifications for roles in the new structure.

66. In terms of the investigation into the claimant's dignity at work grievance, an external body, CMP Resolutions, was instructed by Julie Young to undertake an investigation. A terms of reference document was drawn up and an individual called Gwyneth Atkinson was appointed as the investigating officer. The terms of reference specified that the investigation would start on Monday 8th January 2018. The claimant was sent the draft terms of reference on the 13th December 2017 and was asked to reply to Miss Young prior to the Christmas break if she had any amendments to make to them.

67. On the 18th January 2018 Mr Noor responded to Mr Grover in relation to the statutory redundancy consultation. His letter is dated the 18th January a day before the statutory consultation period was due to close. No explanation for the lateness of his letter was offered. The letter criticised the recent management of school funds since the School went into special measures and challenged some of the reasons which have been given for redundancies being required, such as staff absenteeism causing a deficit in budget. Mr Noor requested that the proposal for redundancy was postponed so that the cause of the school's financial difficulties could be established. He did not respond substantively about the consultation proposals themselves.

68. On the same day, 18th January 2018, the claimant met with Ms Atkinson to begin the investigation process. In that meeting the claimant told Ms Atkinson investigator that she was not sure if her previous suspension by Mr Samad could be discrimination because he was the same religion as her, but she had felt unfairly treated and that her complaint had not been properly addressed. In relation to the current suspension she felt clear there was discrimination because she was a Persian Muslim woman whereas Miss McNab and Mr Grover are both Christians and she also made reference to the fact that she is older that Miss McNab. The claimant also said that she believed she was a victim of institutional racism because she had not been considered for the role of headteacher since Mr Webb had left.

69. On 31st January 2018 the claimant was invited to attend a disciplinary investigation meeting on 15th February 2018 by Ms Deasey.

70. Behind the scenes Ms Atkinson's investigation was not going well. The respondent had raised concerns with CMP Resolutions about delay and cost. Ms Atkinson identified some additional information that she needed from the claimant but that prompted a highly critical email from her manager criticising her for not obtaining this information at an earlier stage. Ms Atkinson wrote to the respondent to acknowledge her failings and she stepped down as the investigator.

71. On 15 March 2018 Mr Grover sent school staff including the claimant further documents in relation to the restructuring exercise. This included details of the deadline for staff who wanted to apply for voluntary redundancy and how to make a submission about their skills and the skills audits admission process which was essentially how staff would apply for roles in the new academy

structure. Significantly the claimant did not apply for any of the new posts or complete the skills audit.

72. On 28th March 2018 the claimant made a formal complaint to CMP Resolutions about how her grievance was being handled.

73. On the 16th April 2018 Mr Noor, submitted a letter to Mr Diamond as the Executive Director for Education which is headed "*significant concern about the treatment of Mrs Zakeri*". The letter goes on to outline various complaints, in essence going over the previous grievances raised with the additional of a final complaint about the handling of the grievance by CMP Resolutions which stated that the claimant had lost confidence in their independence.

74. Mr Diamond explained that it was not uncommon for complaints to be sent to him directly as the overall most senior officer for education, but that he would not consider or look at those because he did not have the resources and time. His view was complaints and grievances should be dealt with in accordance with the respondent's procedures We accepted his evidence about that. His was a very senior role with wide ranging responsibilities and it was not part of any formal process for him to consider such matters.

75. On 17th April 2018 the school wrote to the claimant to confirm the outcome of the redundancy consultation process. The letter stated that the redundancy committee had reached the conclusion that redundancies at the School were unavoidable and warned that an insufficient number of staff have volunteered for redundancy. The letter says this *"the staff whose jobs have been identified as being at risk of redundancy have now been assessed against the agreed criteria by a panel of scorers, using scoring arrangement previously notified to you. At this stage, I regret to inform you that as you have not expressed an interest for a post in the new structure, you have been provisionally selected for redundancy*." The claimant was given the option of attending a hearing before the Redundancy Committee to oppose her provisional selection for redundancy if she wished.

76. In the meantime, CMP Resolutions wrote to the claimant expressing regret for the decision taken to remove the appointed investigator from the claimant's case, explaining why that decision had been taken and informing her that a new investigator, Jessica Higgins, had been appointed.

77. The claimant was still suspended at this time and not attending work. On 20th April 2018 she was formally signed off sick. The reason given for absence was work related stress.

78. On the 24th April 2018 the clamant wrote to Mr Grover in relation to the letter informing her that she had been provisionally selected for redundancy. Her letter set out the formal representations against that provisional selection. In the letter she reminded Mr Grover that she had a number of ongoing complaints being investigated, including allegations of discrimination and stated that she believed her position as deputy headteacher had been deliberately undermined. She informed Mr Grover that she has asked her trade union to write to the respondent to further raise her concerns about her allegations she

was being targeted and stated her belief that the restructure process was part of the ongoing campaign against her. She also referred to the fact that school leadership had not responded to Mr Noor's letter of the 18th January 2018. Finally the claimant referred to the statement in the redundancy letter stating that the school would seek alternative employment and asserted that there are roles within the new structure which should be ring fenced for her so that could be "be slotted in" and she complained that because of the terms of her suspension she was unable to take part in the consultation. It appears no attempt was made to explain to the claimant why "slotting in" would not be possible in this case because that would be a decision for the MAT.

79. On the 30th April 2018 the claimant was invited to attend a hearing on the 16th May with the Redundancy Committee. The purpose of the meeting was to give the claimant the opportunity to comment on the proposal to dismiss her by reason of redundancy and to discuss possible alternatives. The letter stated that the hearing would be conducted in accordance with the Redundancy Procedure adopted by the school.

80. On 11 May 2018, very shortly before the redundancy committee hearing was due to go ahead, Mr Noor wrote to the school business manager to inform her that he would not be available for the hearing and in light of the claimant's ill health asking tor the meeting to be delayed. The email was acknowledged on 14 May. Mr Noor was advised that the Committee may decide to proceed in the claimant's absence and therefore she could submit written representations instead. A letter was also sent to the School from the claimant's GP confirming that she was continuing to suffer from symptoms related to work related stress and her attendance of work-related activities and meetings may worsen her health.

81. On the 15 May 2018 Mr Noor wrote to the business manager objecting to the suggestion that the claimant's case might be dealt with in her absence, pointing out that although the school might have been working to a tight timescale, there were outstanding grievances and raising objections to the process going ahead because there had been a general lack of engagement with the claimant's trade union.

82. The claimant was signed off sick for a further month on the 17th May.

83. On the 18th May Mr Bishop, chair of the redundancy committee wrote to the claimant to inform her that the redundancy committee meeting had taken place on the 16th May. The committee had comprised of Mr Bishop, Ms Beint and Miss Mary Higgins who appeared before us to give evidence. The letter stated that the committee considered the information in the emails from Mr Noor but noted that the claimant had the opportunity to make representations, and that the committee had also considered the GP's letter. The letter stated that after deliberations the committee decided it would be in the interest of both parties to proceed with the meeting because delay "may cause further stress". The letter also stated the committee was satisfied that the school had consulted with the trade union and had taken the decision to proceed with the hearing in the claimant's absence.

84. The letter then went to state that having considered representations made on the 18th January and all the available evidence, the committee had concluded that the claimant had been provided with the opportunity to engage with the process but had chosen not to complete the skills audit. The committee had determined that the proposal to implement the new structure was paramount in order to address the deficit budget and to develop the School. Accordingly, the committee had decided that the claimant should cease work for the School from the 31st May subject to a right of appeal. The letter then outlined the claimant's entitlement to a redundancy payment.

85. That letter suggests there has been careful and considered deliberations by the committee. However, in her evidence before us Miss Higgins was adamant that the committee did not look at individual circumstances and they had not considered the claimant's particular circumstances. She had no recollection of considering the fact that the claimant had been ill. Nevertheless, she was adamant that in the circumstances the claimant would not have been appropriate for the position of head at the new academy. It was suggested to Miss Higgins in re-examination that the content of the letter strongly suggested that the panel must have deliberated in the way suggested but Miss Higgins continued to be adamant that she had no recollection of that and this was not something which would happen at the redundancy committee stage based on her extensive experience of redundancy committees generally. The tribunal panel concluded that as matter of fact the consideration of the claimant's circumstances by the redundancy committee had been at best cursory with little or no consideration of the claimant's circumstances.

86. The clamant offered us no explanation for why Mr Noor left it so late to seek to delay the redundancy committee hearing and no doubt he created significant difficulties through his tardiness. However, the project timeline suggested that the redundancy committee could have sat on other days that week. No explanation was offered to us to explain why at least short delay in holding that meeting could have been allowed to enable Mr Noor to attend. The decision that going ahead with the meeting in the claimant's absence was in her best interests was made by a panel without the benefit of medical advice and without reference to the claimant.

87. Despite Miss Higgins giving us evidence on she was very familiar with the respondent's redundancy procedures her evidence was difficult to reconcile with the procedures themselves. For example, she told us that she was unaware that the procedure expressly provided for consideration of individual circumstances.

88. On the 25th May 2018 Ms Jessica Higgins, who was the replacement dignity at work investigator presented her report into the complaint raised by Mrs Zakeri. She concluded that there was insufficient or no evidence to uphold the allegations of discrimination and bullying.

89. In late May 2018 the claimant made a data subject access request to the respondent.

90. On the 28th May 2018 the claimant wrote to Mr Bishop to state an intention to

appeal against the decision to dismiss her. The claimant felt it was inappropriate for Mr Grover to have been allowed to present the redundancy case to the committee in light of her grievance against him and stated that the letter expressed her intention to appeal in light of the timescale set out in Mr Bishop's outcome letter. The claimant pointed she was still suffering from stress and suggests the reason for her dismissal is her grievance which remained outstanding at that time.

91. The claimant then sent an appeal against redundancy on the 1st June 2018. The grounds of her appeal were that the redundancy committee hearing had not been rearranged, there a breach of her terms of conditions of employment in relation to the notice given to her and that the respondent has failed to follow a fair procedure by failing to properly engage in collective consultation with her trade union, failing to undertake individual consultation with her, failing to invite her to any collective update meetings and by failing to meet duties to consider alternative employment.

92. The claimant pointed out that the post senior post in the new structure for the School was the post of "Inspirational Head of School" which had been advertised at Grade 14 and she was a deputy headteacher on Grade 16, a more senior grade. The claimant asserted that this was permanent employment which she could have been offered. She also repeated her assertion that the involvement with Mr Grover in the process was unfair because of the outstanding grievance against him and her belief that she had been victimised and subject to direct discrimination.

93. On the 19th June 2018 the school business manager received an occupational health report in relation to the claimant. That identified that the issues which the claimant was reporting related to work and required managerial not medical action. In order for her to return to work the school would need to address those issues and it was suggested that she could return on a phased basis.

94. In late June correspondence between Mr Noor and the respondent continued in relation to the arrangements for the appeal.

95. On the 29th June 2018 the claimant made what is described as a protected disclosure to the respondent's whistleblowing service on the basis that the school had breached the nationally agreed terms and conditions of service for teachers and which made a number of allegations which were essentially repeats of the matters already raised about alleged discrimination.

96. On the 29th June 2018 Mr Noor wrote to Mr Diamond again raising concerns about the way Mrs Zakeri had been treated.

97. On the 21st June 2018 the claimant was informed of the outcome of the dignity at work investigation which rejected her grievance.

98. On the 29th June 2018 a Georgina Stich of the respondent wrote to the claimant to inform her that her whistleblowing letter had been received but that in light of the fact that her appeal against redundancy was being considered it had been decided that this particular complaint would not be investigated as a

whistleblowing matter. The claimant replied to that to object that the matter was not being considered separately.

99. On 2nd July 2018 the claimant was invited to an appeal hearing in relation to the decision to dismiss her. That was a hearing to be convened before the appeal committee of the School's governing body.

100. On 18th July 2018 the claimant appealed against the grievance outcome.

101. On 25th July 2018 the claimant was informed of the outcome of the appeal hearing against the decision to dismiss her by reason of redundancy. The appeal was rejected. Perhaps the most significant aspect of the appeal, that the claimant should have been appointed to the head of school post on the basis of assimilation was rejected because the claimant had not completed the skills audit.

