THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lynne Marie Francis**

First Respondent: **Durham County Council**
Second Respondent: **Mrs Anita Boyd**
Third Respondent: **Mrs Carole Barclay**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **Thursday 28th October to Friday 19th November 2021**

Before: **Employment Judge Johnson**

Members: **Mr R Dobson**
Mr J Adams

Representation:

Claimant: **In Person**
Respondent: **Mr A Tinnion of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the employment tribunal is:-

(i) The claimant's complaint against the first respondent, Durham County Council, of victimisation contrary to Section 27 of the Equality Act 2010 (relating to the first respondent's failure to provide the claimant with an adequate reference) is well-founded and succeeds;

(ii) All the claimant's other complaints of unlawful disability discrimination against the first respondent, Durham County Council, are not well-founded and are dismissed;

(iii) All the claimant's complaints of unlawful disability discrimination against the second respondent, Anita Boyd, are not well-founded and are dismissed;

(iv) All the claimant's complaints of unlawful disability discrimination against the third respondent, Carole Barclay, are not well-founded and are dismissed;

(v) The claimant's complaint against the first respondent, Durham County Council, of unfair constructive dismissal is not well-founded and is dismissed.

REASONS

1. The claimant conducted these proceedings herself, gave evidence herself and called one other witness (Ms Janet MacPhee) to give evidence on her behalf. The respondent was represented by Mr Tinnion of Counsel, who called the following witnesses to give evidence:-

   (i) Carole Barclay (Chair of Governors)
   (ii) Mrs Anita Boyd (Head Teacher)
   (iii) Mr Barry Piercy (Lead Governance Manager)
   (iv) Mr Terri Watson (Vice-Chair of Governors)
   (v) Ms Julie Arnot (HR Business Lead)

   The respondent tendered a witness statement from Ms Lisa Thompson (HR Consultant), which statement was not challenged by the claimant and thus Ms Thompson was not required to give evidence and be cross examined.

2. The claimant began her teaching her career with Durham County Council in September 1989. She was appointed deputy head teacher at Shotton Hall Infants School in January 1998. In 2010 the Shotton Hall Infants School merged with the Shotton Hall Junior School to become Shotton Hall Primary School. The claimant became the deputy head teacher of the amalgamated school. The claimant remained in that position until she resigned on 13th July 2018. In 2014 the school was categorised as "requiring improvement" following an Ofsted inspection. The claimant was one of a number of the teaching staff who that year raised a collective grievance against the then head teacher. That head teacher was replaced in September 2014 with an interim head teacher from a different local primary school, pending the appointment of a replacement head teacher. Anita Boyd took over as head teacher in January 2015. The complaints which form the subject matter of the claimant's claims in these employment tribunal proceedings relate to the claimant's alleged treatment by Mrs Boyd, the claimant's complaints about that treatment and the manner in which those grievances were handled by the council. The claimant's allegations cover the period from November 2016 through to her resignation on 13th July 2018 and the council's alleged failure to provide the claimant with an adequate reference following her resignation.

3. By a claim form presented on 4th October 2018, the claimant brought complaints of unfair constructive dismissal and unlawful disability discrimination. The complaints of unlawful disability discrimination contained allegations of direct discrimination contrary to Section 13 of the Equality Act 2010, unfavourable treatment because of something arising in consequence of disability contrary to Section 15 of the Equality Act 2010, failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010, harassment contrary to Section 26 of the Equality Act 2010 and victimisation contrary to Section 27 of the Equality Act 2010. The claimant's "details of complaint" were set out in 86 paragraphs, over 27 pages in her claim form. The claims had been brought against Durham County Council and 6 individual named respondents. The council denied the allegation of unfair constructive dismissal and all 7 respondents denied the allegations of unlawful disability discrimination. The case was

extensively case managed with a total of 9 preliminary hearings, before various Employment Judges between 3rd January 2019 and 10th September 2021. Various case management orders were made and the matter was listed for a 17-day hearing commencing on Thursday 28th October 2021. By then, the claimant had withdrawn her allegations of unlawful disability discrimination against all the named respondents apart from Durham County Council, Carole Barclay (Chair of Governors) and Anita Boyd (Head Teacher). During the course of the proceedings, the claimant had been represented by two different firms of solicitors and at one of the preliminary hearings had been represented by Counsel.

4. The parties agreed a bundle of documents for use at the final hearing. That bundle comprised 6 A4 ring-binders containing a total of 1,911 pages. In addition, there was a further bundle containing copies of the claimant's medical records. The claimant's witness statement contained 759 paragraphs over 159 pages. A draft list of issues had been agreed between the parties, which list of issues was based upon a document which had been prepared by the claimant in June 2019 and which was entitled "Further Particulars June 2019". A detailed examination of those 2 combined documents showed that the claimant was bringing exactly 100 specific and individual allegations of behaviour which amounted to either unlawful disability discrimination, a fundamental breach of the claimant's contract of employment, or both. Some of those factual allegations contained allegations of different kinds of unlawful disability discrimination. Some of those allegations went back to 2014.

5. The tribunal panel spent the first 2 days of the 17-day hearing reading witness statements, documents and medical records. The parties attended on the morning of Monday 1st November. A lengthy and detailed discussion took place about how the hearing itself would be managed and how the claimant proposed to present her numerous complaints. That discussion took up the entire morning of the first day of the hearing. The claimant then requested the remainder of the day to consider her position and in particular which allegations would be pursued, against which respondents and whether any of the allegations would be withdrawn. It was agreed that thereafter the hearing would start each day at 9.30am, so as to ensure that all the evidence would be completed within the allotted time.

6. On the morning of Tuesday 2nd November, the claimant formally withdrew a number of the allegations of unlawful disability discrimination. The claimant took the tribunal through the list of issues/further particulars and identified those allegations which were withdrawn and those which were to be pursued. Mr Tinnion for the respondent then asked for some time to consider each respondent's position in the light of the withdrawal of those allegations. When the parties returned at 11.30, the claimant withdrew a further 9 allegations of unlawful disability discrimination. The claimant's evidence and cross-examination lasted from Tuesday 2nd November through to the end of Tuesday 9th November. During that evidence, the claimant withdrew a substantial number of her allegations of unlawful disability discrimination against the remaining respondents. By the time closing submissions were reached on Wednesday 17th November, there remained 23 factual allegations of unlawful disability discrimination. The tribunal considered each of those remaining factual allegations and the reasons set out below relate

only to those remaining 23 factual allegations. At regular intervals throughout the hearing, the tribunal took time to carefully explain to the claimant the various statutory provisions under which those factual allegations were pursued by the claimant. All the allegations of direct disability discrimination were withdrawn by the claimant. There remained only one allegation of failure to make reasonable adjustments, which related to the reorganisation of the claimant's classroom in November 2016. The remaining allegations were of unfavourable treatment because of something arising in consequence of the claimant's disability, contrary to Section 15 of the Equality Act 2010, harassment contrary to Section 26 and victimisation contrary to Section 27. The claimant had particular difficulty in identifying the "something" which arose as a consequence of her disability, in respect of the Section 15 claims. The claimant frequently referred to the consequences of any alleged unfavourable treatment as being something which arose in consequence of her disability. The claimant found it difficult to differentiate between the reason for the treatment and the consequences of the treatment.

7. Having heard the evidence of the claimant and Ms MacPhee, the evidence of the respondent's witnesses and having examined the documents to which it was referred, the tribunal made the following findings of fact on the balance of probabilities. The tribunal frequently reminded the claimant about the impact of Section 136 of the Equality Act 2010, commonly called the "reverse burden or proof". The claimant was frequently reminded that she had the burden of proving, on the balance of probabilities, facts from which, in the absence of an explanation from the respondent, the tribunal could infer that there might be a discriminatory reason for any treatment. The tribunal was satisfied that the claimant understood the requirement for her to prove such facts. It was the claimant's inability to prove such facts which led her to withdraw many of her allegations of unlawful disability discrimination. There were numerous inconsistencies in the claimant's case, which were revealed by dogged and meticulous cross examination by Mr Tinnion. On several occasions, that cross examination identified that a number of the claimant's allegations were unreasonably exaggerated or completely unsubstantiated. On regular occasions, Mr Tinnion's questions to the claimant were met with either complete silence or an answer which was either evasive or which failed to address the point being made by Mr Tinnion. For the reasons which are set out below, in almost every case where there was a difference between the claimant's version of events and that given by the respondent's witnesses, the tribunal preferred the evidence of the respondent's witnesses, which was, in almost every case, supported by the documents in the hearing bundle.

Findings of fact

8. Disability

The claimant alleges that she suffers from two separate impairments (one physical and one mental), each of which amounts to a disability as defined in Section 6 of the Equality Act 2010. The physical impairment is "Mortons Neuroma". This is a painful foot condition, caused by a growth between the toes. The claimant was first diagnosed in May 2013 and she underwent surgery in June

2015 to remove the growth. That operation left the claimant with post-operative displacement of two toes and scar tissue on the dorsal side of her left foot. Six months following that surgery, the claimant again began to suffer from symptoms associated with Mortons Neuroma. She presently has neuromas in the second/third metatarsals and third/fourth metatarsals spaces in her left foot and in the third/fourth metatarsals in her right foot. The claimant describes how she suffers daily from intense pain, which becomes worse when she has to bear weight on her feet or when she moves her feet. She describes walking or standing for long periods as "excruciating pain". She describes it as "walking on broken glass". The claimant describes how she suffers from a burning sensation in her feet which radiates to her toes and causes her feet to swell up. When this happens, she has to elevate her feet and apply a cold compress to alleviate the swelling and the pain. The claimant's gait has noticeably altered when she walks, due to the pain.

9. As a result of her pain, the claimant describes how she was unable to join in with family activities that involve either standing or walking for any periods of time. The claimant finds this particularly distressing, as her youngest child is only 12 years old. The claimant cannot go shopping for lengthy periods of time. At work, she had to sit for lengthy periods, when other teachers are able to walk round the classroom. The claimant found PE teaching to be particularly difficult. The claimant had to buy special insoles for her shoes and has to drive an automatic car, so that she does not have to use her left foot when driving.

10. Mr Tinnion for the respondent conceded that the claimant suffers from Mortons Neuroma and that the respondent was aware of the claimant's condition throughout the period of time covered by the claimant's allegations of unlawful disability discrimination. The respondent's position however is that the Mortons Neuroma was cured by surgery and that thereafter the claimant was no longer disabled. The tribunal did not accept this submission on behalf of the respondents. The condition itself as described by the claimant is clearly a physical impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities. The surgery in 2015 ameliorated the effects of the condition for a short period time. It did not cure the condition and the tribunal accepted that the symptoms gradually returned and now involve both feet. The claimant has had a number of medical appointments during the relevant period, which involved her being given permission to take time off work to attend those appointments. There have been times when the claimant has had periods of absence from work because of the condition. The tribunal is satisfied that the Mortons Neuroma is and was a physical impairment as defined in Section 6 of the Equality Act 2010.

11. The claimant further alleges that she suffers from a mental impairment, namely depression. The claimant says in her disability impact statement that she has suffered from depression since November 2014 and was first prescribed medication for depression in January 2015. The claimant has been referred to "Talking Changes" which is a therapy service and was referred by her GP to a "well-being" course in November 2018.

12. The claimant describes her symptoms as "suffering from sad days" when she finds it very difficult to lift her mood, becomes very anxious and tearful over the slightest things. She says "I don't want to do things I used to enjoy and struggle to feel positive about the future. I am not able to stop worrying about things and this takes its toll on my sleeping pattern as I lie awake at night, churning things over. I find I sleep too little and am awake from early morning." The claimant goes on to state "I avoid contact with friends and family, constantly postponing get-togethers with them, as I feel overwhelmed and unable to lift my mood in such situations. I don't want them to see me when I am in such low spirits." The claimant gave no examples of those things which she says she used to enjoy, or why her depression meant that she could no longer enjoy them. She gave no examples of any get-togethers with friends or family which had to be postponed, or why they were postponed. None of her friends or family were called to give evidence about any of these matters.