102. The claimant's appeal against the grievance outcome did not go ahead until the following academic year. By this time, she was a former employee of the respondent. A hearing was held on the 17th October and the claimant received a letter on 19th October 2018 informing her of the outcome which rejected her appeal.

The Law

103. The claimant raised a number of different legal claims in relation to how she had been treated by the respondent.

Protected disclosures

104. The relevant legislation is as follows:

105. Did the claimant make a protected disclosure for the purposes of the Employment Rights Act 1996?

"s43B of the Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
(a)that a criminal offence has been committed, is being committed or is likely to be committed,
(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d)that the health or safety of any individual has been, is being or is likely to be endangered
(e)that the environment has been, is being or is likely to be damaged, or
(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

S43C Disclosure to employer or other responsible person.

"(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure.—

(a)to his employer, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility, to that other person".

"Whistleblowing" detriment and dismissal claims under the Employment Rights Act 1996

106. *s47B Right not to suffer detriment: Protected disclosures*

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

107. *s48 - complaints to employment tribunals.*

(1) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B….

(2) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on; *and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

108. Unfair dismissal: *s103A Protected disclosure*.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

109. The claimant also alleges that her dismissal was unfair because it was unfair under s98 of the Employment Rights Act 1996

110. *s98 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.

Equality Act 2010 claims

111. Protected characteristics – under s4. The claimant relies on s9, race and s10 religious or philosophical belief

112. Direct Discrimination

S13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

113. Harassment

S26 (1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

114. It is also relevant to note that Section 212 EqA, which deals with general interpretation, provides at section 212(1) that "'detriment' does not, subject to subsection 5, include conduct which amounts to harassment." Subsection 5 provides that "where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic". Consequently, where detrimental treatment amounting to harassment is

alleged, that should be considered before considering whether the act complained of amounted to direct discrimination, because it cannot be both. That does not, of course, prevent a claimant from pleading in the alternative.

115. Victimisation

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

116. Burden of proof in discrimination cases s136

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

117. Complaint to the tribunal s120

s120 Jurisdiction
(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
(a) a contravention of Part 5 (work);
(b) a contravention of section 108, 111 or 112 that relates to Part 5.

118. It is common ground between the parties that the claimant's claims fall within Part 5.

119. Time s123

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end

of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.

Submissions

120. We received written submissions supported by oral submissions from both counsel. Given the extensive dispute in this case and the number of claims brought these were lengthy and it is not possible to fairly summarise the submissions in brief terms, but they are referred to as appropriate in the discussion and conclusions section below.

Discussion, further findings and conclusions

Was the claimant unfairly dismissed under s103A or s98 of the Employment Rights Act?

121. The claimant alleged that not only was her dismissal unfair contrary to S98, but also that the reason for the principal reason was that she had made a protected disclosure. For that reason, the first thing we considered was whether the claimant had made any protected disclosure at all as this was disputed.

Did the claimant make any protected disclosures?

122. In the claim form the claimant referred to making to oral protected disclosures but the schedule of disclosures produced in response to Employment Judge Camp's orders does not refer to any oral disclosures nor has any reference ben made to any in the evidence before us.

123. In the schedule the claimant says she made disclosures on these occasions:

a. The letter sent by the claimant, dated 29 April 2016, regarding wrongdoing on the part of two of the claimant's colleagues relating to phonics screening checks undertake in or around June 2014 in which the claimant made reference to the respondent having relied upon evidence which could not be vouched for. She relies on s43B(1)(a) and/or (b) of the ERA in that regard.

b. The letter sent by the claimant, dated 12 October 2017, in which she complained that Mr Grover had, from the outset of his relationship with the claimant, sought to bully her and, in particular she complained about the impropriety of the claimant's suspension and posed the question whether her treatment was due to the claimant being a "Parisian (sic) Muslim women" – the claimant relies on s43B(1)(b) ERA.

c. Within an email sent by the claimant on 7 November 2017 (and timed at 00:14)) to Mr Grover in which the claimant complained that her access to the respondent's email system had been disabled and that the claimant was being "kept in the dark" – the claimant relies on s43B (1)(b)

ERA.

d. The letter sent by Mr Noor, on behalf of the claimant, dated 16 April 2018 in which complaints were made about the unfair treatment of the claimant since 2016 in which it was asserted that the respondent wished to rid itself of the claimant: "..by hook or crook..". The claimant argued that her disclosure through the agency of Mr Noor was expressly or impliedly permitted by the respondent and comes within the provisions of section 43C (2) ERA. The claimant relies upon the provisions of section 43B(1) (a) and/or (b) and/or (d) ERA.

e. The letter sent by the claimant, dated 24 April 2018 in which she referred to a targeted campaign which was being conducted against her and which the claimant impliedly linked to her extant complaints (at that time) and which the claimant had asked her trade union to raise with the local authority. The claimant argues that the reference to a campaign was an implied reference to the provisions of Protection from Harassment Act 1997 and the claimant expressly challenged the fairness of her selection for redundancy. The claimant relies upon the provisions of section s43B(1) (a) and/or (b) and/or (d) ERA.

f. The letter sent by the claimant, dated 1 June 2018, in which the claimant appealed against her unfair redundancy selection which she contended was in breach of the operative redundancy policy and that the claimant was being targeted and victimised and subject to direct discrimination. The claimant relies on s43B(1)(b).

g. The disclosure by email on 29 June 2018 to Ms Stitch stating that the respondent had breached its legal obligations under their contracts of employments and policies and referring to a culture of discrimination and a culture of failing to comply with legal obligations in Birmingham City Council.

124. In relation to each of these disclosures we had to determine:

a. Did the claimant disclose information?

b. Did she believe the disclosure of information was made in the public interest? Ms Hands argued that the claimant had not shown this.

c. Was that belief reasonable? In relation to that we must consider what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest, and whether that belief was held reasonably.

d. The public interest test in S.43B(1) can be satisfied even where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable.

e. In relation to that, because the question of why the claimant made

disclosures which is relevant to this issue, we took into account that workers can, and often do, have mixed motives for making disclosures. As Lord Justice Underhill observed in *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA, "the introduction of new powers for the tribunal to reduce compensation for whistleblowing detriment and dismissal where the disclosure was not made in good faith clearly demonstrates that Parliament intended some disclosures to qualify for protection even though they were predominantly motivated by grudges or self-interest when the requirement for public interest was introduced. That does not mean that motive is entirely irrelevant in this context"*. As Underhill LJ accepted, a worker may seek to justify a putative qualifying disclosure by reference to matters that were not in his or her head at the time he or she made it, but if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or she really thought so at all. That is an evidential matter.

f. Returning to the protected disclosure question, did the claimant believe it tended to show that: a person had failed, was failing or was likely to fail to comply with any legal obligation or any of the other categories of qualifying disclosure set out in section 43B(1) of the Employment Rights Act 1996, as detailed in her updated schedule?

g. Was that belief reasonable? The worker's reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure

h. If the claimant made a qualifying disclosure, was it a protected disclosure because it was made to the claimant's employer?

125. In his submissions Mr Brockley rightly highlighted the guidance of Judge Serota in the case of *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416 and the point to point approach that we are required to take, and we adopted that approach. It is also of course the fact that the extent to which the approach set out by Judge Serota is relevant depending on the facts in the case.

126. Although Mr Brockley had identified all of the elements of the test we had to apply we did not necessarily receive evidence from the claimant to enable us to make relevant findings on each point.

Application to our findings of fact

Disclosure 1: Disclosure of 29 April 2016

127. We accepted that this document contains a disclosure of information,

naming information about a number of irregularities in relation to the SATS testing matter.

128. The issues raised relate to the breaches of assessment regulations. Those are clearly legal obligations falling within s43B(1)(b). The claimant reasonably believed the information tended to show that. There is a clear public interest in those matters. We accepted that the claimant believed she was raising these in the public interest even if she had also had a personal motive. The timing of that disclosure, shortly before a disciplinary hearing, suggested that the claimant raised these concerns at least in part for personal reasons, in essence as an attack on the disciplinary action being taken, but we also accepted that the claimant did genuinely believe raising this was in the public interest and that this belief was reasonable.

129. We accepted that that this was a protected disclosure. It was made to the employer and therefore it was qualifying protected disclosure.

Disclosure 2: The letter of 12 October 2017

130. This letter referred to various things which the claimant said showed she has been the subject of unfair and discriminatory treatment by Mr Grover and others. We accepted that this was a disclosure of information.

131. We accepted that it is clear from the letter that the claimant reasonably believed that this information tended to show that there has been breaches of equality legislation and of terms of her contract of employment, that is of legal obligations under s43(1)(b). We accepted that the claimant's belief that these allegations tended to show these allegations were breaches of legal obligations was reasonably held although she had a flawed understanding of what discrimination is. Like many individuals we think it is likely that the claimant and indeed Mr Noor believed that if someone with a protected characteristic is, in their view, treated unfairly or subjected to a detriment they have been discriminated. This led to reasonably belief that the information disclosed tended to show the legislation had been breached although as our findings below set out, that it did not.

132. We then had to ask ourselves whether she had raised this is in the public interest. The focus of this letter is about the claimant's personal situation but we accepted that in raising this in the terms that she did, the claimant believed there was a wider public interest because she was employed by a very large public funded authority which serves a diverse community and that that belief was reasonable.

133. This disclosure was made to the head of the interim governing body of the school. That was not a disclosure to the respondent but given the somewhat complicated employment structures within schools (and particularly bearing in mind that there is no evidence the school gave the claimant a contract of employment to make clear to her who employer was) we accepted that the disclosure was effectively made to the respondent. Although not raised by either of the counsel to us, insofar as authority for this finding is required, *Douglas v Birmingham City Council and ors* EAT 0518/02, an authority which

the respondent is presumably familiar with, found that a disclosure to a head of governing body by a classroom assistant employed by the council, was a disclosure to the employer. We accepted that disclosure 2 was a qualifying protected disclosure.

134. **Disclosure 3: The email sent by the claimant on 7 November 2017**. This is a short email. It says this

> Rob,
>
> I would like to stress that,
>
> I am still waiting for:
>
> - My access to my school's email system to be connected! Despite informing you before, it is still inaccessible to me and not in operation!
> - School's Business Manager to contact me regarding the ' point of contact' which was mentioned in your latter dated 15th September 2017 that was handed to me on 2nd October 2017!
> - To be updated on school matters as I have been deliberately kept in dark and in isolation by you as an interim headteacher!
>
> **Moreover:**
>
> - My name in school's website under staff section (leadership team list) has appeared as an 'Assistant Head' and not Deputy head!? Jo Jex who is an assistant head is being put as Deputy Head! This needs to be corrected please.
> - To my knowledge I am a substantive deputy headteacher of the school, appointed on September 2013, through rigid selection process, therefore my picture on the front page of the school's website should appear before Lorna McNab's picture who has arrived as seconded deputy head from Conway school on September 2017 (4 years
>
> after my appointment as a deputy headteacher). I seriously object to this and wish for it to be corrected please.

135. We accepted that there was a disclosure of information, that email access had been suspended, but there was nothing in that which tended to suggest the claimant believed there was any breach of a legal obligation. Further we found that this email is simply about the claimant's personal situation. We were entirely unconvinced that the claimant made this disclosure in the public interest. It related to her relationship with the employer alone and she did not raise these concerns believing they also applied to anyone else nor indeed is it clear these are matters which would be of wider public interest. If she thought that at the time, and we were not taken to any evidence that suggested she did, that belief was not reasonably held. We did not accept that the claimant believed that any other legislation was engaged, and this was not a qualifying disclosure.

136. **Disclosure 4:** The letter sent by Mr Noor, on behalf of the claimant, dated 16 April 2018, and sent to Mr Diamond at the respondent. This is a long letter which sets out a history of events from the claimant's perspective, including an assertion that the claimant's trade union has not been engaged in collective

consultation alongside other recognised trade unions and identified alleged different treatment and victimisation. There is clearly a disclosure of information.

137. Although the letter does not specifically identify legislation which it is tended the disclosures tended to show had been breached, we accepted that letter is identifying a belief on the part of the claimant that her there have been breaches of legal obligations for the reasons explained above. There is reference to the claimant having been demoted and singled out, to her having been bullied and disciplined unfairly which could be described as allegations of breaches of the claimant's contract of employment, and there is reference to the school failing to comply with its collective consultation obligations (essentially an assertion of a breach of the Trade Union Labour Relations (Consolidation) Act). We accepted that the claimant's belief that these allegations tended to show these allegations were breaches of legal obligations was reasonably held although she had flawed understanding of what discrimination is. and we accepted read as a whole that this was in essence expressing a concern that about how senior teachers were being treated in the context of the Birmingham community and that, there was a reasonable belief in a public interest given the nature of the respondent. We accepted that this was a qualifying disclosure.

138. **Disclosure 5**: Letter sent by the claimant, dated 24 April 2018. This was the letter about the claimant's provisional selection for redundancy addressed to Mr Grover. This letter referred to matters previously raised about the claimant's perception of unfair and in her belief that she had been subjected to unlawful treatment. She referred to Mr Noor's letter above and also referred to her situation being used as leverage in negotiations with the NUT. We accepted there is a disclosure of information which the claimant reasonably believed demonstrated a breach of legal obligations – that is of her rights under the ERA in relation to dismissal and her contract of employment.

139. We then considered whether there was a belief that this was in the public interest. This was perhaps the most finely balanced decision which we had to take on the balance of probabilities. The letter appears to be focused on the claimant's personal situation, but we do accept that, the claimant did genuinely belief there was a public interest in her personal situation because of the public nature of the respondent and its diverse workforce. On balance we accepted that belief was reasonable.

140. **Disclosure 6**: letter of 1 June addressed to Mr Bishop - this letter relates to why the claimant says her dismissal was unfair. It identifies a number of things which have happened that the claimant says are breaches of legal obligations including specific allegations of breaches of the redundancy policy, breaches of the claimant's contract of employment in relation to a PILON payment and unfairness in how the process was dealt with, for example through not delaying the hearing for health reasons. The letter contains disclosures of information.

141. We accepted that the claimant reasonably believed that the information tended to show breaches of legal obligations.

142. The focus of the letter is on the claimant's personal situation. However, we accepted that in raising this in the terms that she did, the claimant believed there was a wider public interest because she was employed by a very large public funded authority which serves a diverse community and that that belief was reasonable.

143. **Disclosure 7** Disclosure by email on 29 June 2018 to Ms Stitch. This was the first disclosure originally identified by the claimant in her claim form and it is a letter sent to the respondent's whistleblowing service.

144. The opening substantive paragraph says this

> For information, I am currently the Deputy Head Teacher at Springfield Primary School, in Moseley, Birmingham. I am currently suspended from my role since October 2017. Furthermore, I have compulsorily been made redundant as of 31 May 2018. During this process, the School has ignored legal requirements and unlawfully attempted to change Nationally Agreed Terms and Condition of Service. The School is breaching legal requirements and breaching nationally agreed Terms and Conditions of Service for teachers, as if they are a law on to themselves. What is most concerning is the fact that breaking law at will appears to be ***a culture*** which is being encouraged by Birmingham City Council. This is totally unacceptable.

145. This letter addressed to the respondent's whistleblowing services referred to matters the claimant had previously raised in correspondence to others, it is essentially a summary of the claimant assertions of the respondent's alleged breaches of its legal obligations to her in relation to her redundancy and suspension which had already been raised.

146. The first paragraph of the letter is a disclosure of information which refers to a breach of legal obligations, and we accepted that the reference to non - compliance by the respondent is evidence that the claimant believed that this was systemic issue within the public authority which was raised in the public interest. We accepted that this letter was a protected disclosure.

Automatically unfair dismissal

147. The case management order of EJ Camp records that the claimant claimed that her dismissal was automatically unfair under s103A (rather than say s105, that is a protected disclosure being the reason for selection for redundancy). S105 was never raised before us to this claim has been determined purely by reference to s103A.

148. S103A says this an employee who is dismissed shall be regarded.. as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

149. Having found that the claimant had made qualifying protected disclosures above, the panel then considered whether the reason for the claimant's dismissal (or, if more than one, the principal reason) could have been that she had made a protected disclosure.

150. When we considered the evidence before us, the panel bore in mind that, as with a discriminatory dismissal, an employer is very unlikely to be open that the fact that the real reason for a dismissal was that the employee had made a protected disclosure. We approach the evidence with that in mind.

151. In terms of the burden of proof in any unfair dismissal case (where, as here, the claimant has qualifying service) it is for the employer to show the reason for dismissal. Here the employer asserts that the reason for it was one of the potentially fair reasons under S.98(1) and (2) ERA. In these circumstances, the employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation, and which is capable of establishing the automatically unfair reason advanced. If the claimant satisfied the tribunal that there was such an issue, the burden would revert to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal.

152. At times the panel found the claimant's case about which protected disclosures she says were the reason for her dismissal to be somewhat confusing but, as a matter of logic, given that the claimant was provisionally selected for redundancy in April 2018 and the decision was confirmed in May 2018, it would have to been disclosures 1, 2 or 4 which would have been the principal reason for her dismissal because the other disclosures were made after the decision to dismiss the claimant had been made. Those disclosures were

a. Her concerns about the exam testing issues and the failure of the Mr Samad to contact the STA and follow the statutory processes set out in relation to the evidence that the claimant had been involved in testing impropriety;
b. Her concerns about her treatment by Mr Grover and in particular his alleged bullying and discrimination of her because she was a Persian Muslim woman.
c. The concerns raised Mr Noor to Mr Diamond.

153. The claimant's evidence was, in essence, that her dismissal must be related to the fact that she had made a protected disclosure (or in the alternative her race and/or her religion as set out below) because she could not think of another reason. The claimant was unwilling to accept the wider context of her dismissal which was explained to us by the respondent's witness in terms of its conversion to an academy could be relevant.

154. We found it difficult to believe that the claimant could not really understand the wider context and thought it likely that she did not accept this because she recognised the problems it causes to her case.

155. We accepted that there was a restructuring of the leadership staff in the school which followed the school being identified as being inadequate and being placed in special measures leading to a proposal that it would be converted to an academy. The claimant clearly profoundly disagreed with the criticism made of the school and the leadership team by OFSTED, with the fact

that it had been placed in special measures and that it was converted. However, whether those decisions were correctly made was not a matter for this tribunal. This context was relevant and we found to be entirely unconnected to the protected disclosures made by the claimant. What happened to the School was driven by the findings of the OFSTED inspectors.

156. We accepted the respondent's evidence that OFSTED reports of this nature and a failure by a school to take itself out of special measures in short order commonly result in conversion to an academy. We also accept that the leadership structure of an academy is very different from the leadership of a local authority primary school because of the role of the MAT. The claimant's refusal to acknowledge the reality of the situation facing the School was damaging to her credibility. We found the claimant evasive in her answers and we considered that this was likely to be because the claimant herself recognised the weaknesses in her claim in this regard.

157. It appeared to be suggested to us that because, it is said, criticism made of the leadership team could not laid at the door of the claimant, there could not be grounds to make her redundant so that is evidence that there must be some other reason for her dismissal. That is an argument we found difficult to follow. The claimant may have been entirely blameless in terms of the poor OFSTED inspections but that did not mean that the OFSTED rating, its recommendations and the conversion to academy status did not justify the restructuring of the entire senior team. If it had been decided to convert the School to an academy for reasons unrelated to an adverse OFSTED inspection there would have been a restructuring of the senior team. We accepted that as a matter of fact that the academy conversion restructuring had nothing to do with claimant and the protected disclosures she had made.

158. One of the criticisms in the OFSTED report was that that the School had a leadership team which was too large. That was not the claimant's fault, but it does not mean it was not a valid criticism. The senior leaders did too little face to face teaching. The claimant strongly expressed the view that in the past it had been agreed she did not have to do much, if any, face to face teaching, or at least not on a timetabled basis and that should have respected by Mr Grover. We have no reason to doubt that this is what had been agreed with her in the past, apparently by Mr Webb, but that was a poor agreement which did not serve the interests of the children. It had contributed to the failings identified in the OFSTED report and it had been identified that was something that needed to be changed for the sake of the children. The children in this school were being let down by the most able teachers in the school, the senior leaders, not undertaking enough teaching, with the teaching falling to more junior employees or supply staff. That needed to change. When the interim heads sought to act on the recommendations of OFSTED the claimant did not respond in a positive way to meet the needs identified for the children, she reacted by resisting undertaking more teaching on the basis of the past agreement and saw this an attempt to undermine and demote her. In that sense the claimant had driven the need for Mr Grover to propose radically changing the school's leadership structure because change would not be possible with the c-operation of the exiting senior staff.

159. It was suggested to us that the evidence of the tension in the relationship between Mr Grover and the claimant was evidence that he was biased against her either because of her race or her religion. However, there was evidence that the claimant had a difficult relationship with every headteacher who tried to manager her. The claimant gave us evidence that the need to increase timetabled teaching by the senior leadership team was a source of tension between the claimant and Mr Grover. The claimant believed that the terms of the previous agreement should have been respected not only by Mr Grover but the other interim heads. That is not a reason related to the claimant's race or her religious beliefs, nor was it related to the fact that she had made protected disclosures, but it was a reason for the relationship between the claimant and whichever interim head was in place to be a difficult one. We also found the claimant's evidence on this was somewhat inconsistent. She appeared to acknowledge at some points there was good reason for her to teach more but it was clear at other times her view was that an interim head had no right to insist on this. The claimant may well have been right that the terms of her employment as a deputy head teacher were not consistent with what was being suggested (and she claimed with national guidance although we had no evidence of that) but that supported the respondent's case that a restructure was required because the senior leadership structure of the school needs to meet the needs of the pupils and the existing structure did not do that. There was a need to change the senior team at this school even if it stayed in local authority control in light of what OFSTED had said about the leadership team but the changes needed were compounded by the MAT academy conversion which would further reduce the need for senior leaders within the School as senior leadership functions moved from the School to the MAT.

160. Much was made in the claimant evidence and cross-examination that the criticisms made by OFSTED were not "her fault". We did not consider that assisted the claimant in her case, although the panel appreciated that it is something she feels strongly about. An analogy may be drawn with a business who loses a significant client and needs to restructure its client service team as a result. The fact that that restructure impacts on employees who had no part in losing the client is immaterial to whether the restructure is needed. If the result is redundancies, the dismissal of those "blameless" employees by reason of redundancy is still potentially fair.

161. The focus of our enquiry in terms of whether the true reason, or a principal reason, for the claimant's dismissal must be on what was in the minds of the person or persons who took the decision to dismiss the claimant, whether they knew about the protected disclosures and whether that motivated their decision.

162. The decision to dismiss was taken by the redundancy committee based on the recommendations of Mr Grover about the new structures, recommendations which had the support of the School's governing body

163. We accepted that Mr Grover was not aware of the first protected disclosure. There was no apparent reason why as an interim head he would have been told about that disclosure and the claimant did not suggest that she had told him about it.

164. In terms of disclosure 2 Mr Grover told us that he regarded complaints and grievances from staff after he had taken disciplinary decision as an occupational hazard. We accepted that. We accepted that that when he came to make his recommendations about leadership structure he sought to recommend a structure which was consistent with the needs of the new academy and which addressed the budget deficiency in a school which had a large leadership team who were not doing enough teaching. The structure he proposed was consistent with that and we accepted the evidence of the respondent's witnesses that it is a typical structure for an academy primary school. We found no basis to find anything in the structure itself to suggest it was influenced in any way by the claimant's protected disclosure about him. We also took into account that Mr Grover made structural recommendations but it would not be his decision who was appointed. He recommended that the school be led by a head whose post was to be graded at a lower level than the claimant's deputy headteacher post. It is impossible he would have done so if it was his intention to create a structure which the claimant would be excluded from.