13. In her evidence, the claimant made reference to those entries in her medical notes and records which refer to her being treated for depression. The claimant however conceded that these medical notes and records were never disclosed to the respondents at any stage prior to the order for disclosure in the employment tribunal proceedings. The claimant insisted that she had informed the first respondent's occupational health doctor that she was suffering from depression, but the occupational health reports do not mention that. The only document in the bundle which makes any reference to "depression", is that at page 400 in the bundle which is a letter from the claimant's GP dated 10th July 2015 and addressed to "To whom it may concern". The letter states:-

> "This lady has been suffering from work-related stress since November 2014. This has resulted in a significant reactive depressive illness which necessitated her being absent from work. She informs me that it has been arranged that she will be working closely with a member of staff with whom there has been conflict in the past. I feel that if this occurs this will have a deleterious impact on my patient's health and has the potential to cause a relapse in the depressive illness from which she is currently making a recovery."

Prior to that, there had been an occupational health service report dated 18th December 2014 (page 241) which shows the reason for the referral was "long-term sickness absence" and that the diagnosis was "work-related stress" on the GP fit note. That report does refer to "depression", but only in the following terms:-

> "The most difficult symptoms of depression are depressed mood, loss of interest and enjoyment and reduced energy leading to increased fatigue and diminished activity. Marked tiredness after only slight effort is common. Other common symptoms are reduced concentration and retention, disturbed sleep, diminished appetite and reduced self-confidence. All of these may have an effect on attendance and performance in the workplace."

14. Under cross examination from Mr Tinnion, the claimant insisted that fit notes issued by her GP were the key documents which would enable her employer to identify the reason for her absence. Mr Tinnion asked the claimant to identify whether any of the fit notes issued to her throughout her lengthy absence actually referred to "depression". The claimant was reluctant to concede that "depression" was not mentioned on any of the fit notes. Mr Tinnion then had to take the claimant through every single fit note in the bundle, before she would confirm that none of them referred to "depression" as the reason for her absence. Mr Tinnion pointed out that only one of the fit notes referred to her Mortons Neuroma and that all of the others referred to "work-related stress". Having been taken to every single fit note the claimant conceded that none referred to "depression". The claimant maintained however that because she had been absent with work-related stress, then the respondents ought reasonably to have been aware that this itself was a mental impairment which was equivalent to depression. The claimant refused to accept that a diagnosis of "work-related stress" is different to a diagnosis of "depression". The claimant refused to accept that work-related stress was a reaction to matters ("stressors") which happened at work. Mr Tinnion put to the claimant that if those "stressors" were removed, then the claimant would be able to return to work. That in effect is what was said in the occupational health report. Whilst the claimant was prepared to accept that premise, she still insisted that the work-related stress amounted to depression, that this was a disability and that the respondents were, or ought to have been, reasonably aware of that.

15. The claimant was taken to certain of the GP's fit notes which referred to the reason for absence as being "work-related stress caused by bullying and harassment". It was put the claimant that those entries by the GP could only be based upon what the GP had been told by the claimant, when asked what she thought was causing her stress. The claimant refused to accept that. Mr Tinnion took the claimant to page 38 in the bundle of the claimant's medical records which is an entry dated 1st September 2017. The entry by the claimant's GP reads as follows:-

> "Problems; depression nos.
> History; she has had a phased return, subject to harassment and bullying and abuse. Intending to negotiate leaving with compromise. Has had extremely unfair treatment. Brought letters in. Back to how she was with low mood and distress.
> Plan; agree issue medical certificate next week. She will contact union rep. I am more than happy if needed to add harassment and bullying on med cert if needed."

Further down is another entry dated 1st September some 8 hours later, which reads as follows:-

> "Patient rang to inform Doctor Graham of wording needed for sick note.
> "Work-related stress due to bullying/inappropriate management practice."

That is what was put on the fit note submitted by the claimant to the first respondent as her reason for absence. The tribunal found that entries on the GP

fit notes relating to "bullying and harassment" or "bullying and management practices" were as a result of specific requests made by the claimant to her GP.

16. The tribunal found that the claimant had suffered from depression, which had been diagnosed in late 2014 and in respect of which she had been prescribed medication in early 2015. The tribunal did not accept that the claimant's depression amounted to a disability as defined in Section 6 of the Equality Act 2010. The tribunal was not satisfied from her evidence, that the claimant's depression had a substantial adverse effect on her ability to carry out normal day to day activities. The dates of her treatment for depression in her medical records coincide with absences from work following incidents which the claimant found to be stressful. The Tribunal found it more likely that the claimant suffered a stress-related reaction to adverse events or circumstances which had occurred at work. Furthermore, the claimant had failed to satisfy the tribunal that the respondent knew, or ought reasonably to have known, that she suffered from depression. The claimant's evidence to the tribunal in this regard was inadequate. The claimant made no reference to depression at any of her meetings with the respondent's occupational health doctors. None of the reports mentioned that the claimant had been diagnosed with depression or was being treated with medication for depression. The occupational health specialist did not have access to the claimant's medical notes and records. In those circumstances, the respondents were entitled to rely upon the occupational health doctor's confirmation that the reason for the claimant's absence was "work-related stress" which is something different to "depression". The tribunal was not satisfied that the claimant had established that it could well happen that her work-related stress may develop into a depressive condition which would satisfy the definition of a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. This was not one of those cases where the employer could reasonably be expected to infer depression from the claimant`s absences with work-related stress, or to make further enquiries about that. The respondent`s reliance on the OH reports was reasonable in all the circumstances.

17. The first incident about which the claimant complains occurred in November 2016. The claimant had a period of absence caused by her Morton`s Neuroma. During that absence, Mrs Boyd, the head teacher, covered some of the claimant's classes. Mrs Boyd rearranged the layout of the classroom "to make access to lower ability pupils easier, as they were all in a front row. Two special educational needs pupils were working on a curriculum to meet their needs and were located at the back of the class, which gave them a sense of independence so that they developed resilience and enjoyment of learning. The claimant had set out the room in such a way that there were queues of pupils lining up to get work marked by the claimant while she was sitting at a working table, where lower ability pupils were also trying to work. Mrs Boyd considered that this was not a suitable environment for the lower ability pupils. Mrs Boyd considered she had organised the classroom in such a way that the claimant did not need to stand for long periods, as she had a swivel chair at the front of the class and sat on the chair, using a stick to point at the Interactive White Board. Upon her return to work, the claimant took exception to her class having been reorganised. The claimant sent an e-mail to the head teacher, in which she raised a number of issues, including

the reorganisation of the classroom. The head teacher invited the claimant to a meeting on 2nd December to discuss those matters. A note of the meeting appears at page 606. The relevant entry states as follows:-

> "Reorganisation of the classroom was done because only LF knew where pupils were sitting. LF accepted my justification for moving the class whilst I was teaching in there. It has been agreed that the class will be re-set to accommodate LF's immobility at times due to her on-going foot injury. This will enable her to sit and teach for a period of time when she is pain. LF will provide a class map when I go to cover to enable me to pick up the teaching quickly for continuity. AMB offered help to move tables but this was declined. ACTION; reorganisation of class seating on Monday morning 5th December 2016."

In cross-examination, the claimant accepted that she had been allowed to reorganise the class to suit her own purposes from the first working day following this meeting. In simple terms, the adjustment requested by the claimant to accommodate her physical disability was immediately implemented by the head teacher.

18. The next allegation made by the claimant was that the respondent had "failed to facilitate a return to work meeting, knowing that there would be challenging consequences for the claimant." The claimant pursued this as an allegation of harassment contrary to Section 26 of the Equality Act 2010. The claimant returned to work after periods of absence in 2015, 2016 and 2017. The claimant alleged that the meetings either did not take place, or took place too late or were held in a place which was neither quiet nor private and thus the meetings fell outside the respondent`s policies for holding such meetings.

19. The council implements a "schools attendance management policy and procedure", a copy of which is in the trial bundle. At page 1655 section 3, "managing attendance" contains reference to the use of return to work interviews.

> "3.1 Return to work interview
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> The head teacher must conduct a return to work (RTW) interview with the employee after every period of sickness absence, irrespective of the length of the absence. Ideally, this meeting should take place on the first day the employee returns to work, but where this is not possible, within 3 days of the return. The return to work (RTW) declaration form must be completed at this meeting. The meeting should take place in a confidential setting and should be face to face. Head teachers must not conduct RTW interviews via telephone or e-mail unless there are exceptional circumstances."

20. The claimant was absent from work from 3rd November 2014 to 4th May 2015. It was agreed that there would be a phased return to work for the claimant, which took place between 5th May and 4th June 2015. The RTW interview took place on 8th June 2015. The claimant was absent again between 17th June 2015 and 15th July 2015. She returned to work on 16th July and 17th July was the last day of

term. The new term began on 7th September 2015. The RTW interview took place on 14th September 2015. The claimant had another absence between 15th and 18th March 2016. The RTW meeting took place on 24th March 2016. The claimant had another absence between 9th January 2017 and 22nd June 2017. The claimant attended a RTW meeting on 23rd June 017. The claimant returned to work on a phased return on 26th June 2017 and on 17th July had a further meeting to discuss that phased return. At that meeting, it was agreed that the formal return to work meeting would take place during the first week of the new term in September. However, the claimant did not return to work thereafter.

21. The respondent accepted that the failure to hold a return to work meeting on the first day back or within three days of that return, constitutes a technical breach of the absence management policy. The evidence of the head teacher was that the dates of all these meetings were agreed with the claimant. The claimant raised no complaint whatsoever at the time of those meetings or in their immediate aftermath. When the claimant raised her first formal grievance on 2nd September, there is no mention whatsoever of any complaint about these return to work meetings. The tribunal was not satisfied that the technical breaches of the policy amounted to "unwanted conduct" at the time of that technical breach. In her witness statement at paragraphs 86, 103 and 116, the claimant makes mention of the return to work interviews, but provides no evidence whatsoever about any alleged impact upon her of the technical breach by holding the meetings outside the three-day period specified in the policy. The claimant describes the meeting on 7th September 2015 as having taken place "in the school heart-space, with members of staff and children passing, contrary to DCC policy which states that the meeting should be held in a confidential setting." Again, the claimant makes no mention of any impact upon her of holding the meeting in the heart space.

22. The claimant was absent from work from 6th January 2017 until 23rd June 2017. A phased return to work was agreed, following advice from occupational health. By the last week of the summer term (week commencing 17th July) the claimant was working full-time hours for the first time since her return. In the meeting with the head teacher on 17th July, it was agreed that the claimant would be granted some PPA and management time in order to familiarise herself with the new curriculum to which she would be moving in September 2017. It was specifically agreed between the claimant and the head teacher that the claimant would utilise the afternoons of Thursday 20th July and Friday 21st July to undertake the PPA and management time. On Wednesday 19th July the head teacher took a number of the school children on a residential camping trip and returned to school at 3.00pm on Friday 21st July.