165. It was suggested by the claimant that the fact that Ms McNab had been brought into the school was inconsistent with any genuine budgetary reason for the restructure. However, in making these arguments the claimant ignored the fact that the new structure was to be put in place as a long-term measure for the School once it was an academy. Ms McNab on the other hand was appointed on a short-term basis, as a secondee, to provide short term support until conversion. There clearly is a significant saving for the new academy trust in not retaining a headteacher, deputy head and two assistant heads and moving to the new proposed structure where even the head was a lower grade than the current deputy role with a head of inclusion at a lower grade still. However, in terms of the academic year 2017/2018 it was intended that Mr Grover was going to spend much of the year working on the restructure and conversion. In the short term he needed more senior leadership support, especially given the prohibition at the school to rely on newly qualified teachers and the direction to reduce its reliance on supply teachers. That short term need which was not relevant to the plausibility or reliability of the evidence we received from the respondent witnesses about the reasons for the new structure and there was nothing in Ms McNab's appointment that suggested the new structure was a sham designed to achieve the claimant's dismissal.

166. There was no evidence that Mr Grover was aware of disclosure 4 to Mr Diamond but in event by the time of that disclosure his proposed structure had already been adopted and consulted upon. We were given no evidence that the proposed structure changed after the letter of 16 April 2018 which might have suggested it had been influenced by the disclosure in some way.

167. We found nothing in these facts which suggested that the claimant's protected disclosure about Mr Grover had influenced his design for the proposed new leadership structure for the academy or the claimant's selection for redundancy.

168. In terms of the redundancy committee Miss Higgins was aware of the events surrounding the claimant's suspension in connection of the SATs issues because she was one of the panel who decided that disciplinary action would not be taken against the claimant. She told us that she was not aware that the claimant had made a protected disclosure about those matters. If she was, it had not motivated her to make any decision which was adverse to the claimant at the time.

169. We did think it was likely that the redundancy committee were aware of the concerns raised by the claimant about Mr Grover because the dignity at work investigation was commissioned by the governing body. Miss Higgins may not have been aware of it, but Mr Bishop would have been. The claimant did not suggest the she or Mr Noor made the redundancy committee aware of disclosure 4 but have accepted that they were likely to have been aware of the disclosure about Mr Grover we considered whether the claimant had shown evidence which warranted investigation and which would be capable of establishing the automatically unfair reason advanced.

170. The claimant's selection for redundancy arose out of the new staffing structure which was to be put in place for the MAT and which had been accepted by the School's governing body. That structure was not the redundancy committee's decision, their remit was to consider potential dismissals which arose out of that structure. The new structure removed the claimant's post altogether. The claimant expected the redundancy committee to "slot her in" to the head's post but we accepted Mr Diamond's evidence that this was not something the committee had the power to do, that was a decision for the MAT who would consider staff who put themselves forward via the skills audit and the claimant had not done so.

171. We did make findings that the redundancy process was conducted in an unfair way. We therefore considered whether this was evidence that dismissal could been by reason of the protected disclosures. However although we found that the way the claimant was dealt with was unfair, we found no evidence that the reason for her dismissal was related to anything but the fact there would be no deputy head at the School when it became an academy and it was not for the respondent or the governing body who would decide who would be appointed to the new posts. There was no evidence that the approach adopted for the claimant was any different to that applied to the other senior leaders whose posts were not retained in the new structure and where we made findings of unfairness this appeared to arise out of the fact the claimant was suspended. The claimant did not present us with evidence which led us to conclude that the reason or principal reason was that she had made one or more protected disclosures.

172. In terms of the reason for dismissal we were satisfied that the respondent had shown that there was a reduction in the respondent's requirement for senior leadership staff at the School and for an employee employed as a deputy headteacher at grade 16 in particular. Accordingly, we accepted the reason for claimant's dismissal was redundancy in accordance with s98(2) (c) of the ERA.

Unfair Dismissal

173. We then considered how the respondent had handled the process once the claimant had been selected for redundancy in accordance with the test in s98(4) *"….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."

174. The policy document in the bundle contains a somewhat curious introduction which suggests that it is perhaps a document which has been changed by the claimant or someone else but no issues were raised about that before us and it was common ground between the parties that this was the procedure which had been applied to the claimant. The essential steps in this process are as follows:

175. The headteacher holds a preliminary discussion with the governing body which may result in more detailed discussions with the redundancy committee. There is also reference to separate guidance in relation to restructuring but we were not taken to that and are unable to make a finding that a different policy should have applied in this case.

176. Proposals are prepared for consideration by the redundancy committee. That is the document prepared by Mr Grover. If approved by the redundancy committee, those proposals are the basis for statutory consultation with both trade unions and employees.

177. There is then a process of individual consultation with employees in groups or individually. The headteacher reports back to the redundancy committee and discusses with the redundancy committee which may lead to the s188 notice being served and trade union consultation. If sufficient expressions of interest are received for voluntary redundancy the process may end there.

178. If not, selection criteria will be applied on a provisional basis and the result reported by the headteacher to the redundancy committee. The process provides for an informal consultation with the individuals provisionally selected and formal hearings with the redundancy committee. The redundancy committee must then decide whether to make an employee redundant and subject to the right of appeal.

179. The restructuring proposal prepared by Mr Grover says this

Impact on staff

Affected posts in this proposed restructure exercise would be 13 posts which will no longer exist in the new school leadership structure. However, the individuals currently in post have the opportunity to apply for posts within the new structure.

As a result, there is an identified risk of redundancy for 13 posts. (all included in the current staffing structure diagram, page 4)

Financial Considerations
Redundancy costs – depending on continuous service period for staff, this might carry high costs.

A selection process with clear criteria will be used in assessing individuals for posts in the new structure. This will be determined through an assessment of the requirements of the role and individuals' performance profile.

Selection criteria will include: relevant knowledge, competencies and performance profile, current and past performance and conduct, current and past attendance and timekeeping, relevant education and qualifications. The process will be carried out in a reasonable, open, transparent, fair and objective manner and decisions taken will be evidence-based.

180. One difficulty which existed on the face of things which appears not to have been identified by the respondent at the time is that the way Mr Grover proposed to proceed was not in fact consistent with the respondent's policy. That anticipates redundancies being dealt with in what might be described as a traditional approach. Employees are scored in relation to their existing roles and the lowest scoring are selected for redundancy. That is not what Mr Grover was proposing. His plan involved the removal of posts and an appointment process for new posts. In essence the implementation of the plan jumped any selection for redundancy, Mr Grover's plan was about the design of a new structure and selection for alternative employment which would be based on information put forward by the claimant. Despite this we have not been shown any evidence of the respondent consulting with the trade representatives and individual staff about the how the procedure needed to be adapted, if at all. This was a fundamental matter relating to a departure from an agreed process which was the subject of consultation with staff or their representatives.

181. It was striking how little evidence about the redundancy process we received from the respondent witnesses. Mr Grover says this about the redundancy process (and nothing else):

> 16. In terms of the selection process, full processes were followed with the skills matrix, the applications and interviews based on the skills match matrix. The whole process went through from start to finish. We made sure that whilst the Claimant was on suspension, HR were constantly advising and assisting us to make sure that the Claimant was receiving updates and information of everything we did.

182. If the School was receiving constant advice and assistance and if the claimant was receiving updates and information, we were not shown any

evidence of that except as noted below.

183. Ms Higgins said this about redundancy (and nothing else) in her statement:

> I believe the Claimant's redundancy hearing proceeded and it was advised by schools HR, because within the processes and procedures I am aware that if you should give notice, you can proceed in the employee's absence. For example, David Bishop like myself was somebody brought in to manage the process, so that it wasn't people with direct school involvement to maintain independence. However, it would have been an HR decision ultimately in relation to hearings proceeding or not and I would not have had any involvement in that aspect, so I am puzzled as to why the Claimant has named me in her Scott Schedule. It is probably just a nuance of the fact the Claimant didn't really know the HR process and that it was somehow she was targeted with intentional delays.

184. Ms Higgins statement that it was an "HR decision" as to whether the final redundancy hearing went ahead is not correct. It was a decision of the redundancy committee and this statement is inconsistent with the letter sent by Mr Bishop. This was Ms Higgins sworn evidence and it leads to us have significant concerns about the approach adopted by the redundancy committee and the weight which we could attach to the contents of Mr Bishop's letter.

185. We were given no evidence that any attempt was made to conduct the first stage of individual consultation meetings with the claimant despite the redundancy procedure noting the importance of who are suspended are included in the process. There is no evidence this was done in the claimant's case at this stage.

> 2.11 Employees who are absent from any consultation meetings (perhaps due to maternity leave, sickness, suspension, secondment or other commitments) must be included in the consultation process at all stages. This is particularly important for employees who are on maternity leave as it is automatically unfair to select a woman for redundancy simply because she is on maternity leave. The head teacher shall ensure that all the points covered in the meeting are reported to missing employees as soon as possible, by written communication if necessary. In addition, absent employees should be offered the same opportunity to make representations and to appeal against the decision to end their contract as non-absent employees.

186. The bundle of documents contains the s188 notice to the trade unions.

187. There should be further consultation meeting with employees who are identified as being at risk. Section 5.11 says this

5. Consultations with staff

5.1 The consultation with staff will take place as soon as possible after the consultation between the redundancy committee and the trade unions and teachers' associations. It will be led either by the head teacher or an appropriate governor as the redundancy committee shall decide. It will cover the contents of the Section 188 notice and the outcome of the consultation between the redundancy committee and the trade unions and teachers' associations. Copies of the Section 188 Notice and attachments should be provided to the employees identified as at risk of redundancy.

5.2 There will also be individual consultation as soon as reasonably practicable with those employees who are at risk of redundancy, with representation if requested.

188. On 6 December Mr Grover wrote to the claimant as follows:

Dear Nahid,

Re: Formal Statutory Consultation on Redundancies

I am writing to you to advise you that Springfield Primary School have commenced formal consultation with the trade unions and staff on a proposed staffing restructure of the teaching staff.

Please find enclosed documentation shared with staff this week.

I will make arrangements to meet with you next week should you require a meeting with me.

Yours sincerely,

Mr. Robin Grover
Head Teacher

On behalf of Springfield Primary School IEB, Redundancy Committee

189. Although the letter says *"arrangements will be made to meet with you should you require a meeting*" there is no reference to this being an individual consultation meeting and no attempt to explain to the claimant what the purposes of that meeting would be. The redundancy procedure does not place any obligation on staff to tell the headteacher they want meetings and there appears to have been no attempt to inform the claimant about the consultation meetings held with other staff members. There is no reference in the letter to the right under the procedure for the claimant to be accompanied.

190. On 15 March Mr Grover sent the following email to the claimant and others affected by the proposals:

Good morning everyone,

Please find attached all of the documents you will need if you are affected by the Leadership restructure.

The new timeline sets out the deadlines for VR expressions and skills audit submissions.

I have attached the business case, skills audit, Job descriptions and Person Specs also.

Please, if you have any queries, do not hesitate to contact me.

191. The bundle for this hearing only contains a timeline document. If the other documents contain an explanation of the employee is required to do and why we did not receive any evidence of that.

192. It is common ground that the claimant did not complete a skills audit but the timeline document sent to the claimant referred to this skills document being submitted but there is no evidence that the claimant was given any specific information about what was required or what it was for or what would happen if she did not complete this.

193. After the stage where volunteers are sought, the next stage should be the scoring of at-risk staff. The procedure says this:

> 7.1 If there is not a sufficient number of expressions of interest in voluntary redundancy, the head teacher shall select a panel of scorers who will be responsible for provisional selection of employees for compulsory redundancy. The panel will score those employees in the selection pool against the chosen selection criteria, having regard to the guidance in Appendix 1. A recommended form for recording scores appears at Appendix 4. The head teacher may decide to undertake a skills audit (see Appendices 2 and 3 for model forms) of those employees in the relevant selection pool before proceeding with the selection process.
>
> 7.2 Once the scoring process has been undertaken, the panel shall meet with the head teacher and explain how they undertook the scoring process, what evidence they took into account and which employees have been provisionally selected for redundancy. The head teacher will then meet with the redundancy committee to discuss the scoring. The redundancy committee may ask members of the panel to attend this meeting. The committee shall decide whether to accept the recommendations of the panel and who shall be selected provisionally for redundancy.

194. We have no evidence of how this stage was completed. The claimant was the only deputy headteacher whose employment could have continued after conversion because Ms McNab was only seconded into the School and that secondment was to end (and did in fact end) when the School became an academy.

195. The next stage under the process is the hearing with the redundancy committee. The procedure requires this

7.3 The head teacher shall write to all employees in the selection pool and confirm whether or not they have been provisionally selected for redundancy and what the next steps will be, including the right to a hearing before the redundancy committee to make representations about their selection. As part of the continuing consultation process with directly affected employees, the head teacher should disclose to each employee the score for that employee, explaining in each case how the score was reached. Employees may wish to call the chair of the scoring panel as a witness to this hearing. The hearing will usually cover the way in which the redundancy process was undertaken, including the selection criteria chosen or the way in which they were applied, although this list is not exhaustive. The employee has the right to see a copy of the selection matrix setting out the scores of all employees in the selection pool, but the name of each employee must be redacted for data protection purposes.

7.4 Each employee provisionally selected for redundancy will be invited to a hearing before the redundancy committee. In order to ensure that the employee has enough time to prepare his or her response to the proposed dismissal on grounds of redundancy reasonable notice of the hearing should be given. This should be at least fifteen working days. It is helpful to agree a date with the employee's union/professional association if the employee wishes to be accompanied, before sending the formal notice to attend the hearing. The employee may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee may reject this suggestion but will do so only if it is unreasonable, when they may proceed to hear the case in the absence of the employee or the employee's representative and will take advice from the Employee Relations Team on what is unreasonable. The committee has the discretion to defer the date of the hearing by a longer period in exceptional circumstances in order to reach mutual agreement on a convenient date, having particular regard to the availability of the employee's representative.

196. On 17 April 2018 Mr Grover to the claimant to say this:

Further to my previous email communications in December and again in March where I sent you information and related documents regarding the restructure process, including proposed structures, job descriptions, person specifications and timelines, detailing the opportunities available to you to express an interest in all available posts during the formal consultation. I am now writing following the recent meeting in which staff were informed of the outcome of the consultations with the unions on the possibility of redundancy or redundancies.

197. He also explained the claimant's right to a hearing before the redundancy committee.

198. At around this time the respondent began advertising the head of school post the claimant says that she should have been "slotted into". That post was graded 2 levels below the claimant's current grade.

199. On 24 April 2018 the claimant wrote to Mr Grover about her selection for redundancy. The letter is mainly a reiteration of the claimant's complaints about being targeted and subjected to discrimination. In relation to redundancy she says this

> I note that you have stated in your letter dated 17 April 2018 that the school will continue to explore alternative employment for me. I believe that this is simply a lip service to the process. It is my understanding that there are similar roles within the new structure which should be ring fenced for me given my current role and where by I should be slotted in. While the new roles look different, to select me for provisional redundancy when there are possible roles within the new structure without even considering if they are suitable alternative roles for me is unfair. I believe that it simply suits the schools campaign against me to select me for redundancy. After all, the school have been attempting to get me out of my deputy role for almost 2 years, with this restructure process being a part and parcel of those attempts.
>
> Furthermore, as you are aware, I am currently suspended. The letter outlining my suspension sets out number of restrictions including not to enter any council building. Given that the school have failed to engage with my union as stated above, how was I expected to take part in the consultation in a meaningful way? The employer has simply created obstructions and actively placed barriers in my way in order to strategically place me in a impossible position where by I have not been consulted over the restructure proposal in any meaningful way whatsoever. I believe that this is further evidence of how I have been treated differently which once again makes this whole restructure process unfair.

200. And this

> Above is a non exhaustive list of my concerns submitted as an example of some of the reason why I believe the restructure process and my provisional selection for redundancy is unfair. I reserve the right to expand and add to the above at any subsequent hearing. All of the matters as stated above, taken together, demonstrates that my provisional selection for redundancy is unfair along with this whole restructure process. I am absolutely astounded in the way how I am continually being treated by the school which I believe is unfair and unlawful.
>
> For the record, as a direct result of the way I am being treated by the employer, I have been experiencing significant stress and anxiety, resulting in my GP declaring me unfit for work activities as of 20 April 2018 for a period of 1 month.

201. There is no evidence that Mr Grover responded to explain to the claimant whether “ring fencing” would be applied in this case and if not, why not. In light of the lack of consultation with the claimant and individual engagement in this case this should have rung alarm bells in his mind about the claimant’s understanding of the process.

202. On 30 April 2018 the claimant was invited to the redundancy committee meeting. By this time she had submitted a sick note referring to stress but there was no acknowledgment of her ill-health from the School and no evidence that any attempt had been made to arrange a meeting with her trade union representative, despite what the procedure says about how a process should be handled in these circumstances. There was a lack of engagement with the claimant at this stage.

203. At short notice (on 11 May) Mr Noor informed the School that he could not attend the meeting and in light of the claimant’s ill-health asked for it to be arranged. Mr Noor suggested the claimant may be fit after 20 May 2018 which would have been a delay of only a week or so. It is difficult to see how a delay of week would be unreasonable. The business manager replied to say that the

meeting may go ahead in her absence despite the procedure expressly allowing an employee the right to propose an alternative date which could only be refused if the request was unreasonable. The respondent offered no evidence to explain why that the request was considered to be unreasonable.

204. On 15 May Mr Noor objected to hearing going ahead, referring to failure by the school leadership to engaged with the claimant's trade union at a collective level and stressing that a hearing in this case was important. There was no response to that.

205. Miss Higgins was asked further questions about the process, but she was candid that she remembered very little of the process as it was applied to the claimant. As noted in the findings of fact above, Miss Higgins told us that she had experience of redundancy committees and that was the reason for her involvement on this occasion and she was adamant that it is not the role of the redundancy committee to be involved with individual meetings with those selected for redundancy. She continued to maintain that this was not her experience even when she was taken to the relevant sections of the procedure.

206. In her submission Ms Hands appeared to be critical of the questions the employment judge asked of Ms Higgins about this but the panel wished to understand precisely what Miss Higgins' evidence was in circumstances were she appeared to be admitting that the agreed procedure had not been followed. If Ms Higgins had created that impression inadvertently it would be in the interests of fairness to her and the respondent to ensure that her evidence had not been misunderstood. However, Miss Higgins was adamant about this point.

207. The tribunal panel concluded from Ms Higgins' evidence that despite the obligation in the procedure for the redundancy committee to look at individual circumstances in practice this does not happen.

208. Despite Mr Noor's representations, the redundancy committee hearing was not postponed and the meeting was held in the claimant's absence despite that the fact there had been no individual consultation meetings with the claimant whatsoever. The letter to the claimant explaining the outcome dated 23 May 2018 says this

> You did not attend the meeting, and notified this via your trade union representative, Mr Emdad Noor (NAHT), who emailed correspondence for the Committee's attention dated 11.05.18 and 15.05.18. The Committee did consider the information within these emails, and also noted that you had the opportunity to make written submissions for the Committee's attention which would have also been taken into consideration. The Committee did consider your GP's letter dated 09.05.18, which made reference to symptoms of work related stress. The Committee also noted that in your representative's email dated 15.05.18, whereby reference was made to other outstanding processes which, upon conclusion, had no bearing on the process of the restructure. Furthermore, the restructure which has resulted in redundancies, affected all members of the Senior Leadership Team, including yourself. The Committee deliberated and determined that it would have been in the interest of both parties to have proceeded with the meeting for avoidance of any further delays around the process, which inevitably may have caused further stress. The Committee also noted your representative's comments about keeping him informed throughout the process. The Committee were satisfied that the school had consulted with the local NAHT representative, and therefore considered that it was your responsibility to share any information regarding this process with your representative. The Committee therefore took the decision to proceed with the hearing in your absence.

209. It is unclear on what basis the committee could determine that going ahead was in the claimant's interests "because delay might cause further stress" without the benefit of specific medical advice on the impact of the claimant's stress on her and what was causing her stress.

210. It appeared to this employment tribunal that despite the intention of the procedure that the redundancy committee should closely scrutinise the individual circumstances of potentially redundant employees, in practice this has not happened on the committees Ms Higgins has been involved in. Despite what the letter sent to the claimant suggested, at best there was a cursory consideration of these matters and there was a failure by the committee to give consideration to the fairness to the claimant of proceeding in the way they did.

211. The letter of 23 May 2018 also said that the claimant had chosen not to complete the skills audit on two occasions. We saw no evidence that the claimant was told or warned that if she did not complete the skills audit, she would not be considered for the new academy head post. The letter also says that the claimant was provided with opportunities to participate in the restructure process, but we were not provided with evidence of that.

212. In their evidence Ms Higgins and Mr Diamond made much of the fact that the claimant would not be considered to be a suitable candidate for the post of head of school at the academy because of the OFSTED report. Mr Diamond referred to his experience of appointments at academies within Birmingham in support this to suggest that it would extremely rare for a member of the leadership team of a school in special measures to be appointed as a member of the leadership team of the new academy. The tribunal panel found the respondent's evidence on this point to be somewhat difficult. We have no basis for doubting what Mr Diamond said and we recognised that he has wide ranging experience of the respondent's practices and of what happens on an academy conversion but that does mean that is reported as a widespread practice is fair. The staff were told in Mr Grover's restructuring plan that the appointment process would be open, fair, transparent and objective and decisions would be evidence based. It is difficult to see how dismissing a candidate's suitability for a post simply because they had worked at the failing school without looking at any other evidence, and especially if the staff have not been warned that this is the view of those who make the appointments, is any of those things.

213. It was also suggested by the respondent witnesses that the claimant would not be suitable for that post because she did not have the necessary experience and skills. This was hard to reconcile with the fact the new head of school post was two grades lower that the claimant's deputy headteacher post. That role would in fact have been a demotion for her. It was also difficult to see how Mr Diamond, Ms Higgins and even Mr Grover could give us evidence about the claimant's suitability for the new post of head at the academy. She did not complete a skills audit and their evidence appeared to be based on assumptions and a desire to further the respondent's case.

214. We accepted Mr Diamond's evidence that who is appointed to academy posts is a matter for the academy and that even at local authority schools who is appointed to a particular post is a matter for each school's governing body not the respondent. However, we saw no evidence that was explained to the claimant and the respondent had promised staff that the appointment processes would be conducted in a particular way which appears at best to have been misleading.

215. The policy provides this about redeployment

> **Redeployment**
>
> 28. The school will make every reasonable effort to redeploy an employee who has been selected for redundancy. Whilst redundancy is to be viewed as the last resort, it is recognised that neither the governing body nor the Local Authority has the power to redeploy staff between schools. However, schools in a redundancy situation are encouraged to seek the support of the Local Authority as well as their own contacts with other schools in recommending staff vulnerable to redundancy for consideration for suitable vacancies.

216. The respondent has produced no evidence that any attempt was made to recommend the claimant for other posts. We accept that the respondent could not offer the claimant alternative employment as a deputy or headteacher at another school, but a reasonable employer would still take steps to meet its obligations under the policy which were even more important given the somewhat unique position of teachers. The respondent failed to do that.

217. The claimant was allowed an appeal against the decision which in due course was refused.

218. We concluded that no employer acting reasonably would have departed so far from its own policy procedure in the ways specified above particularly the failure to consult with the claimant individually at all before dismissing her. The appeal process did not address those matters of unfairness. The respondent is the one of the largest local authorities in the country which makes the failures of the respondent identified above appear particularly significant. This is an employer with substantial resources. It would be clear to any employer who had properly determined what the interactions had been with the claimant and given the lack of any individual consultation with her, that to proceed with the dismissal hearing in the absence of both the claimant and her trade union when she was unfit to attend on but without any attempt to establish her state of health was an unreasonable and unfair way to proceed. The approach adopted meant that at no time had the claimant been given a proper chance to be heard and the processes had never been properly explained. She raised issues about why she believed she should be slotted in which were never address and it was never explained to her why this would not be appropriate. It was never explained to her how the usual redundancy process would be affected by an academy conversion. The claimant was never given a proper explanation of why she was being told to complete the skills audit or what the implications might be if she did not complete that in accordance with the timeline. The

respondent acted outside the range of reasonable responses to the claimant's redundancy arising from the removal of her post from the new academy's structure. In the circumstances the claimant was unfairly dismissed contrary to s94 of the ERA.