23. On Thursday 20th July, the claimant agreed with a colleague, Ms McCoy, that she would take some of her PPA time in the morning, so that she could help out in the early years class for part of the afternoon. The claimant did not seek permission from the head teacher or the acting head teacher to leave her class in the morning. The claimant's presence in the heart space was noticed by another member of staff, who was aware of the agreement that the claimant would take time off in the afternoon. The matter was reported by telephone to the head teacher. Mrs Boyd in turn spoke to Carole Barclay (Chair of Governors) and asked for a "letter of management advice" to be prepared for when the head

teacher returned to school on Friday. The claimant had been asked to contact the head teacher by telephone and had done so. The claimant's evidence to the tribunal was that she explained how she had agreed the change with Ms McCoy and believed that she had been acting in the best interests of the school. Mrs Boyd's version of this telephone exchange was that she had made it clear to the claimant that a specific agreement had been reached as to when the claimant would be teaching and when she would be taking time out for PPA and management. Mrs Boyd made it clear to the claimant that she was unhappy that those plans had been changed without consulting the acting head teacher. The letter of management advice appears at page 833 in the bundle. It states as follows:-

> "Dear Mrs Francis
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> Letter of management advice
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> Further to our phone call held on Friday 21st July at 9.00am (whilst I was at camp in Ullswater) I write to confirm the outcome of the discussion. After carefully considering the issues we discussed and your response to this regarding taking your PPA at an alternative time to help with the bug ball, I have decided to provide you with a formal letter of management advice.
>
> It was agreed at your six months absence review on Monday 17th July that the time would be given on the afternoons of Thursday 20th and Friday 21st July in order for you to further prepare and research the curriculum in year one in preparation for next year. On Tuesday 18th July when I approached you about the completion of the appropriate paperwork to substantiate two afternoon sessions of management time, you insisted upon one of the sessions being taken as PPA. In the interests of continuing to maintain positive working relationships, I agreed that one PPA session could be taken. At no point did you express any intention or desire to take additional PPA time on the morning of Thursday 20th July.
>
> On the morning of Thursday 20th July whilst I was out of school it was brought to my attention that you indicated to staff you were carrying out PPA. However, you were seen in communal areas drinking tea/coffee for approximately for 45 minutes when you should have teaching in early years. This directly contradicts the arrangement which was agreed at your sickness absence review meeting on Monday 17th July and reiterated on Tuesday 18th July. I believe these actions contravene the code of conduct policy, particularly in relation to personal conduct which expects all staff to act with honesty, integrity and professionalism. You should be aware that if any further incidents of this or similar behaviour occur in the future, they may result in formal disciplinary action being taken, which could ultimately lead to dismissal. This letter will remain live on your personal file to be reviewed after a period of twelve months. If you require further clarification regarding any aspects of this letter, please contact me when school resumes after the summer break."

24. The claimant alleges that this was a "completely excessive" letter of management advice. The tribunal did not accept that the issuing of the letter of management advice in these circumstances was in any way excessive. During her telephone call with the head teacher, the claimant accepted that she had acted contrary to the instructions given by the head teacher and contrary to the agreement reached between the claimant and the head teacher. The claimant had apologised for doing so. The claimant accepted under cross examination that she had changed the times when she would take PPA and had done so without the permission of the head teacher or the acting head teacher. The claimant accepted that she had failed to comply with a reasonable and lawful instruction, which was to comply with the terms of that agreement.

25. The issue of a "letter of management advice" is part of the council's disciplinary policy which is at page 1747 in the bundle. It appears under the heading "conduct" and is part of the informal stage. The relevant extract states as follows:-

> "Letter of management advice
>
> Where initial enquiries have established that the matter is not serious enough to warrant proceeding to a formal investigation, but concerns remain about the employee's behaviour, the head teacher may feel it is appropriate to advise the employee in writing of how their conduct has fallen short of the schools standards and expectations, the change or improvement that is expected of them and that a failure to achieve the standard in the future may result in disciplinary action being taken. The head teacher must include a review period for the letter, usually of no more than twelve months. The letter will remain live on the employee's personnel file and may be referred to if any further disciplinary incidents occur during the review period. It is possible to extend the review period if the head teacher concludes that the required improvement has not been made. Where a letter of management advice is issued in relation to safeguarding issues, it is necessary and appropriate for this document to remain live and not subject to any particular time limit.
>
> The letter of management advice is not a formal disciplinary warning and therefore the employee has no right of appeal."

26. The tribunal accepted the claimant's evidence that the issue of the letter of management advice amounted to "unwanted conduct" by the head teacher. The claimant may well have felt humiliated by the issue of the letter of management advice. However, the claimant failed to provide any evidence to connect the issue of the letter of management advice to either of her alleged disabilities. The tribunal found that the issue of the letter of management advice was entirely due to the claimant's failure to adhere to the terms of the agreement she had reached with the head teacher. It was in no sense whatsoever related to the claimant's alleged disabilities. The claimant went on to allege that the timing of the issue of the letter of management advice was designed to cause the maximum upset and distress to the claimant as she would have it hanging over her throughout the summer holiday. The claimant said she found this particularly distressing,

because she had only recently returned to work following a period of absence due to work-related stress. The claimant conflated the impact of the letter of management advice with the reason why it had been issued. The letter of management advice was not related to the claimant's disability, but was entirely due to her failure to comply with the agreement she had reached with the head teacher. The tribunal found it entirely appropriate for the head teacher to have issued the letter of management advice immediately upon her return to the school, regardless of that being the last day of term.

27. The claimant did not return to work on the first day of term on 2nd September 2017. The claimant's submitted a fit note for "work-related stress due to bullying and inappropriate management practice" to cover the period from 4th September 2017 to 2nd October 2017. The claimant never returned to work thereafter.

28. By letter dated 2nd September 2017, the claimant raised a formal grievance against the head teacher, Mrs Boyd. The letter appears at page 833 in the bundle and is addressed to Mrs Carole Barclay, the chair of governors. The letter states as follows:-

> "I wish to raise a grievance against my head teacher Anita Boyd.
>
> I believe her handling of an incident, involving a minor change of timetable was at worst a deliberate act to sabotage my successful return to work and at best so badly handled on her behalf as to constitute a breach of trust.
>
> As you are aware, I have recently returned to work following a period of absence triggered by work-related stress. The incident happened at the end of my first full week of work, following a phased return. Issues had been raised with my employer, using the stress management tool kit, as to the cause of my illness/absence from school. I believe Mrs Boyd is aware of my perception that I do not feel valued at work; for my opinion for the work I do or as a person, and this has been a major contributory factor to my illness. I have no details as to the extent of the investigation undertaken or the evidence used for her to conclude that I should be issued with management advice but I would suggest, given my previous history, Mrs Boyd should have been well aware that, at such a time, this course of action would be detrimental to my well-being.
>
> During my phased return, I had been managed by the early years lead. The amendment to my timetable, which led to the management advice, was done in consultation and agreement with the early years lead with a view to best accommodating the needs of the school with the staffing available. Similar action taken during the whole of my phased return, in consultation and agreement with the EYFS lead, was commended by Mrs Boyd, as meeting the business needs of the school in the meeting held on school on 17th July.
>
> I find the issuing of management advice perverse given the facts of the incident. I feel the timing of being given management advice at 3.30pm

on the last day of term, without the opportunity to challenge until after the summer break ie 6 weeks later was calculated to minimise my personal well-being throughout the holidays.

I am not party to the evidence that would lead Mrs Boyd to the conclusion that undertaking PPA in a communal area contravened the code of personal conduct.

I also feel that there has been a breach in confidentiality in that other staff appear to have been made aware I was to receive management advice prior to me.

My desired outcomes would be:-

(i) that management advice be withdrawn and that any future investigations be conducted with the prior involvement of my trade union representative

(ii) that I receive a written apology for the inappropriate way this situation has been handed regarding the process of the investigation, the timing of the action and the breach in confidentiality

(iii) I seek assurances that in future due regard is given to the duty of care owed to me as an employee

I await your response."

29. The claimant accepted when it was pointed out to her by Mr Tinnion, that this letter, constituting a formal grievance, makes no reference whatsoever to any disability from which the claimant allegedly suffers. It simply refers to a period of absence triggered by "work-related stress". The only matter about which the claimant complains is the issue of the letter of management advice, the timing of the issue of the letter and the allegation that other members of staff were aware of it before the claimant.

30. The claimant brings no claims to the employment tribunal relating to the conduct of this first grievance. The investigation was carried out by Lisa Thompson, an associate of NEREO an independent HR consultancy. Interviews took place between 1st and 20th November 2017. The outcome letter appears at pages 1061 – 1062 in the bundle. None of the claimant's allegations were upheld. The outcome letter was accompanied by a copy of the investigation report.

31. By letter dated 20th December 2017, the claimant submitted an appeal against that outcome. The appeal letter runs to almost 3 pages and contains 14 separate grounds of appeal.

32. By letter dated 20th November 2017, the claimant had invited Ms Thompson to extend the scope of her investigation into the claimant's first grievance. This letter made allegations of "bullying and harassment against me by Anita Boyd". The claimant says that, "this is due to the fact that I was the widest known campaigner

to remove the previous head teacher and I was a whistle blower re the practice and procedures of the previous head teacher (ie I was already considered to be a trouble maker)." Towards the end of the letter the claimant states, "she has also displayed very little regard of my disability, forcing me to stand for long periods of time and rearranging my classroom, again with no concern whatsoever about the impact this would have on me and my ongoing medical condition of which she was well aware." This was the first mention of the claimant's physical impairment.

33. On 8th January 2018 the claimant lodged three Separate Subject Access Requests to the council, copies of which appear at pages 1101 – 1106 in the bundle. In those requests the claimant seeks the following information:-

(i) all information held re me in HR department (Education);

(ii) my occupational health file from August 2017;

(iii) all information held at Shotton Hall Primary School in my name including my staff file, any information held re return to work forms, any information held in complaint file, any further information held on me at the school.

Those forms make it clear that the council should respond to requests for information "within 40 calendar days after we receive a valid request". The tribunal was satisfied that the claimant did not expect a reply to those requests prior to submitting her second grievance, four days later.

34. Having lodged her appeal on 20th December, the claimant then raised a second formal grievance on 12th January 2018. A copy appears at page 1110A – 1112 in the bundle. The relevant part setting out the grounds of the grievance states as follows:

> "My grievance is against both Anita Boyd, head teacher and Carole Barclay, Chair of Governors at Shotton Hall Primary School.
>
> (i) I have felt victimised bullied and harassed by the actions of both Anita Boyd and Carole Barclay.
>
> (ii) I have had my responsibilities, status and authority eroded over time by the actions of Anita Boyd.
>
> (iii) I have been subject to performance management sanctions that I feel were disproportionate.
>
> (iv) I was issued with performance management sanctions in a manner that was detrimental to my health and well-being.
>
> (v) My initial grievance was not dealt with in an objective manner, with untrue and prejudicial information being relied upon to inform findings. Furthermore, I was denied the opportunity to expand my initial grievance to include additional relevant information in relation to the conduct of these individuals.

(vi) My disability has not been appropriately supported or managed and reasonable adjustments have not been made.

(vii) My work-related stress absence was not appropriately supported or managed.

(viii) Actions agreed as part of both my return to work and stress tool kit have not been delivered or complied with.

(ix) There have been multiple incidents where processes and procedures have not been followed and this has been detrimental to my ability to return to work.

(x) I feel that there has been a complete breakdown of trust in the relationship between myself, my line manager and the chair of governors."

In answer to the part of the grievance form which asks the question, "What do you propose should happen in order to resolve your grievance?, the claimant replies, "A good working relationship with the line managers and governors of the school in which I work."

35. This second grievance was addressed to Mr Barry Piercy, the lead governance manager of the council's School and Governor Support Service. Mr Piercy sought advice because grievances raised by teachers were normally dealt with by one of the governors and Mr Piercy was unsure as to whether another governor could investigate a complaint against the chair of governors. Mr Piercy was also concerned that some of the matters raised in the second grievance appeared to be duplicates of those raised in the first grievance and which also may have been raised in the claimant's appeal against the outcome of the first grievance. Mr Piercy suggested that Mr Terri Watson, one of the governors should meet with the claimant and her trade union representative to try and identify exactly which issues were being raised on the second grievance and to establish how the investigation into those matters should proceed. The claimant and her trade union representative initially refused to attend such a meeting on the basis that the respondent's grievance procedure does not contain specific provision for such a meeting to take place. There was an exchange of correspondence between 12th January 2018 and 30th January 2018, at the end of which the claimant and her trade union representative accepted Mr Piercy's proposal and agreed to attend the meeting with Mr Watson.