219. We considered if we could determine if the claimant would have been dismissed in any event. The burden is on the respondent to show if a so called Polkey reduction under s123(1) is appropriate. We did not consider however that we are in position to determine this matter and have invited the parties to make further representations about that at the remedy hearing, must be based on the evidence already presented and the findings of fact made above.

Claims under s 47B detriment

220. In terms of the detriment claims under S47B of the ERA we reached the following conclusions.

221. The term 'detriment' is not defined in the ERA, but it has a broad ambit. Its meaning has been given extensive consideration in case law. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

222. In respect of a S.47B ERA detriment claim, it is for the employer to show "*the ground on which any act, or deliberate failure to act, was done"* — S.48(2). Section 48(2) is does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

223. In her submissions Ms Hands did not address us on the burden of proof but Mr Brockley did. He rightly drew our attention to the judgment of *Fecitt and others v NHS Manchester* where the approach to be adopted was explained by Elias LJ. We have also had in mind the approach of Recorder Underhill QC, as he then was, in *London Borough of Harrow v Knight* [2003] IRLR 140, paragraphs 20-21, a case cited without disapproval by Elias LJ in Fecitt. The claimant must establish a prima facie case that the ground of the detriment was the protected disclosure. As was observed in *Mrs J Ibekwe V Sussex Partnership NHS Foundation Trust*, a worker does not succeed in default if the employer cannot show the reason for the detriment.

224. The detriments alleged by the claimant are set out in her claim form and particularised in her "Scott Schedule". Before us the claims were pursued as they have been set out in the Scott schedule:

    a. The delay in providing the claimant with appeal hearing, an appeal outcome on grievances until 17 October 2018 or an outcome to the

safeguarding investigation; and

b. The decision not to uphold her appeal on 17 October 2018.

225. The claimant identified 6 individuals who she said was responsible for these detriments.

Detriment 1 – the delay in the appeal hearing

226. In terms of the delay for the appeal hearing, that is the appeal to the redundancy dismissal. The claimant initially indicated she wished to appeal on 28 May and submitted details of her appeal on 1 June 2018.

227. At this time the respondent had sought an occupational health report on the clamant. That was criticised by Mr Noor as being an inconsistent approach by the respondent because the redundancy meeting had gone ahead without such advice being sought. However, we saw little merit in an argument that the respondent acted improperly by failing to seek medical advice but then also acted improperly because it did later seek advice. We accept that seeking occupational health advice would be something that an employer would be expected to. The respondent here might have been expected to that earlier, but it would be illogical to additionally criticise it for correcting that earlier omission. An adverse inference cannot be drawn from the respondent seeking and then waiting for that advice.

228. The redundancy policy states that the appeal hearing should be held within 20 working days so according to the policy should have been held by 29 June. However, the occupational health report was not received until 4 July 2018. The hearing went ahead on 17 July and the outcome was sent on 25 July 2018. That is a delay of 18 working days.

229. The claimant does not refer to the delay in her witness statement. She does not refer to the delay having any impact on her at all. She has not shown us that, compared with other workers (hypothetical or real who had not made disclosures) she had suffered a disadvantage of some kind as a result of the delay. We have not been addressed on whether employee who was off ill with stress at the time of their redundancy but who had no raised disclosures or who had outstanding grievances which required an occupational health report would have had a quicker appeal. We concluded the claimant has not shown, on the balance of probabilities, that she suffered any detriment from the mere fact of delay in the hearing. Further the claimant did not offer us any evidence to suggest why for there could be a link between the delay and protected disclosure except to say she could think of no other reason. We found no basis for concluding that the claimant had established any sort of prime facie case would require the respondent to meet the burden under s48(2) of the ERA.

230. The claimant also alleged that the delay was orchestrated, and that allegation was made against individuals without any explanation for why she can ever have believed that the named individuals could have been involved in that. For example, that allegation was made against Miss McNab who was the same seniority as the claimant and who was substantively employed by an academy trust. She had nothing to do with the redundancy appeal and the

claimant and her trade union representative would have known that. It was alleged that Mr Diamond had orchestrated these matters, but Mr Diamond did not even know who the claimant was. The claimant was unable to articulate any reason for explaining her claims and naming the individuals she had in her Scoot Schedule except that she could not think of any other reason for the delay and, it seemed, she thought someone had to be responsible without her being able to say who. Her somewhat scattergun approach in making such serious allegations without any meaningful explanation gave the tribunal reason to doubt she had any credible basis for her claims.

Detriment 2 – delay in the grievance outcome appeal

231. The second detriment claims relate to the grievance outcome appeal. The claimant says this in her statement *"Sadly, the rejection of my appeal regarding my grievance which proceeded under the Dignity at Work Policy was similarly lacking in insight and left me struggling to understand how the decision had, again been reached to reject this appeal [428-429]*." She does not refer to the delay nor does she identify any detriment arising from that delay nor does she offer any basis for suggesting that the delay could have been caused by the protected disclosure. We found no basis for concluding that the claimant had established any sort of prime facie case that she had been subject to a detriment would require the respondent to meet the burden under s48(2) of the ERA

Detriment 3 - the delay in the safeguarding investigation.

232. A disciplinary investigation about the safeguarding incident could have begun after the meeting on 15 September 2017. However, the claimant gave evidence there were discussions at that time between the trade union and the respondent about a possible consensual termination of her employment. She did not suggest that was related to her protected disclosures and those discussions themselves offer a plausible reason for the delay. In any event the claimant did not suggest that there was any detriment to her from that delay. She was suspended from work on 2 October 2017 and an investigation could have begun then. However, the reasons why an investigation did not progress are apparent from the claimant's own evidence. The respondent appointed an investigator for the investigation (Mrs Deasey), but the claimant almost immediately objected to her whilst also raising the dignity at work allegations against Mr Grover. That was the reason for the delay at that time.

233. The claimant and her trade union made clear that in their view the dignity at work investigation had to be resolved before the disciplinary safeguarding investigation could commence. That process took a long period of time, not least because of the need to restart the investigation after the independent investigator stepped down and had to be replaced.

234. We concluded that the reason why the disciplinary safeguarding investigation was not progressed was due to the claimant's own insistence that the dignity at work investigation had to be completed first. We could not find that this was a detriment which the respondent subjected the claimant to. It was consequence of the respondent accepting the objections of the claimant

and her trade union to the investigations running concurrently. If there was detriment from the delay it was created by the claimant herself by reason of her request.

235. The dignity at work investigation concluded with the outcome on 29 June 2018. That was around three to four weeks before the end of the term. The claimant was initially told her employment would end on 31 May 2018 on the basis that she would be paid in lieu of notice. That was a breach of contract and although we were not provided with evidence of exactly when this was rectified, but it had been rectified by the time of the redundancy appeal hearing on 17 July. The claimant's employment was to end on 31 August 2018.

236. The dignity at work investigation concluded before employment had ended but the timescales were tight. The claimant offered us to suggest that the reason could have been that she had raised protected disclosures. We considered the context of when this happened to see if there was evidence which could suggest the reason for the delay was the protected disclosures. The governing body of the school and Mr Grover had faced a particularly challenging time. There had been a 22-day strike at the school in May and June 2018, the staff restructuring was on-going, and the academy conversion had been delayed. In any event the end of the academic year in any primary school is a busy and demanding time. The claimant offered us no evidence that the disciplinary investigation for any actual comparator had been completed in those circumstances. We considered if there was any reason to believe that a disciplinary investigation which had been put on hold for reasons which were not connected to a dignity at work investigation being completed where the reasons for the delay were removed in the last few weeks of term. We were unable to reach a conclusion that it would. The claimant failed to establish a prima facie case of detriment on the ground that she had made a protected disclosure and accordingly this claim fails.

Detriment 4: The decision not to uphold the claimant's grievance (dignity at work) appeal on 17 October 2018 (the outcome letter being dated 19 October 2018).

237. In her witness statement the claimant says that "the rejection of my appeal… was similarly lacking in insight and left me struggling to understand how the decision had, again been reached to reject this appeal". We understood the basis for the claiming that this was a detriment which could have been connected to the protected disclosure was that there is no proper explanation for the decision.

238. We considered the outcome letter sent to the claimant. It is a letter which gives brief reasons for the decision taken but the claimant was given an outcome for each of her grounds. We had no evidence to suggest that the grounds of the claimant's appeal were substantiated with any more evidence or explanation of the grounds of appeal that were offered to this tribunal. In simple terms the appeal panel did not agree with the claimant's assertions about the dignity at work outcome but the claimant offered us no basis for us to conclude that that outcome could have been related in any way to protected disclosures except that she thought it must be. We were unable to find that the

claimant had established a prima facie case of detriment on the ground that she had made a protected disclosure and accordingly this claim fails.

Discrimination and victimisation claims

239. The acts of discrimination we considered were as follows. These are all alleged to be acts of unlawful harassment or, in the alternative, direct discrimination on the ground of the claimant's race or her religion and religious belief:
    a. The decision to suspend the claimant on 14 October 2016
    b. The demotion and side-lining of the claimant in October 2017
    c. Not allowing the claimant to access her work emails
    d. The decision to suspend the claimant in October 2017 and the handling of that suspension
    e. The decision not to address grievances
    f. The claimant's selection for redundancy 17 April 2018
    g. The handing of suspension

240. As noted in the submissions to us, discrimination claims under the EqA are subject to the 'shifting burden of proof' set out in S.136 of the Act. This provides that the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened a provision of the Act (a 'prima facie case'). If the claimant meets that initial burden the burden, then passes to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim.

Direct discrimination

241. Direct discrimination is defined in section 13(1) of the EA10 as "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

242. In the predecessor legislation, the words "grounds of" were used instead of "because of". However, subsequent case law has confirmed that the change in wording was not intended to change the legal test. This means that the legal principles in respect of direct discrimination remain the same.

243. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

244. In every case the employment tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

245. If the employment tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

246. Direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination. The wording in s136 of the EqA has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination.

247. The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

248. It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer (“the reason why”) and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the employment tribunal is acting on the assumption that the first hurdle has been crossed by the employee.

249. It is incumbent on an employment tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

250. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground

contributes to an act or decision even though it is not the sole or principal reason for it. If the employment tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

251. If the employment tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between the two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).

Harassment

252. The wording of section 26 makes it clear that a distinction is to be drawn between conduct with "the purpose of… " which will amount to harassment as a matter of law, and conduct with "the effect of… " In the latter case the test is partly subjective ("the effect on B" and, arguably, "the other circumstances of the case") and partly objective ("whether it is reasonable for the conduct to have that effect").

253. There are also potential issues about time in this case because a claim may not be brought after the end of

(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

Conduct extending over a period is to be treated as done at the end of the period.

Application to this case

Act 1: the acts of suspension on 16 October 2016 and on 2 October 2017

254. The acts of discrimination arising out of the suspension on 16 October 2016 is alleged to have been committed by Mr Samad, Ms Smart and Ms Cox and on 2 October 2017 are alleged against Mr Grover, Ms Young and Ms Smart.

255. In relation to the first matter, the suspension on 16 October 2016, the claimant appeared to link this to later events by referring to Pat Smart in her Scott schedule. However, we were not presented with any evidence to suggest that Ms Smart had any involvement in any of these matters. The other employees named by the claimant were Maneer Samad and Pat Cox. The claimant offered us no evidence to suggest that her race or religious belief could

be the reason for suspension except that the other employees in the STAs testing matter were not the same race and religion as her. The claimant did not even refer to Pat Smart in her witness statement at all to explain why she was named in the Scott schedule. Pat Cox is referred to once but no basis for any discrimination claim against her is mentioned. The claimant failed to offer any basis for her claim of discrimination against Mr Samad, who is also Muslim, after explaining that information initially offered by which might suggest a basis for hostility was just background information and was not relied upon.