36. The claimant remained absent on sick leave and the council intended to follow its absence management policy by holding regular absence management interviews with the claimant. One such interview was proposed to take place on 2nd February 2018, but that was postponed by consent following an agreement between the council, the claimant and her trade union representative that they should embark upon a mediation process with a view to resolving all outstanding difficulties. As part of those negotiations, Anita Boyd was asked to draft a reference which was to be attached to a draft compromise agreement, the effect

of which would be to bring the claimant's employment with the council to an end in return for an agreed sum by way of compensation and an agreed reference. The claimant would also withdraw her Subject Access Request, grievance appeal and second grievance. The claimant's trade union representative replied by stating that the claimant wished to have some time to consider the offer and to take legal advice, particularly regarding her pension entitlement. A copy of Miss Armstrong's (the claimant's trade union representative) letter to Mr Piercy appears at page 1241 and states as follows:-

> "Dear Barry.
> Lynn is currently considering your offer and taking financial advice with regards her pension. I hope to revert to you with our response by the end of next week. During this period of consideration can we agree that all processes will go on hold in connection with the FOI request, grievance, grievance appeal and absence monitoring process. Are you in a position to release the draft reference to Lynn for consideration. I look forward to receiving your response."

The bundles do not contain a copy of any written response by Mr Piercy, but he did confirm in evidence that he accepted that the "pause" in all proceedings would include any attendance management interviews.

37. Negotiations continued about the terms of the settlement agreement. The claimant sought an increase in the compensatory payment, to take into account sums relating to her pension. The claimant also sought a more detailed reference than that which was appended to the draft settlement agreement. The respondent declined to increase its original offer of compensation and refused to accept a number of the claimant's proposed amendments to the draft reference. However all versions of the draft reference contained a final sentence which states, "During her time at Shotton Hall there were no disciplinary or safeguarding concerns."

38. The draft settlement agreement contained a proposed date for the claimant's employment to come to an and as at 28th February 2018. In anticipation of terms being agreed and in anticipation of that remaining the effective date of termination of the claimant's employment, Mr Piercy informed the council's salary section that no further salary payment should be made to the claimant beyond 28th February. Negotiations in fact continued into March, meaning that the claimant remained an employee of the council. Mr Piercy informed the payroll section on 29th March that the claimant should be paid her salary for the month of March. Unfortunately that message did not reach the payroll department in time for payment to be made by the last working day of that month, which was the normal date for payment. Payment was in fact not made until 5th April. By that time, due to the length of her absence, the claimant was only entitled to be paid half her normal salary.

39. Negotiations about the settlement agreement continued but agreement could not be reached and negotiations finally came to an end on 16th April.

40. On 10th April the claimant had raised a third grievance, a copy of which appears at page 1322 in the bundle. The grounds of the grievance are as follows:-

(i) I have been patiently awaiting news in relation to my on going grievance which I commenced on 12th January 2018. To date I have had no indication whatsoever as to how and when this grievance will be dealt with which is causing me considerable upset due to the uncertainty. It is appalling that there has not been any progression nor any explanation or update in relation to this delay whatsoever.

(ii) I was not paid my salary in accordance with my employment contract on 29th March as was expecting. Querying this with payroll after the Easter bank holiday weekend, I was advised by telephone on 4th April that my employment had been terminated with effect from 28th February. I was also advised that I was to be paid "settlement monies" on 5th April 2018, having never greed to the terms of any settlement agreement. I was advised that this instruction had been given by an e-mail from Barry Piercy dated 29th March. I then received a payment on 5th April which Mr Piercy advised my solicitor was "wages". I have not received any pay slips setting out the basis of that payment, in spite of my request for same. I have always had my pay slips sent out to my home address, during my sickness absence, as I have never been given by my school access to my pay slip on line.

(iii) It would appear that the council's behaviour towards me is calculated to break down the relationship of trust and confidence in respect of my employment.

In response to the section of the grievance form which asks "What do you propose should happen in order to resolve your grievance?", the claimant states "trust and confidence is re-established."

41. Although there had been an agreement to pause all proceedings by letter dated 12th March 2018, the clerk to the governing body (Linda Ellison) wrote to the claimant inviting her to attend a grievance appeal hearing on 22nd March. By letter dated 18th March the claimant wrote to Ms Ellison in the following terms:- "I wish to request a postponement of the above appeal hearing. I have been unable, in the very short timescale given to me (I only received the paperwork via recorded delivery on 13th March), to secure trade union representation and to ensure I have the prerequisite meeting with them to ensure any representative is up to speed with my case. It has been 87 days since my appeal submission, yet I have been given only 5 working days to submit documentation/written statements and 7 working days notice of the meeting. I look forward to your reply to my request on Monday 19th March."

The following day Ms Ellison replied confirming postponement of the appeal hearing and stating that it would be rearranged "after the Easter holidays." The tribunal noted that the claimant made no mention at this stage of the agreed "pause" in these proceedings.

42. By letter dated 3rd April 2018, Mrs Barclay in her capacity as chair of governors wrote to the claimant inviting her to attend an absence management interview on 26th April at 3.30pm. The tribunal noted that the claimant made no complaint

about this proposal when she submitted her third grievance on 10th April 2018. The claimant in fact attended the absence management interview on 26th April and was accompanied by her friend Ms Janet MacPhee. Minutes of the meeting appear in the bundle and nowhere is there any mention by the claimant of her objecting to the meeting taking place or that there was supposed to have been a "pause" in all proceedings.

43. There is in the minutes of the meeting a note of an exchange between Mrs Barclay and the claimant, which is recorded at page 1403 in the bundle:-

> "CB enquired around a possible return to work. LF replied, "I don't think I'd ever be secure there. Whatever the outcome of the grievance there will be ill-feeling and I don't feel I would be safe and secure at work. There is a potential for bullying and isolation to continue or be worse. Its sad but that's how I feel. CB said that this was a change of opinion. LF did not agree and said that she had stated this for a while. CB reiterated that LF had continually said she hoped to return to work. LF then stated that there had been a breach of contract as she had not been paid in March. There appeared to be some confusion by LF whether this was February or March but then decided it was indeed March. CB clarified that she had had no involvement in this. CT asked whether this had been rectified and said she understood that an admin error was the cause. LF was certain that this had not been an admin error. "I wasn't on payroll and my pay slip wasn't sent until two weeks later. I had direct debits coming out and no money in. I was paid one week later on a supplemental run. This was stressful. I received no apology. It was not an admin error."

44. In her claims to the tribunal the claimant alleges that she was victimised by the council when they "deliberately delayed progressing the claimant's second and third grievances and failed to follow their own processes and timescales out with the respondent's procedures." The tribunal found that there had been no delay in progressing the claimant's second grievance. It was the claimant's trade union representative who proposed the "pause" in the progress of that grievance so as to enable negotiations to take place between the parties. As soon as it became apparent that negotiations had broken down, the process recommenced. Any delay that there may have been was in no sense whatsoever related to the claimant's physical impairment of Mortons Neuroma or the alleged impairment of depression. The tribunal found that the allegation of victimisation in this regard is simply not made out.

45. The claimant further alleges that she was "forced to engage in the grievance appeal process and AMI meetings with Carole Barclay in spite of an agreement that all procedures were on hold in February and March 2018." The tribunal found that this allegation was contradicted by the claimant's own evidence. The claimant was not forced to engage in the grievance appeal process and AMI meetings. She was invited to an appeal meeting which was immediately postponed upon the claimant's request. She was invited to an absence management interview, which she agreed to attend without any objection prior to, or during, that meeting. The tribunal did not accept the claimant's description of

being invited to partake in those procedures as "creating an intimidating and hostile environment for the claimant as the claimant was placed under severe pressure in dealing with Carole Barclay when the relationship was already difficult, which contributed to her stress and exacerbated her depression. This is linked to the claimant's disability of depression." The tribunal has found that the claimant's depression did not amount to a disability. The tribunal further found that invitations to meetings were in no sense whatsoever related to the claimant's depression. The tribunal found it difficult to reconcile the claimant's complaint that there was unreasonable delay in the progress of grievance appeal, when she also tries to argue that she should not have been required to partake in it. Nowhere in the minutes of any of the meetings is there any suggestion by the claimant that she felt pressurised in dealing with Mrs Barclay. Those allegations are not made out.

46. The claimant alleges that by continuing with the grievance appeal process between January and March 2018, the council and Carole Barclay treated the claimant unfavourably because of something arising in consequence of her disability. The tribunal found that the claimant had failed to establish that there had in fact been any unfavourable treatment. The tribunal was not satisfied that the claimant had been placed at any kind of disadvantage or been subjected to any detriment. There is no evidence that this "exacerbated her depression". Furthermore, this allegation was brought under Section 15 of the Equality Act and the claimant has failed to establish what was the "something" which arose as a consequence of her disability and which was the cause of the unfavourable treatment.

47. The claimant alleges that the delay in paying her salary which was due at the end of February and which was paid one week late, was unfavourable treatment because of something arising in consequence of her disability. The tribunal accepted that the late payment amounted to unfavourable treatment. However, the tribunal accepted the respondent's explanation that this had simply been an administrative error as a result of the council's expectation that the compromise agreement would have been completed in time for the effective date of termination of 28th February to have been implemented. The delay was not because of anything which arose as a consequence of the claimant's disability.

48. The claimant also alleged that, when she enquired as to why her salary had not been paid, she was told that her employment had been terminated on 28th February. The claimant alleges that this amounts to unfavourable treatment because of something arising in consequence of her disability. The claimant describes it as, "discovering by telephone that my employment was terminated after 28 years service caused additional stress and anxiety which exacerbated my depression." The tribunal was satisfied that the claimant was fully aware from the contents of the draft compromise agreement that the proposed effective date of termination set out therein was 28th February. The tribunal was satisfied that the claimant would have been fully aware that this was the date both parties were aiming for. When the claimant contacted the council's payroll department, she was told that the payroll department understood her employment had been terminated on 28th February. That is not the same as being told that her employment was terminated. At this time, the claimant had the benefit of trade

union advice and that of a solicitor. It was the claimant who had contacted the payroll department by telephone. Whatever the claimant was told during that conversation, it had nothing to do with her alleged disability of depression. The allegation under Section 15 is not made out.

49. The claimant also alleges that the failure to pay her salary was an act of victimisation, contrary to Section 27 of the Equality Act 2010. The alleged protected act was the claimant's raising concerns in her grievance appeal on 20th December 2017 about the fairness of the previous process. The alleged detriment was the "severe anxiety after being told the delay in payment was due to the termination of her contract of employment at the end of February 2018 on the instruction of Barry Piercy." The tribunal repeats its earlier finding that the failure to pay the salary was an administrative error based upon Mr Piercy's presumption that the terms of the settlement agreement would be finalised by the end of February and that the claimant's employment would come to an end on 28th February. The tribunal found that any delay was in no sense whatsoever connected to any earlier protected act.

50. The claimant's appeal against the dismissal of her first grievance took place on 19th April. The claimant was accompanied by her trade union representative Mr Lashley. Minutes appear at pages 1367 – 1390. By letter dated 27th April 2018, the appeal was dismissed. That letter runs to five and a half pages and sets out in detail the grounds of appeal and the reasons why those grounds were dismissed.

51. By letter dated 19th April, the claimant had been invited to attend a first meeting to consider her third grievance on Tuesday 26th April. Mrs Francis replied stating that 26th April was not in fact a Tuesday but a Thursday and on that date she was already due to attend an absence management interview. The claimant therefore asked for the meeting to be rearranged. The respondent agreed. The meeting finally took place on 15th June. Minutes appear at pages 1495 in the bundle. The meeting lasted from 12.45 until 4.20pm. At the very end of the meeting, the notes show the following exchange between Mr Watson and the claimant's trade union representative, Mr Lashley:-

> "It was pointed out to LF that when she first submitted this grievance her proposed outcome would be to have a "good working relationship with the line managers and governors of the school in which I work." As significant time had elapsed since the original submission, could LF confirm that this was still her preference, and if so does she have any thoughts as to how that could be achieved?
>
> BL responded that LF feels that her position is now untenable and that she does not see her future in that school. BL further stated that there is an appetite to enter settlement and after today there should be sufficient to enter those discussions again. The initial settlement broke down due to a date issue and the agreed content of a reference. LF is keen to engage in settlement discussions."

52. The claimant submitted her resignation to the council on 13th July 2018. By that date the claimant had not received any outcome to her second grievance which had been raised on 12th January 2018, nor had she received a formal outcome to the grievance she raised on 10th April relating to the non-payment of her salary.

53. In her remaining complaints to the tribunal, the claimant makes allegations against the council relating to the provision of documents. Firstly, the claimant alleges that her Subject Access Requests were not properly handled and were "suppressed" and/or "intentionally delayed". The claimant alleges that this amounted to unfavourable treatment because of something arising in consequence of her disability. The claimant further alleged that she was required to pay £289.87 to the council before they would provide her with hard copies of the documents included in the Subject Access Requests. Again, the claimant alleged that this was unfavourable treatment because of something arising in consequence of her disability. The claimant also alleged that the respondent's suppression of documents and delay in the production of the information amounted to victimisation contrary to Section 27 of the Equality Act 2010 and that it was retaliatory action because of the protected act contained in her grievance dated 12th January 2018.

54. The "suppression of information" related to a letter which had been sent by the chair of governors, Carole Barclay, to the claimant's GP on 15th September 2017. That letter had been sent after the claimant had submitted the fit note referred to in paragraph 15 above. Mrs Barclay had taken exception to the use of the phrase "work-related stress due to bullying/inappropriate management practice." Mrs Barclay complained to the GP on the basis that this "diagnosis" was entirely based upon what the GP had been told by the claimant. The claimant's case in respect of this letter was difficult to understand. In her evidence, the claimant states that she became aware of the letter as a result of a Subject Access Request she made to her GP's practice. It was not clear from the claimant's evidence as to whether she had been told by her GP about this letter at the time it had been sent by Mrs Barclay. The claimant was asked to specify what detriment had been caused to her as a result of the letter being sent to her GP. If she did not know about it at the time, then there could not have been any detriment at the time. If she had known about its existence at the time, why did she seek a copy via a Subject Access Request to her GP? In cross examination, the claimant stubbornly refused to accept that Mrs Barclay, in her capacity as chair of governors, was entitled to challenge the contents of the fit note, particularly when the school denied that there had been any bullying or inappropriate management practice. In her pleaded case, the claimant maintained that discovering that the council had failed to provide a copy of this document caused her "further distress relating to her grievances, as information was being suppressed". The claimant was unable to explain the link between the subject matter of her grievances and Mrs Barclay's letter to her GP. The claimant was unable to explain what was the "something" which arose as a consequence of her disability and which led the council to withhold a copy of this letter. The council's explanation was that it did not hold a copy of Mrs Barclay's letter to the claimant's GP. That letter had in fact been sent by Mrs Barclay from her own personal computer and therefore the council did not hold a copy within their records. Similarly, the school did not hold a copy of that letter within its records. The tribunal accepted those explanations

and accepted Mrs Barclay's explanation that her own copy of the letter had been stored under the title "letter to GP" and therefore was not revealed in a search for documents relating to the council/the claimant. The tribunal found that there was no causative link between the failure to disclose the letter and any grievance which had been raised by the claimant. The council's explanation was entirely plausible.

55. The claimant further alleged that the council had been tardy in dealing with her Subject Access Requests. The council accepted that it had not dealt with them by replying within the 40 days specified on the application form. The council's explanation was that the claimant had agreed to a "pause", which included dealing with the Subject Access Requests. Once the pause was lifted, the council dealt with the Subject Access Requests as soon as they could. Again, the claimant alleged that the delay was unfavourable treatment because of something arising in consequence of her disability contrary to Section 15 of the Equality Act and victimisation contrary to Section 27 of the Equality Act. Again, the protected act for the victimisation allegation was the claimant's grievance of 12th January 2018. The alleged detriment was the "further distress caused to the claimant". The claimant did not give any evidence about what was this "further distress". The claimant gave no evidence about how the failure to provide any of this information impacted in any way upon the grievances or the handling of her grievances. The claimant failed to identify what was the "something" which arose as a consequence of her disability which caused the respondent to intentionally delay the processing of the Subject Access Requests. The claimant failed to establish any causative link between her grievance of 12th January 2018 and the delay in providing the information. The tribunal accepted the council's explanation for the delay and found that it was in no sense whatsoever related to the claimant's Mortons Neuroma.

56. The claimant made further Subject Access Requests on 13th April 2018 and 18th April 2018. The claimant sought in particular copies of documents relating to the handling of her grievances and sickness absence review meetings. At the end of her request at page 1360 in the bundle the claimant states as follows:-

> "Please advise if you require a fee in relation to this request and whether you also need any further correspondence to confirm my identity."

57. The council replied to the request of 13th April on 7th June. It was accepted at the tribunal hearing that there was a standard fee of £10.00 payable for the provision of the information which, ordinarily, would be provided in electronic format. Having received the information by electronic means, the claimant then made a specific request for "a paper copy of all the documents you have sent to me electronically", in her letter of 21st June. The claimant subsequently confirmed on 25th June that she had been able to open all of the electronic files sent to her. On 25th June Carole Barclay asked the claimant, "Can I ask you to confirm whether you require me to cost-up the provision of hard copies of the school information?" The following day the claimant replied stating, "I would like you to cost-up the provision of a set of hard copies of my Subject Access Requests. " The following day Mrs Barclay replied stating, "I attach a document showing the breakdown of the costs to copy and post hard copies." That breakdown came to £289.87 which

included copying charges and Mrs Barclay's time. The claimant did not pay the requested sum and hard copies were not provided. The claimants pleaded case is that this amounted to a breach of Section 15 of the Equality Act (unfavourable treatment because of something arising in consequence of her disability) and of victimisation contrary to Section 27 of the Equality Act 2010. In respect of the latter claim, the protected act was again the grievance of 12th January 2018. The claimant's pleaded case is that the requirement for her to pay such a substantial sum was "calculated to impede her access to relevant documents. This financial requirement caused additional stress and anxiety to the claimant which exacerbated her depression." In respect of the victimisation allegation, the claimant alleges that the detriment suffered was "the additional and unnecessary stress inflicted upon the claimant by making this request of her when she was already on half pay."

58. The tribunal found that the claimant had failed to establish what was the "something" which arose as a consequence of the claimant's Mortons Neuroma and which caused the council to request payment of this sum. The tribunal rejected the claimant's argument that the fee was "calculated to impede her access to relevant documents." The claimant had in fact already received copies of all of those documents by electronic means and they were therefore already in her possession. What the claimant sought was hard copies for her own convenience. The claimant accepted that a fee would be payable but seems to challenge the amount of the fee payable. The tribunal found that the requirement to pay the fee was in no sense whatsoever related to the claimant's Mortons Neuroma. There was no obligation on the respondent to provide hard copies of the information. They were prepared to do so upon payment of a fee by the claimant, which the claimant declined to pay. The allegation of victimisation is not made out, as the requirement for the fee was in no sense whatsoever to do with any earlier grievance.

59. The final complaint about documents relates to copies of the minutes of the Absence Management Interviews which took place during the claimant's lengthy absence through illness. The claimant alleges that she was, "required to review all notes of meetings and to challenge content after every AMI review and that this increased her stress and anxiety and exacerbated her depression." In cross examination however the claimant accepted that notes taken at each AMI meeting was sent to her and/or her trade union representative for amendment and approval. The claimant accepted that any such amendments as were required were accepted and that there were occasions when no amendments were required. The whole purpose in submitting copies of the notes to her was so that she could check the accuracy of those notes. The claimant's complaint appeared to be there were occasions when, in her opinion, the notes were not accurate. As a result, she had to check carefully any subsequent notes to make sure that they were accurate. The tribunal did not find that this amounted to any kind of "detriment" or any kind of "unfavourable treatment". Furthermore, even if it had been the claimant had failed to establish that it was because of "something" which arose as a consequence of her disability. Similarly, the claimant failed to establish that there was any connection whatsoever between the lack of accuracy in the minutes and her Mortons Neuroma.

60. The absence management interviews themselves continued throughout the claimant's absence. The claimant alleges that these meetings with Carole Barclay were frequently "hostile" and included "unacceptable behaviour" by Mrs Barclay. The claimant was accompanied by her trade union representative or another colleague at these meetings. No complaint was made by the claimant, her trade union representative or colleague at the time of or immediately following any of these meetings, apart from the last one which took place on 5th July 2018. It is Mrs Barclay's behaviour that this meeting which the claimant alleges to be the "last straw" in the course of conduct alleged by the claimant to amount to a fundamental breach of the implied term of trust and confidence in her contract of employment. The claimant also alleges that Mrs Barclay's behaviour at this meeting was unfavourable treatment because of something arising in consequence of her disability contrary to Section 15 of the Equality Act 2010 and victimisation contrary to Section 27 of the Equality Act 2010.

61. The AMI meeting on 5th July was part of the respondent's normal process of management of the claimant's long-term absence. As is referred to above, these AMI meetings took place regularly during the claimant's absence. On this particular occasion, the claimant was accompanied by her friend and former work colleague Ms Janet MacPhee. The claimant's allegations against Mrs Barclay relating to this meeting are that she behaved in a manner which was generally "hostile and aggressive towards the claimant" and that the detriment under the Section 27 claim was "the extreme upset and distress caused by Carole Barclay's behaviour in the meeting." The particular allegations raised by the claimant in her witness statement was that Mrs Barclay had:-

    (i) rolled her eyes at the claimant;
    (ii) pushed papers across the table towards the claimant;
    (iii) threw her pend down on the table.

    In answering questions from Mr Tinnion, Ms MacPhee accepted that at the very start of this meeting, the claimant had insisted upon reading out a typed statement, the contents of which were critical of the council and Mrs Barclay about the manner in which the claimant's grievances had been handled. Those were not the subject matter of this meeting, which was to manage the claimant's absences. Ms MacPhee accepted that she had not seen Mrs Barclay roll her eyes at the claimant, but had simply heard the claimant saying to Mrs Barclay words to the effect of "Don't roll your eyes at me". Ms MacPhee further accepted that the claimant had pushed papers across the table to Mrs Barclay and that Mrs Barclay had pushed them back in a similar manner. Mrs MacPhee's recollection was that towards the end of the meeting Mrs Barclay had "dropped her pen on the table".

    When asked by the tribunal whether she believed that someone "rolling her eyes" at her was something which should form the subject matter of litigation, the claimant insisted that such behaviour did amount to harassment, as defined in Section 27.

62. Mrs Barclay's evidence was that she was "shocked by the claimant's aggressive manner towards me at the meeting. I put my pen down on the table. I stated that

the claimant had misrepresented the position in relation to the attendance management process. I was so shocked by the claimant's aggressive manner at the meeting that I reported this immediately after the meeting. I do not accept the the claimant's description of my conduct during the meeting as described in her complaints to Julie Arnott on 6th July 2018."

63. That letter appears at page 1532 in the bundle. The relevant extracts state as follows:-

> "The completely inappropriate and unsympathetic reaction by Mrs Barclay was that she didn't get paid for doing these meetings and she had to compress her diary to attend. When I challenged the fact that this was not the point she rolled her eyes. As the meeting progressed I asked for notes from the previous AMI to be amended as they were inaccurate. Her response was to angrily take the pages off me and then throw the signed pages back at me. Her behaviour was ill-tempered and completely unacceptable. It is clear from such behaviour that she has no understanding or compassion and that she has lost patience with me."