256. Ms Hand in her submissions drew our attention to the CA decision in Madarassay v Nomura International plc 2007 ICR 867. In that case Lord Justice Mummery said this: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination* ' but that is what the claimant invites us to do. In any event there were other differences between the claimant and the two members of staff named in connection with the SATs allegations. The claimant was a member of the senior leadership team and it had been alleged she had given the other staff inappropriate instructions about the SATS testing. In culpability terms that made the charges against her more serious.

257. In simple terms the claimant failed to offer us evidence of the "something more" which would suggest either race or religious belief discrimination as being the reason for the suspension. In other words, she showed no basis on which we could conclude that the suspension was unwanted conduct related to her protected characteristics nor that it was a detriment applied the claimant because of those protected characteristics.

258. As we found no basis for this claim at that initial stage there was no reason for us to consider the jurisdictional time issue.

Act 2: suspension October 2017

259. There is separate harassment allegation which is listed at the end of the second version of the Scott Schedule section which says this *"The unreasonable manner of the handling of the suspension, specifically the failure to deal with and conclude the safeguarding allegations preventing the claimant from accessing her work emails and documents on her computer to enable her to adequately respond to the allegations leading to her suspension"* which the claimant says has happened from 2 October 2017 to date. This is taken out of order in terms of the Scott schedule, but it makes sense to deal with it here as there was clearly a substantial factual overlap between these two alleged acts of discrimination.

260. These allegations are made against Mr Grover, Ms Young and Ms Smart in relation to the decision to suspend and against Ms McNab in relation to the second reiteration of the allegation. As already noted, the claimant offered us no evidence at all in terms of her allegations against Ms Smart. In relation to Mr Grover, Ms Young and Mrs McNab her position seemed to be that because she thought what happened was unfair and because these individuals have a

different racial origin and religious background to her, as do the other individuals involved in the incident with child AA, this must have been discrimination against her.

261. Although Ms McNab was named as a perpetrator of discrimination under this heading there was no evidence to suggest that she was involved in the decision to suspend any way. The decision was taken by Mr Grover in consultation with Ms Young. As a deputy headteacher at the same grade as the claimant there was no basis for Ms McNab to be involved in that decision and the claimant offered us basis for suggesting she was except that is the claimant's opinion. Not only was Ms McNab not involved we could find no reason for the claimant to believe that she was. Mr Brockley criticised Miss McNab because it was her evidence that she thought the claimant had been suspended for lying when that is what not the letter of suspension says. That criticism was misconceived. Miss McNab believed the claimant had lied about what the claimant had said to her about AA being in school. That could give a plausible explanation for suspension and all Miss McNab had done was to state her understanding. She had not seen the letter. We accepted that as a matter of she was not involved in the decision to suspend the claimant and the claimant's allegations against her in this regard were misconceived. We concluded that the claimant had a deep-seated dislike of Miss McNab and the allegations arose from that dislike rather than any reasonable belief that she had been subjected to discrimination.

262. Turning then to Mr Grover. The claimant pointed to the racial and religious belief differences between her and Mr Grover and between her and Miss McNab and Ms Kundrai to explain why she believed this was the direct discrimination or harassment. When asked about this the claimant said that "she could think of no other reason".

263. We considered the reason Mr Grover had given for this decision. The claimant suggested that all three of them should have been suspended if any of them were because any of them could have been equally to blame for the safeguarding failure. However, that was not the case. Mr Grover was aware that the claimant had failed to correctly identify in her attendance data provided to him that child AA had not returned to her school. On a day when Ms McNab was not in school at all, the claimant had not identified that AA was still missing. Mr Grover was aware that the claimant had given different accounts of events, at first denying that she had told Ms McNab that AA was missing and then saying it was based on information provided by Ms Kundrai. He had been made aware by the claimant's trade union that the claimant had disregarded his instructions about speaking to other staff about events. There were no allegations against Miss McNab and we accepted that in fact there was no basis to suggest Ms McNab had done anything wrong. The administrator, Ms Kundrai had made a mistake but she was a junior member of staff who did not have responsibility for safeguarding. We accepted that neither of them was in a comparable situation to the claimant.

264. Given the claimant's case for saying that reason why her suspension could have been her race or religion was based on her comparison with her colleagues we found that the claimant had failed to establish a prima facie case

of harassment or discrimination in this regard.

265. In relation to the specific allegation that the denial of email access during suspension by Mr Grover was an act of unlawful harassment we accepted that it is common for individuals who are suspended from work to have their access to email suspended alongside a suspension from work. There is nothing in that decision in itself which suggests discrimination and in this case we were mindful that Mr Grover was concerned that the claimant had sought to undertake her own investigation. On the basis of what Mr Noor had said in his email to the respondent that belief was a reasonable one. In those circumstances we found it unsurprising that he wanted to stop the claimant contacting staff or accessing records during her suspension. We accepted Mr Grover's evidence on this matter that he thought this was the usual thing to do in the circumstances after discussing with matters with Ms Young and the claimant offered us no other evidence from which we conclude that the reason for the removal of email access could have been because of her race or religious belief.

266. The claimant suggested nothing in her evidence which suggested that the reason Ms Young agreed with or approved Mr Grover's suspension of the claimant could be because of her race or religious belief and we found that the claimant had failed to establish a prima facie case of harassment or discrimination in this regard

The failure to deal with and conclude the safeguarding investigation, is an allegation also made against Mr Grover, Ms Young and Miss McNab which is alleged to be direct discrimination or unlawful harassment

267. Miss McNab was not investigating the safeguarding matter. The claimant knew that. Ms Deasey had been appointed to be the investigator. The claimant knew that Miss McNab was not involved because the two women held the same position of deputy headteacher. The claimant offered no evidence to suggest why Ms McNab could have influenced how the investigation was conducted and nor why the claimant could have believed that she could be involved. We concluded that this allegation was misconceived and made because of the claimant's personal dislike of Ms McNab.

268. The findings highlighted above in relation to the panel concluded that the allegations of detriment on the ground that the claimant had made a protected disclosure were misconceived are also pertinent here. The safeguarding investigation was delayed because the claimant objected to that going ahead in light of her dignity at work grievance against Mr Grover. Delaying an investigation in those circumstances is not a unwanted conduct or a detriment because of the claimant's race and religion because the respondent has done what the claimant has requested.

269. The decision about delaying the disciplinary safeguarding investigation was Ms Young's and not Mr Grover's but it was done because that was what the claimant wanted. The dignity at work investigation concluded before the claimant's employment had ended. The disciplinary investigation could have been restarted before her employment ended but the timescales were tight and as we noted above the panel found the circumstances at the School at the time

suggested that any investigation was likely to be delayed. The claimant offered us no evidence from which we could find there could be a link to her race or religious belief and no evidence that the investigation for an actual or hypothetical comparator would have been completed in the circumstances of the school at the time (given the proximity to the end of term, the on-going academy conversion, the strike as we explained in our previous findings).

270. When the new academic year started the claimant was a former employee. We did not received any evidence of other situations where a suspended employee had their disciplinary investigation concluded after they had been made redundant. The claimant was represented by the trade union throughout her employment and if it was usual for investigations to be concluded we would have expected the trade union to have been aware of those cases. Given the size of the respondent it seems unlikely that this was a unique and novel situation. Whilst we could appreciate that the claimant found the failure to resolve this matter to be unsatisfactory we had no evidence from which we could conclude that the respondent had an obligation to do that such that a failure could be described as a culpable omission. As such it could be harassment or discrimination.

Act 2 of direct discrimination/harassment: effectively being demoted and sidelined

271. This allegation which relates to when Ms McNab was appointed is alleged to have been committed by Mr Grover, Ms Young, Ms Smart and Ms McNab

272. We accepted that a need for extra safeguarding support at the School had been identified in the summer of 2017 and that this was consistent with a school in special measures being provided with additional support. The context was a Primary school with 33 children missing in education which is the equivalent of one than a single class of children across the school. Almost 1 in 20 of the pupils were missing in education. That must have been a significant and worrying situation which required urgent action. Mr Grover told us that he was concerned that the claimant did not appear to regard that as being significant. His concern was consistent with the tone of the claimant's evidence before us and we accepted that Mr Grover genuinely believed that this was something the claimant did not take seriously enough.

273. We also accepted that Ms McNab was recognised as having particular expertise in relation to safeguarding and for that reason had been asked to become involved in the school by Ms Smart. Given the situation at the school there was a need for a new approach to the issue. Further as a panel we found it was significant that Ms McNab was not being brought in a new permanent member of staff. She was seconded to provide short term support while the head would be forced to spend time away from the usual duties of a headteacher by the demands of the conversion process. Ms McNab's appointment as a deputy headteacher which was within the powers of the school's governing body in the circumstances faced by the school was not evidence from which could conclude that the claimant was demoted or sidelined because of her race or religious belief.

274. In terms of Ms McNab's and Mr Grover's conduct towards her, the claimant pointed to the fact that she said there was a hostile attitude towards her and because both have a different racial and religious background to her that was evidence of discrimination. However, we accepted the evidence of Ms McNab that in fact it was the claimant who was hostile and unfriendly towards her and that she had tried to maintain a business-like relationship with the claimant. Likewise, we accepted the evidence of Mr Grover that he had no reason to be hostile towards the claimant. We found it was likely that there was tension between them, partly because the claimant was resentful of Ms McNab's appointment and her unfounded belief that Mr Grover and Ms McNab were friends and because she resented being asked to undertake more timetabled teaching in accordance with the OFSTED report recommendations and restrictions on new qualified and supply teachers . We found no evidence on which to basis a finding that the claimant had been subjected to unwanted conduct or a detriment by Mr Grover and Ms McNab. She was simply being dealt with as a colleague who could sometimes be rather difficult and hostile in her attitude and that was not because of her race or religious belief.

275. In terms of her allegation that Mr Grover had been hostile towards the claimant in the email of 7 September 2017 about pupil data we did not find that the email was hostile. We accepted that it was crucial in those first few days of term to address the issue of children missing in education and the claimant had been asked to produce data for Mr Grover which was consistent with her responsibility for attendance. The panel found the claimant's insistence Mr Grover was unreasonable because that this was an issue for Ms Kundrai and had been busy should a lack of appreciation of the seriousness of the safeguarding issues. We found it implausible that the claimant could not access student data directly and if that was the case it suggested a failure on her part in how she had approached her duties. In any event the data must have been available directly from the classroom teachers. The claimant had set up a separate spreadsheet of missing children but that simply created more work for all concerned and given the data input into that spreadsheet was inaccurate, it was clearly unhelpful and, when it came to AA who was missed from the data as a result, had created a risk of harm. Any frustration on Mr Grover's part was understandable and was not evidence of discrimination.

276. We concluded that the claimant had not shown evidence which shown that she had been demoted and sidelined and the reason for that could be her race or religious belief.

Act 3 The failure to address the claimant's grievances

277. **The grievance of 18 Jan 2017: alleged to have been direct discrimination/harassment by Mr Diamond, Mr Samad and Ms Cox**

278. No document of this date was produced to us, but the claimant refers to the response to it in her witness statement. That response document does not appear in our bundle but in any event the claimant presented no evidence to us to suggest any failure to address that grievance could have been her race or religious belief or to explain her allegations against Mr Diamond, Mr Samad or Ms Cox in this regard.

279. In her statement the claimant suggests that a failure to address this grievance would be a breach of the ACAS code by Mr Diamond, but he had no responsibility to determine any grievance lodged by the claimant under the respondent's procedures.

280. We accepted that Mr Diamond did not know the claimant but that he had responsibility for all the schools in Birmingham and given the scope of that role felt he did not have the time or resources to look at individual issues raised with him outside procedures. He simply delegated all correspondence to someone else with an expectation that the respondent's procedure would be applied. We accepted that was simply his approach to all correspondence of this sort. There was no evidence to suggest the reason he made that decision could have been for discriminatory reasons. For example, Mr Noor could have provided us with evidence that Mr Diamond had intervened in other cases in similar circumstances which might have supported the claimant's allegations in this regard but there was no evidence of that. If the claimant believed that she could compel a senior officer of the respondent to consider her issues outside of the respondent's procedures simply by calling it a grievance that belief was unreasonable. The basis on which the claimant suggests that an adverse inference of discrimination should be drawn about this in her witness statement appears to be misconceived.