64. The tribunal found it likely that Mrs Barclay had indeed rolled her eyes at the claimant, had pushed the papers back to the claimant in the same way that the claimant had pushed them across to her and had probably dropped her pen on the table at the end of the meeting. The tribunal found that this was likely to have been a display of impatience and frustration caused by the claimant's insistence upon reading out her typed statement, the contents of which had little, if anything, to do with the purpose of the absence management interview. That was why Mrs Barclay behaved the way she did. It had nothing to do with anything which arose as a consequence of the claimant's disability. It was not in any sense whatsoever related to the claimant's disability and was not influenced by any earlier protected act.

65. The claimant's letter of complaint about Mrs Barclay's behaviour at that meeting is dated 6th July 2018. A week later by letter dated 13th July the claimant tendered her resignation. The letter of resignation appears at pages 1537 – 1538 in the bundle. It is appropriate to set out the full contents of that letter:-

> "Dear Carole
>
> Resignation from Employment
>
> It is with great sadness that I am writing to confirm my resignation with immediate effect from my post as deputy head of Shotton Hall Primary School. My decision to resign now after many months of sickness absence with work-related stress due to bullying and inappropriate management practice, has come about due to your recent appalling behaviour towards me at the AMI on Thursday 5th July 2018. I feel that your actions and those of my employer in dealing with my employment issues have been deliberately protracted and designed to cause me the maximum amount of anxiety and stress possible and which has ultimately proved too much for me to bear. Whilst such behaviour would normally

result in a grievance, I cannot be expected to raise yet another grievance where the track record of the council is to delay for many months at a time and ultimately not to make any findings in my favour.

Your actions on 5th July 2018 were wholly consistent with the treatment that I have received from Anita Boyd since her appointment as head teacher, you as chair of governors, other school governors, HR and the governors support service team. I have simply reached the point whereby the council is my employer and individuals within the organisation have acted in a manner calculated to force me out of a job I have loved and succeeded in for many years. To clarify, I have been bullied and side-lined as a result of my disability by Anita Boyd, I have been singled out, had my duties narrowed and then be so mistreated that my position is no longer tenable. During the last two years I have been forced to bring numerous grievances in relation to a lack of support or adjustment which have been repeatedly and inexplicably delayed, this leads me to the inescapable conclusion that I have been victimised by my employer, as I have been subjected to a catalogue of unfavourable treatment for having had the audacity to complain about this.

During my very difficult absence from school I have had to repeatedly reassert my rights against very difficult and obstructive delays in dealing with several issues and I have also suffered from a complete lack of progress in relation to my grievances. This has exacerbated my symptoms and prevented me from returning to work. My grievance submitted on 12th January 2018 for example still remains in the early stages of investigation and yesterday I have been rearranged for the second time to photocopy documents confirming the allegations which I offered four weeks ago. Insufficient resource has been attributed to obtaining these documents and such a delay is simply not acceptable. For an individual genuinely suffering from symptoms of stress and depression, this delay illustrates the cold and uncaring attitude of an employer who has little regard for the needs of its employees or the trust and confidence in the employment relationship. Accordingly, by your repudiatory breaches of contract and the last straw of your behaviour last Thursday I have no alternative but to resign my position. Your breaches are sufficiently serious to constitute a repudiatory breach. By my resignation I accept the breach as I believe that the termination of my employment is by way of a constructive unfair dismissal.

I am extremely disappointed that there has been no genuine effort to resolve matters with me and allow me to return to work and I trust you will be pleased with this outcome as this is exactly what you and others appear to have been trying to engineer for some time.

Yours sincerely, Lynne Francis

66. That letter of resignation was acknowledged by Carole Barclay on 19th July, confirming that the claimant's employment effectively came to an end on 13th July

2018. On 18th July the claimant had written to Mr Terry Watson stating as follows:-

> "Following my resignation due to a total breakdown in trust and confidence, I am writing to inform you that due to the total lack of any reasonable progress in the matter, I will not be engaging any further in the grievances. Sadly I have no confidence in this process which has caused me, over a long period of time, considerable stress."

The following day Mr Watson replied, stating, "At your request we will make no further contact with you in regard to the grievance investigations."

67. The claimant's final complaint is one of victimisation contrary to Section 27 of the Equality Act 2010. The claimant alleges that the council and Mrs Boyd have "written inaccurate references and repeatedly failed to provide me with a reference to allow me to gain any meaningful employment." The protected act is the presentation of the claimant's claim form to the employment tribunal on 4th October 2018, which was served upon the respondent by letter from the employment tribunal dated 7th November 2018.

68. On 15th October 2018 the claimant registered with School House Recruitment Limited, an employment agency specialising in placing teachers with schools. School House Recruitment Limited sought a reference from Shotton Hall Primary School and submitted a form for the head teacher to complete. A copy appears at page 1581A – 1581B in the bundle. In respect of each of eight listed skills the claimant was marked as "average". The form confirmed that the head teacher would recommend the claimant for day to day/short-term supply and states "No" to the question "During the applicants time in your school, have there ever been any safeguarding issues?" That latter point confirms what had been in the draft reference which was to be attached to the settlement agreement about which negotiations had taken place in early 2018. The tribunal also noted from the bundle at pages 1543B and 1543C, that there had been an exchange of correspondence in late June/early July 2018, between the claimant's trade union representative and Mr Barry Piercy, concerning the possibility of settlement at that stage. Whilst terms again could not be agreed, the draft reference at that stage still contained the words, "During her time at Shotton Hall there were no disciplinary or safeguarding concerns regarding Mr Francis."

69. The tribunal was satisfied that at all times prior to the presentation of the claimant's claim form ET1, Mrs Boyd and the council were prepared to provide a reference which confirmed that there had been no disciplinary or safeguarding concerns regarding Mrs Francis during her employment at Shotton Hall primary school. The claimant registered with several other employment agencies which specialised in placing teachers with schools. Each of those agencies approached Mrs Boyd for a reference and for confirmation that there had been no safeguarding issues concerning the claimant during her employment at the school. Rather than completing the various forms which were submitted to her by those employment agencies, Mrs Boyd decided to draft a single letter which thereafter would be sent to anyone who approached for a reference on behalf of the claimant. A copy of that letter appears at page 1571 in the bundle. It is dated

7th January 2019 and is on Shotton Hall primary and pre-school letterhead paper. The letter states as follows:-

> "Reference – Lynne Francis
>
> To Whom It May Concern
>
> Lynne Francis was employed as a deputy head teacher of the primary school from the 1st of September 2010 to the 13th of July 2018. Previously she was deputy head teacher of the infant school.
>
> The school operates an attendance management policy and procedure. The attendance management policy and procedure is intended to set out a procedural framework and standards of practice which enables the school to consistently manage attendance, taking account of business needs, and ensuring support for employees during absence and their return to work. Lynne was in the process of going through the procedure when she left her employment at the school on the 13th of July 2018. As the procedure was not completed, no assumptions can be made and I am unable to answer the questions on your form in either a positive or negative manner.
>
> This reference is given to the addressee in confidence and only for the purposes for which it was requested. It is given in good faith and on the basis of the information available to the employer at the time it is given, but neither the writer nor the employer accept any responsibility or liability for any loss or damage caused to the addressee or any third party as a result of any reliance being placed on it."

70. The claimant's evidence to the tribunal, which was accepted by the tribunal, was that she would be unable to obtain employment as a teacher or even as a teaching assistant, unless she could obtain a reference from her previous employer which confirmed that there had been no disciplinary or safeguarding issues relating to her. Mrs Boyd was asked in cross examination as to why she was no longer willing to confirm in writing or verbally at the telephone that there had been no disciplinary or safeguarding issues concerning Mrs Francis. Mrs Boyd's reply to the tribunal was that she had been "acting upon legal advice". Mrs Boyd did confirm under oath that there had been no safeguarding or disciplinary issues concerning the claimant. Mrs Boyd could give no further explanation as to why she was no longer willing to inform any of the employment agencies who approached her for a reference about the claimant that there had been no disciplinary or safeguarding issues.

71. The tribunal found that there had been no disciplinary or safeguarding issues concerning the claimant during her employment with the respondent. The tribunal found that Mrs Boyd and the council had been prepared to provide a reference confirming that, during the settlement negotiations in early 2018 and again in June 2018. Mrs Boyd and the council had been prepared to provide a reference to that effect up until 18th October 2018. The tribunal found that the council and Mrs

Boyd were aware of the presentation of the claim form ET1 by the claimant by not later than 11th November 2018.

72. The tribunal accepted that Mrs Boyd was not obliged to disclose in her evidence as to what was the nature of the legal advice given to her about the provision of the reference. Nevertheless the council could have waived its right to privilege in respect of its reasons for not providing confirmation that there had been no disciplinary or safeguarding issues. As a result, the tribunal was left without any meaningful explanation from the council as to why such confirmation was not provided to the various employment agencies after the date when the claim form ET1 was served upon them.

The law

73. The statutory provisions engaged by the claims complaints of unlawful disability discrimination are contained in the Equality Act 2010. The statutory provisions engaged by the claimant's complaint of unfair constructive dismissal are set out in the Employment Rights Act 1996.

Equality Act 2010

Section 4 The protected characteristics

The following characteristics are protected characteristics –

Age;
Disability;
Gender reassignment;
Marriage and civil partnership;
Pregnancy and maternity;
Race;
Religion or belief;
Sex;
Sexual orientation.

Section 6 Disability

(1) A person (P) has a disability if--

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13

Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 26 Harassment

(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.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

Section 27 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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123 Time limits

(1) [Subject to section 140A] 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.

(3) For the purposes of this section--

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136 Burden of proof

(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.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

(1) The effect of an impairment is long-term if--

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

3. Severe disfigurement

(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) The regulations may, in particular, make provision in relation to deliberately acquired disfigurement.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if--

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply--

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

6. Certain medical conditions

(1) Cancer, HIV infection and multiple sclerosis are each a disability.

(2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

7. Deemed disability

(1) Regulations may provide for persons of prescribed descriptions to be treated as having disabilities.

(2) The regulations may prescribe circumstances in which a person who has a disability is to be treated as no longer having the disability.

(3) This paragraph does not affect the other provisions of this Schedule.

8. Progressive conditions

(1) This paragraph applies to a person (P) if--

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.

9. Past disabilities

(1) A question as to whether a person had a disability at a particular time ("the relevant time") is to be determined, for the purposes of section 6, as if the provisions of, or made under, this Act were in force when the act complained of was done had been in force at the relevant time.

(2) The relevant time may be a time before the coming into force of the provision of this Act to which the question relates

Employment Rights Act 1996

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--

(a) the employer gives notice to the employee to terminate his contract of employment, and
(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

74. The first issue for the tribunal to consider is whether or not the claimant's depression amounted to a disability as defined in Section 6 of the Equality Act 2010 and if so, whether the respondent knew or ought to have known about that disability. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person. For that purpose, the required knowledge, whether actual or constructive, is of the **facts** constituting the employee's disability as identified in Section 6 of the Equality Act 2010. Those facts have three elements to them, namely (a) a physical or mental impairment which has (b) a substantial and long-term adverse effect on (c) her ability to carry out normal day to day activities. Whether those elements are satisfied in any case depends also on the clarification as to their sense provided by the guidance in Schedule 1. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to

know that as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined in Section 6.

75. In 2011 the Equality and Human Rights Commission produced a "Code of Practice on Employment" ("The Code") to accompany the Equality Act 2010. The code was brought into effect on 6th April 2011. The purpose of the code is to provide a detailed explanation of the Equality Act to assist courts and tribunals when interpreting the law and to help lawyers, advisors, trade union representatives, human resources departments and others who need to apply the law and understand its technical detail. Whilst the code does not impose legal obligations, it is well recognised that it should be used in evidence in legal proceedings brought under the Equality Act. The employment tribunal must take into account any part of the code that appears to them relevant to any questions arising in proceedings.

76. Appendix 1 of the code deals with "the meaning of disability". The relevant extracts are as follows:-

(ii) A person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

(iv) "Impairment" covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

(vi) The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as "learning disabilities".

(vii) There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.

(viii) A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that in effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

(ix) Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or because of a loss of energy and motivation.

(x) An impairment may not directly prevent someone from carrying out one or more normal day to day activities but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day to day activities, the person may have the capacity to do something, but suffer pain in doing so, or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

(xi) A long-term effect of an impairment is one:-

- Which has lasted at least twelve months or
- Where the total period for which it lasts is likely to be at least twelve months or
- Which is likely to last for the rest of the life of a person affected

(xii) Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within twelve months and the effects of temporary infections from which a person would be likely to recover within twelve months.

(xiii) If an impairment has had a substantial adverse effect on normal day to day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur, that is, if it might well recur.

(xiv) Normal day to day activities are activities which are carried out by most men or women o a fairly regular basis and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day to day activities would be covered by this part of the definition.

(xv) Day to day activities thus includes – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading or taking part in normal or social interaction or forming social relationships, nourishing and caring for oneself. Normal day to day activities also encompass the activities which are relevant to working life.

(xvi) Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (thought not the impairment). In such cases the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).

(xx) Progressive conditions which are likely to change and develop over time. Where a person has a progressive condition they will be covered by the act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day to day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirements of the definition.

77. In Chapter 5 of the Code, dealing with claims under Section 15 of the Equality Act, the question is asked “What if the employer does not know that the person is disabled?” and the following advice is set out:-

5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formerly disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a disabled person.

15.5 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example

A disabled man who has depression has been at a particular work place for two years. He has a good attendance and performance record. In recent weeks however he has become emotional and upset at work for no apparent reason. He has been repeatedly late for work and has made some mistakes in his work. The worker was disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

5.17 If an employer's agent or employee (such as an occupational health advisor or HR officer) knows, in that capacity of a worker's disability, the employer will not usually be able to claim that they did not know of the disability and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

78. In **Vicary v British Telecom [1999 IRLR 680]** it was held that the decision as to whether a person is disabled is one for the tribunal to make and not for any medical expert. The burden of proving disability lies upon the claimant. In **McNicol v Balfour Beatty Rail Maintenance Limited [2002 IRLR 711]** it was stated that, "the definition of a physical or mental impairment is "some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition" and that "the essential question in

each case is whether, on a sensible interpretation of the relevant evidence, including any expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment." In **Hill v Clacton Family Trust [2005 EWCA 1456]** the Court of Appeal said, "No court or tribunal would come to a decision on the question of mental impairment without giving careful consideration to the medical evidence before it. That evidence must, however, be considered in the context of the totality of the evidence and the decision is of the tribunal not the expert, however qualified he may be or may not be." In **Morgan v Staffordshire University [2002 ICR 475]** the Employment Appeal Tribunal held that the obligation upon the claimant to prove a mental impairment should not be taken to require a full consultant's psychiatrist report in every case.

79. In **Parnaby v Leicester City Council [UKEAT/0025/19/BA]** Her Honour Judge Eady QC considered the question of whether a particular impairment was "long-term" and confirmed that the tribunal needs to consider the question of likelihood – whether it could well happen that the effect would last at least twelve months or recur – at the time when the relevant decisions were being taken. What is "long-term", is defined in Schedule 1 Paragraph 2 of the Equality Act 2010. Where it is necessary to project forward to determine whether an impairment is long-term, in **SCA Packaging v Boyle [2009 ICR 1056]** the House of Lords clarified that in considering whether something was likely it must be asked whether it "could well happen", not that it is more probable than not that it will happen. Looking back at what happened after the relevant act of which complaint is made is not, however, the correct approach when determining what was the likely effect – "likelihood is not something to be determined with hindsight".

80. In **J v DLA Piper [2010 IRLR 936]** the Employment Appeal Tribunal said that the employment tribunal should be aware of the difference between alleged depression and a reaction to adverse circumstances. Whilst both can produce symptoms of low mood and anxiety, only the first condition should properly be recognised as a mental impairment which satisfies the definition in Section 6. The requirement that any impairment must have long-term adverse effects if it is to amount to a disability for the purposes of Section 6, usually assists in separating the two. However, a person with depression may react more severely to adverse circumstances. The Employment Appeal Tribunal approved previous decisions which stated that it was good practice for employment tribunals to state their conclusion separately on the questions of impairment and adverse effect and in respect of the latter, their findings on substantiality and long-term effect. Where the existence of an impairment is disputed, it makes sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. The following four questions should be posed sequentially:-

    (i) Did the claimant have a mental or physical impairment?

    (ii) Did the impairment affect the claimant's ability to carry out normal day to day activities?

(iii) Was the adverse condition substantial?

(iv) Was the adverse condition long-term?

81. When considering whether an employer knew or ought reasonably to have known that an employee suffered from a disability, the following principles were identified by Judge Eady QC in **A Limited v Z [UKEAT/0273/1ARN].**

(a) There need only be actual or constructive knowledge as to disability itself, not the causal link between the disability and its consequent effects which led to any unfavourable treatment.

(b) The employer need not have constructive knowledge of the employee's diagnosis to satisfy the requirements of Section 15 (2). It is however for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that the impairment had a substantial and (c) long-term effect.

(c) The question of reasonableness is one of fact and evaluation; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(d) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance; (i) because in asking whether the employee has suffered a substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes, and (ii) because, without knowing the likely cause of a given impairment, it becomes much more difficult to know whether it may well last for more than twelve months, if it has not already done so.

(e) The approach adopted to answering the question posed by Section 15 (2) is to be informed by the Code paragraphs 5.14 and 5.15.

(f) It is not incumbent upon the employer to make every enquiry where there is little or no basis for doing so.

(g) Reasonableness must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

82. Should the tribunal find that the respondent does not, or did not, have actual knowledge of the disability, then it must go on to consider whether the respondent had what is commonly called "constructive knowledge". That means whether the respondent could – applying a test of reasonableness – have been expected to know, not necessarily what was the claimant's actual diagnosis, but of the facts that would demonstrate that she had a disability ie that she was suffering a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. As to what a respondent

could reasonably have been expected to know, that is a question for the employment tribunal to determine. The burden of proof remains on the respondent, but the expectation is to be assessed in terms of what was reasonable. That in turn will depend upon all the circumstances of the case (**A Limited v Z** above).

83. What a respondent may reasonably have been expected to know, is different to what it might reasonably have been expected to do. It is now well recognised that mental health problems often carry a stigma, which discourages people from disclosing such matters. It may then be reasonable to require an employer to make enquiries about an employee's mental well-being. However, that does not answer the question as to what an employer might reasonably have been expected to know after having made those enquiries. Even if an employer could reasonably have been expected to do more, that does not necessarily mean that it could reasonably have been expected to have known of the employee's disability. Much will depend upon the nature of the enquiries made, or questions asked and the outcome of such enquiries or replies given to such questions, or what replies were likely (**A Limited v Z** above). Since the decision of the Court of Appeal in **Gallup v Newport City Council [2013 EWCA/CIV/1583**] it has been accepted that an employer cannot slavishly rely upon the contents of occupational health reports and opinions – it remains for the employer to decide in all the facts and information available to it, whether the employee suffers from a physical or mental impairment and, if so, whether that impairment satisfies the definition of "disability". In reaching that assessment, the employer may of course attach considerable weight to an informed and reasoned opinion from occupational health.

84. The claimant has withdrawn all her complaints of direct disability discrimination contrary to Section 13 of the Equality Act 2010 and those complaints are dismissed. The claimant's remaining complaints engage Sections 15, 20 – 21, 26 and 27.

85. **Section 15 claims**. In **Pnaiser v NHS England and Coventry City Council [2016 IRLR170]** the Employment Appeal Tribunal set out the proper approach to Section 15.

> "The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to legislative history of Section 15 of the Act, the statutory purpose which appears from the wording of Section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. For example, in **Land Registry v Houghton [UKEAT/0149/14]**, a bonus payment was refused by A

because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Employment Appeal Tribunal had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend upon the thought processes of the alleged discriminator. Moreover, the statutory language of Section 15 (2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required, the statute would have said so.

86. Sections 20 – 21 of the Equality Act 2010 impose upon an employer an obligation to make reasonable adjustments where a disabled person is placed at a substantial disadvantage as a result of a provision, criterion or practice, physical feature of the employer's premises or the absence of an auxiliary aid. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

87. In order for the duty to arrive, the employee must be subjected to a substantial disadvantage in comparison with persons who are not disabled. "Substantial" as defined in Section 212 (1) means "more than minor or trivial". The threshold is set deliberately low. The disadvantage is comparative, so it is no answer to a claim to show that persons who are not disabled are also disadvantaged by the PCP, if the claimant's disadvantage is greater. The duty to make reasonable adjustments arises when the employer can take steps to avoid the relevant disadvantage.

88. It is for the claimant to identify and prove the provision, criterion or practice. [**Project Management Institute v Latif 2007 IRLR 579].** It is important to keep in mind the whole of Section 20 (3). The elements within that are designed to link together. The purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore be the cause of the substantial disadvantage. Wide though the concept is, there is no point in identifying a PCP which does not cause substantial disadvantage. **[Secretary of State for Work and Pensions v Higgins – 2014 ICR 341].**

89. Whilst it is for the claimant to identify and prove the PCP, the claimant will have the benefit of the "reverse burden of proof" in Section 136 of the Equality Act 2010. The claimant must prove facts from which it could be inferred that any provision, criterion or practice has placed her at a substantial disadvantage. If so, the respondent must then go on to prove that there was no such provision, criterion or practice or that the claimant was not at a substantial disadvantage and there were no further or other steps that the respondent could reasonably have taken in order to reduce or eliminate any such disadvantage.

90. It is trite law that the duty to make reasonable adjustments does not arise if the employer lacks knowledge or constructive knowledge of either the disability or the disadvantage.

91. When pursuing complaints of harassment contrary to Section 26 of the Equality Act 2010, the claimant must only establish that the unwanted conduct "relates" to her disability and not that it is "because of" that disability. In deciding whether the unwanted conduct "relates to" the disability, the tribunal must consider the mental processes of the putative harasser. In determining whether conduct has the effect of violating the claimant's dignity or creating a relevant environment for the purposes of Section 26 (1) (b), the tribunal must take into account the employee's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In **Land Registry v Grant [201 EWCA CIV 769]** the court focussed on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:-

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

92. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated as violating a complainant`s dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. The tribunal must however take the complainant's perception into account in making that assessment. The intention of the alleged harasser may also be relevant in determining whether the conduct could reasonably be considered to violate a complainant's dignity. It is not necessary that the alleged harasser should have known that his or her behaviour should be unwanted. Where the language of the alleged harasser is relied upon, it will be important to assess the words used in the context in which the use occurred. [**Lindsey v London School of Economics – 2013 EWCA CIV 1650].**

93. The claimant brings allegations of victimisation contrary to Section 27 of the Equality Act 2010. It is necessary for the claimant to establish that she has done a protected act or that the respondent believed that she had or may do a protected act and that thereafter she was subjected to a detriment because she had done that protected act. In terms of being subjected to a "detriment", the claimant need only that she has been treated badly, not that others have been treated better than her.

94. The claimant must establish that she has been subjected to a detriment because she has performed a protected act. This means that the protected act has to be an effective and substantial cause of the employer's detrimental action, but does not have to be the principal cause. Again, the claimant will have the benefit of Section 136 in that she must prove facts from which in the absence of an explanation the tribunal could infer that any subsequent detriment imposed was effectively retaliation for the claimant doing a protected act.

<u>Constructive unfair dismissal</u>

95. The relevant statutory provisions are those set out above in the Employment Rights Act 1996.

96. To succeed in a complaint of unfair constructive dismissal, the employee must establish the following:-

    (i) a breach of contract by the employer;

    (ii) the breach is fundamental, ie one which indicates that the employer altogether abandons and refuses to perform its side of the contract;

    (iii) the employee has resigned in response to that breach;

    (iv) before doing so, the employee has not acted so as to affirm the contract notwithstanding the breach.