281. **Grievance 12 October 2017: individuals identified Ms Young and Mr Diamond**

282. This grievance was addressed to Ms Young. Mr Diamond was the Executive Director of Education at the time. There was no reason for him to be involved in that grievance and indeed it would have been curious if he had been. We accepted that was why he did not act upon it even if he became aware it (and there was no evidence that he had).

283. It was to Ms Young to whom the claimant directed grievances because she was chair of the EIB, the school's governing body. However, the claimant offered us no evidence for the fact that any decision taken by Ms Young was because of her race or religious belief except that Ms Young is of a different racial background. The claimant did not for example provide us with evidence to show that the attitude of Ms Young or the EIB generally when other staff raised grievances had been different. Ms Young was not a decision maker in the subsequent grievance process. The claimant did not offer any evidence to suggest that Ms Young had somehow directed the outcome from behind the scenes.

284. When the claimant first raised complaints about Mr Grover and her suspension, Ms Young had rejected the suggestion that Ms Deasey could not investigate the disciplinary matter, but she did decide that a dignity at work investigation was required in relation to the concerns about Mr Grover. That was what the claimant wanted. The terms of reference for the dignity at work investigation were agreed with the claimant.

285. The tribunal panel found the claimant's objections to Ms Deasey acting as

the investigator to be difficult to follow. The claimant suggested that because Ms Deasey worked for the School she had a conflict of interest and would be biased because she knew the staff. It is perfectly usual for disciplinary investigations to be undertaken internally by someone like Ms Deasey. It is consistent with the ACAS code of practice. The panel found that the claimant had not offered any substantive basis for asserting the investigation would not be impartial. We found for not basis for concluding that that could be unwanted conduct which could reasonably be perceived as having the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant had not shown it was a detriment and there was nothing to suggest that the reason for that decision could be the claimant's race or religious belief.

286. The dignity at work grievance progressed very slowly. That was regrettable and it appears that this was caused in part by the inexperience of the first investigator, but we found nothing to suggest that the delays in that investigation were the fault of the respondent. Emails between the respondent's HR team and CMP Resolutions suggest the respondent expressed its own frustrations about the delay. The claimant has offered no evidence from which we could conclude that the reason for the delay could be the fault of Ms Young or indeed any other officer or representative of the respondent.

287. The claimant was dissatisfied with the final grievance outcome and the independent investigator's failure to interview certain witnesses but there is no evidence to suggest the reason for that could be the claimant's race or religious belief. The reason given by the investigator was that she did not have any powers to compel witnesses to speak to her. The claimant could have compelled the attendance of those witnesses before us if they had evidence of discrimination to offer which had been covered up, but she has not done so or even suggested what that evidence would have been. In any event the allegation in the Scott Schedule, drafted by the claimant's then professional representatives was that those responsible for this alleged discrimination were Ms Young or Mr Diamond. There was no evidence before us that they had influenced the CMP Resolutions investigation.

288. **Grievance of 16 April 2018: alleged perpetrators Ms Young, Mr Diamond and Mr Hay**

289. That letter was addressed to Mr Diamond by Mr Noor. Although the letter was copied to Ms Young and Mr Hays there seemed to be no expectation that they would take any action. The claimant has failed to offer any evidence to explain the basis of a claim against Ms Young and Mr Hays in this regard.

290. In terms of Mr Diamond, the claimant referred to him as being a "ringleader" of the discrimination she says she suffered because he declined to intervene in the internal process underway after Mr Noor raised concerns with him.

291. We accepted as a matter of fact that Mr Diamond did not know the claimant or indeed Mr Grover personally although he was aware of the School given its difficulties and the need to find a solution to those. As already referred to above, he had responsibility for all the schools in Birmingham and felt he did

not have the time or resources to look at individual issues raised with him outside procedures and simply delegated correspondence to someone else, even if he later signed a reply. We accepted that was simply his approach to all correspondence of this sort. There is no evidence to suggest that Mr Diamond had intervened in other cases in similar circumstances which might have supported the allegations that the claimant has treated less favourably in this regard. We found that this was not evidence which could suggest that the reason why Mr Diamond did not intervene could have been the claimant's race or religious belief.

292. The Scott Schedule refers to a number of individuals indicated in brackets. This appears to be because are the individuals identified by the claimant as being behind the concerns but her claims in this regard were not explained to us and there was no evidence from which we could conclude that these individuals somehow influenced the outcome or otherwise discriminated against the claimant.

293. **Grievance of 29 June 2018: alleged perpetrators Mr Diamond, Ms Young and Mr Grover**

294. We understand that this complaint to relate to the letter of that date sent by Mr Noor to Mr Diamond. Curiously the Scott schedule also refers to Georgine Stitch. She was sent a quite separate letter on the same date.

295. Ms Stitch informed the claimant that no action would be taken about the matters raised in the letter she reviewed because they were subject of internal processes. There is nothing to suggest that Mr Diamond, Mr Grover and Ms Young were involved in that decision. Ms Stitch told the claimant her concerns would be addressed as part of the internal processes. There was nothing about the letter sent to the claimant which suggested that the reason why Ms Stitch adopted could be the claimant's race or religious belief.

296. In terms of the letter to Mr Diamond our findings are exactly the same as for the previous letter sent to Mr Diamond by Mr Noor. There is no evidence from which we could conclude that Mr Diamond's failure to intervene could be because of the claimant's race or religious belief. There was no reason for Ms Young or Mr Grover to act on upon a letter addressed to a senior officer of the respondent. The matters referred to were already subject to on-going internal processes in any event. There is no basis for finding that their failure to act in those circumstances could be because of the claimant's race or religious belief.

Act 4: The selection for the claimant for redundancy

297. A discussion of the findings the panel made about the claimant's selection for redundancy is set out above and is not repeated in detail here. In terms of the reasons for the School restructuring plans, we accepted that the decisions taken by the respondent have to be seen in the context of the critical OFSTED inspections and the conversion to an academy. Whether the claimant agrees or not, the regulatory pressure on this school was for significant structural changes in its leadership team to increase the amount of teaching undertaken by the senior school leaders.

298. We also accepted the evidence of respondent witnesses that multi-academy trusts deploy different leadership structures from maintained local authority schools. This has a particular impact in terms of the senior leadership team given the different role of a head of an academy school in a multi-academy trust. We accept that is what influenced the design of the structure proposed by Mr Grover to the redundancy committee. The restructuring resulted in changes to the entire senior leadership team and we found no basis for concluding that the removal of the claimant's post could be because of her race or religious belief. We were satisfied that the new structure was what would be expected in any academy conversion in similar circumstances. The claimant felt that she should have been "slotted in" but we accepted that the respondent could not appoint to new academy posts. The claimant's post of deputy headteacher did not exist in the new structure. The appointment to new posts was a decision for the academy trust.

299. We were satisfied that the reason for the claimant's selection for redundancy was the new structure. We found no basis for the claimant's suggestion that Mr Grover designed the structure as a sham to remove her post and end her employment.

300. In conclusion we found no basis for upholding any of the claimant's harassment or direct discrimination claims. For that reason we did not find it necessary to consider the issue of statutory time limits.

Victimisation (Equality Act 2010 section 27)

301. The statutory definition of victimisation set out above is substantially the same as under the previous legislation, save that reference was made to "less favourable treatment" rather than "subjecting to detriment". The former definition technically required a comparator, although there was a real question as to whether a comparator was necessary. The starting point is that there must be a protected act. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment and, if so, whether that was because of it.

302. Victimisation claims under the EqA are subject to the same 'shifting burden of proof' set out in S.136 of the Act. In other words, the claimant is required to show evidence which could suggest that she has been subjected to less favourable treatment because she had a protected act.

303. The claimant relied on the following protected acts:

a. The grievance letter of 16 April 218
b. The grievance letter of 29 June 2018 sent to Mr Diamond.

304. In his submissions Mr Brockley says that "As to the documents which are said to have amounted to the doing of a protected act these are, respectively the fourth and seventh protected disclosures and their terms do not need to be repeated.".

305. However, that does not reflect the findings we are required to make and we could not simply adopt the findings above on this matter.

306. We accepted that the letter of 16 April 2018 was a protected disclosure. Mr Noor referred to the claimant being treated unfairly, being targeted and singled out and to breaches of collective consultation. We accepted those were disclosures about breaches of legal obligations. However, nowhere did he refer to discrimination, to the claimant's protected characteristics or to the Equality Act. He does refer to victimisation, but the context suggests that what he must mean is bullying. He cannot have meant victimisation in the sense that term is used in s27 of the EqA because if he did there would have to have been an earlier protected act. We have no evidence before us to enable us to make such a finding.

307. Mr Noor refers in his letter to the need for a *"diverse workforce with diverse skills"* but we found that to be too vague to be regarded as being a reference to any protected characteristic or to any obligation or prohibited conduct under the Equality Act. This is not a reference to "an allegation of discrimination or otherwise a contravention of the legislation" (*Beneviste v Kingston University and Waters v Commissioner of Police of the Metropolis* 1997 ICR 1073). We concluded that the letter of 16 April was not a protected act.

308. The second letter of 29 June 2018 was also a letter from Mr Noor to Mr Diamond. This letter referred to discrimination but Mr Noor appears to mean unfair treatment and he does not refer to any protected characteristic or to any breach of the legislation. We also concluded that this letter was not a protected act. We recognised this may seem a somewhat curious finding. The claimant herself had referred explicitly to discrimination because of race and religion on a number of occasions in her correspondence, but those instances were not identified as protected acts in this claim. The claimant was professionally represented throughout and we have determined the claim on the basis that had been set out in the Scott Schedule. On this basis we concluded that the victimisation claims must fail because there was no protected act.

309. We did consider what our conclusions would have been if we are wrong about the relied upon letters being protected acts. The acts relied upon as the acts of victimisation because of the protected acts are each considered below.

310. **The decisions taken by Mr Grover which were notified to the claimant on 17 April 2018:** that is said to be an act of victimisation because of the letter of 16 April 2018. The claimant presented no evidence from which we could conclude that Mr Grover was aware of the letter of 16 April 2018 when he wrote to her on 17 April. Mr Noor did not send the letter to him at the time and it was only sent to him by the claimant when the claimant wrote to Mr Grover on 24 April. The letter of 17 April could not have been sent because of the letter of 16 April. This claim must be misconceived.

311. The detriments relied upon as having happened because of the protected act on 29 June 2018 are:

    a. As conceded by Mr Brockley, and somewhat reluctantly by the claimant

in cross examination, to allege that the decision to proceed with the redundancy hearing on 16 May 2018 is an act of victimisation based on a letter of 29 June 2018 must be misconceived because the detriment is said to have occurred before the protected act.

b. **The delay in providing with an appeal outcome on 17 October 2018 or an outcome to the safeguarding investigation at the point of her appeal outcome**. The claimant failed to provide us with any evidence from which we could conclude that that the decision makers for the appeal hearing on 17 October 2018 were aware of the letter to Mr Diamond on 29 June 2018 nor have we made any findings of fact from which we could draw an inference that they were so aware. This claim must also fail, and that reasoning must also apply to the allegation that the decision not to uphold the appeal on 17 October 2018 was an act of victimisation. The same applies to this claim.

312. **The handling of the suspension, specifically the failure to address or conclude the safeguarding allegation on 2 October 2017 to date affecting her ability to find future employment**.

313. Something which happened on 29 June 2018 cannot be the reason why something happened in October 2017. That is misconceived.

314. Whilst it could, in theory, be possible that the letter on 29 June 2018 could be the reason why the safeguarding investigation was not concluded after 29 June 2018 we have been pointed to no evidence to suggest that, if Mr Noor had not sent that letter, the safeguarding investigation would have been concluded or that there was any change in attitude or approach which could suggest that there could be any link. The claimant failed to make a prima facie case of victimisation in that regard.

315. In conclusion even if we had found the letters relied upon were protected acts, we would not have upheld the acts of victimisation in any event.

Employment Judge Cookson

Date 14 February 2022