97. It is trite law that there is implied into every contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which must exist between employer and employee. The tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The employer's conduct must impinge upon the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in its employer. Proof of a subjective loss of confidence in the employer is not an essential element of the breach.

98. Constructive dismissal is a form of termination of the contract by a repudiation by one party which is accepted by the other. The proper approach once a repudiation of the contract by the employer has been established, is to ask whether the employee accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer. The issue is whether the breach played a part in the resignation.

99. The repudiatory breach by the employer may come from a series of acts. It is for the employee to elect to accept the breach and treat the contract as at an end. The employee must still resign in response to the breach. In **Kaur v Leeds Teaching Hospital NHS Trust [2018 EWCA/CIV/978],** guidance was given about what is commonly called the "last straw", which leads to an ultimate resignation.

    - What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?
    - Has he or she waived the breach, or affirmed the contract, since that act?

- If not, was that act or omission by itself a repudiatory breach of contract?
- If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? If so, there is no need to consider separately any previous affirmation as the effect of the final act is to revive the right to resign.
- Did the employee resign in response (or partly in response) to that breach?

100. The tribunal must therefore establish or identify the alleged breach of contract and establish the evidential basis for that and ask whether the facts are sufficient in law to amount to a repudiatory breach of contract. That is essentially a question of fact and degree.

101. If a final straw is argued as being the last in a series of acts or incidents that cumulatively amount to a repudiation, that final straw must contribute something, even if it is relatively insignificant to the breach. It must not be utterly trivial although it does not have to be of the same character as earlier acts. It is not necessary to categorise the final straw as "unreasonable" or "blameworthy" conduct in isolation. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer **[Waltham Forest v Omilagu – 2004 EWCA-CIV-1493].**

102. It is trite law that it is not implied into every contract of employment that the employer will give the employee a reasonable opportunity to obtain redress in respect of a grievance. **[WA Goold (Pearmark) Limited v McConnell – 1995 IRLR 516].** It is a question of fact whether the poor handling of a grievance is sufficiently bad.

Conclusions

103. The tribunal found that the claimant's Morton`s Neuroma is and was at all material times a physical impairment which had and has a substantial and long-term adverse effect on her ability to carry out normal day to day activities. The respondent was aware at all material times that the claimant suffered from Morton`s Neuroma and of its impact and was thus aware that it amounted to a disability. The tribunal was not satisfied that the claimant had established that she suffered from a mental impairment (depression) which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. The claimant failed to provide any meaningful evidence as to the existence of a mental impairment which had any effect on her ability to carry out normal day to day activities, which was both substantial and long-term. The tribunal was not persuaded by the claimant's attempt to categorise her work-related stress as depression. The tribunal found it likely that the claimant's absences were a response to adverse circumstances at work, which the claimant either didn't like or with which she disagreed and in respect of which her reaction was to take sickness absence. The claimant's attempts to influence the wording of the fit - note provided by her GP (as mentioned in paragraph 15 above) were found by the tribunal to be examples of the claimant's exaggeration of her symptoms and their cause.

104. The tribunal found that the respondent did not know and could not reasonably have been expected to know that the claimant was suffering from depression. There were no facts provided by the claimant, her GP or the respondent's occupational health physicians which could lead a reasonable employer to conclude that the claimant was suffering from depression. Even if the claimant's depression did amount to a disability as defined in Section 6 of the Equality Act 2010, the respondent did not know about it and could not reasonably have been expected to know about it.

105. The tribunal found the claimant generally to be an unreliable and unpersuasive witness of fact. A clear example was her insistence that the reason for her lengthy absences was because of her depression. It was only when Mr Tinnion for the respondent took the claimant through each of the fit notes that she reluctantly accepted that none of them mentioned the word "depression" and that there was no evidence anywhere in the voluminous bundle which mentioned "depression", apart from the medical notes which were not disclosed to the respondent at the time. Nevertheless, the claimant maintained her insistence throughout that the respondent was aware, or ought to have been aware, that she suffered from depression and that it amounted to a disability.

106. The claimant maintained her allegation that Mrs Boyd had insisted that she could only leave work for medical appointments relating to her Morton`s Neuroma some 25 minutes before those appointments. It was only when Mr Tinnion took her through each individual appointment, as recorded in the bundle, that she accepted that this had never been the case. The claimant's description of the reorganisation of her classroom was similarly exaggerated. The claimant's insistence that the headteacher's "rolling her eyes" towards her amounted to an act of harassment, was another example of the claimant's exaggeration of the impact of minor or trivial matters. The claimant's inability or refusal to answer straightforward questions in cross-examination throughout the hearing (as is referred to in paragraph 7 above) reinforced the tribunal's view that the claimant was frequently being evasive, obstructive and less than candid with the tribunal.

107. The claimant withdrew all her allegations of direct disability discrimination contrary to Section 13 of the Equality Act 2010. All those claims are dismissed.

108. The claimant maintained several allegations of unfavourable treatment because of something arising in consequence of her disability, contrary to S.15. In each of those cases, as described above, the claimant conflated the reason for any treatment which she did not like, with the consequences of that treatment. In each of those cases, the claimant failed to identify and describe what was the "something" which arose as a consequence of her disability. The claimant failed to establish facts from which the tribunal could infer that any treatment about which she complained was in some way associated with that "something". There were certainly no facts from which the tribunal could infer that the treatment was because of that "something". The claimant alleged that the treatment was "unfavourable" because of the impact it had upon her, which impact was made more serious because of her disability. For the reasons set out above, none of the allegations of unfavourable treatment because of something arising in

consequence of disability, contrary to Section 15 of the Equality Act 2010, are well-founded and all those claims are dismissed.

109. By the end of the hearing, there was only one remaining complaint of failure to make reasonable adjustments and that related to the reorganisation of the claimant's classroom by Mrs Boyd in November 2016. The facts are set out in paragraphs 17 above. The claimant alleged that the respondent applied a provision, criterion or practice of rearranging her classroom and that this placed her at a substantial disadvantage because of her physical impairment (Morton`s Neuroma) in that she had to walk further, be on her feet for longer and was thus subjected to additional pain and discomfort. The adjustment sought by the claimant was that the classroom set up should be left as she personally required. The tribunal was not satisfied that the rearrangement of the classroom placed the claimant at any substantial disadvantage. The tribunal accepted the description of the rearrangement as made by Mrs Boyd. Furthermore, the tribunal found that the claimant was free to rearrange the classroom to suit her own requirements at any time (and indeed did so), provided that she ensured it was arranged differently and as per the headteacher's instructions, if the claimant was to be absent for any length of time. The allegation of failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010 is not well-founded and is dismissed.

110. The claimant made several allegations of harassment, contrary to Section 26 of the Equality Act 2010. In each of those cases, as is described above, the claimant described the behaviour which she alleged to be acts of harassment and described the impact of that behaviour upon her. What the claimant failed to do in every case was to establish a causal connection between that treatment and either her physical or mental impairment. The claimant failed to prove facts from which the tribunal could infer that any unwanted conduct was in any way whatsoever related to her physical (or mental) impairment. The claimant's case was simply that "I am disabled and I did not like the way I was treated, therefore this treatment amounts to harassment contrary to Section 26". In each case, the respondents gave an explanation for their conduct and that explanation was accepted by the tribunal. None of the allegations of harassment are well-founded and all are dismissed.

111. The claimant maintained several allegations of victimisation, contrary to Section 27 of the Equality Act 2010. Again, the claimant identified the conduct by the respondent which she did not like or with which she disagreed, and which occurred after she had made a protected act (the raising of the grievances). In each case, the claimant described the respondent's behaviour as something which subjected her to a detriment and that the imposition of the detriment was because she had done the protected act. The tribunal found that the claimant had failed to establish in any of those cases that the respondent's conduct was in any sense whatsoever because she had done the protected act. There was no causal link between the protected act and the alleged detriment. Those findings apply to each allegation of victimisation, save for that which relates to the respondent's alleged failure to provide a reference confirming that during her employment the claimant had not been subjected to any disciplinary procedures nor safeguarding issues.

112. All the other allegations of victimisation are not well-founded and are dismissed.

113. The tribunal found that the respondent's failure or refusal to confirm in a reference that the claimant had not been subjected to any disciplinary action or any safeguarding issues, does satisfy the definition of victimisation in Section 27 of the Equality Act 2010. The tribunal found that the claimant had established facts pursuant to Section 136, from which the tribunal could infer that the reason for the treatment may be discriminatory. The respondent failed to provide any meaningful explanation for its behaviour and thus failed to prove on the balance of probabilities that there was no discriminatory reason for the behaviour.

114. The relevant facts with regard to this allegation are as follows:-

    (i) the claimant had not been subjected to any disciplinary proceedings during her employment with the respondent, nor had there been any safeguarding issues regarding her;

    (ii) the respondent had confirmed in the draft reference attached to the draft compromise agreement, that there had been no such disciplinary proceedings or safeguarding issues;

    (iii) the first reference provided after the claimant's resignation, but before she issued employment tribunal proceedings, confirmed that there had been no disciplinary proceedings or safeguarding issues;

    (iv) immediately after the respondent was served with the claimant's claim form ET1 in the Employment Tribunal, (the protected act) they were no longer prepared to confirm that there had been no disciplinary proceedings or safeguarding issues;

    (v) the only explanation given by Mrs Boyd for this change in approach was because she was "acting on legal advice".

115. The tribunal found those to be facts from which the tribunal could decide, in the absence of any other explanation, that the respondent had contravened Section 27. The tribunal found that the respondent's explanation ("acting upon legal advice") was inadequate. The tribunal was satisfied that the burden of proof shifted to the respondent to show that its change of approach in failing to confirm that there had been no disciplinary proceedings or safeguarding issues, was not retaliatory action in response to the presentation of the claim form by the claimant to the Employment Tribunal. The respondent has failed to establish that there was a non-discriminatory reason. Accordingly, the claimant's complaint against the first respondent of victimisation contrary to Section 27 of the Equality Act 2010 is well-founded and succeeds.

116. The Tribunal was satisfied that the second respondent, Ms Boyd, was at all times acting in the course of her employment with the first respondent. Ms Boyd was acting in accordance with the legal advice of the County`s legal department when she declined to provide the reference sought by the claimant. That was not

challenged by the claimant. Ms Boyd relied upon that legal advice and the Tribunal was satisfied that no personal liability should attach to her in that regard. (S.109-110 Equality Act 2010.)

117. The Tribunal found that the respondent had not committed any breach, or any fundamental breach of the claimant`s contract of employment. The respondent reasonably dealt with the grievances raised by the claimant. Any delay which may have occurred did not amount to unreasonable delay in all the circumstances. There was no course of conduct over a period of time which amounted to a breach of the implied term of trust and confidence. Each of the allegations of discriminatory behaviour were found by the Tribunal to have not taken place as described by the claimant. Although not specifically pleaded by the claimant as individual breaches, the Tribunal found that none of the following matters amounted to conduct which the claimant could not be expected to put up with;

a) re-arranging her classroom
b) not promptly holding return to work meetings
c) the letter of management advice
d) late payment of her salary
e) late payment of her salary
f) attending attendance management meetings during the “pause”.
g) being mistakenly told her employment was terminated.
h) the alleged suppression of information by Carole Barclay.
i) the late replies to her Subject Access Requests
j) the charges for the hard copies of that information
k) the chair of governor`s conduct at the meeting on 5th July.

What the claimant described as “the last straw”, was an innocuous and trivial incident, when Ms Barclay “rolled her eyes” at the claimant, pushed papers back across the table and dropped her pen on the desk. That was not something which amounted to or contributed to a fundamental breach of contract. There was no conduct by the respondent which was calculated or likely to destroy or seriously harm the relationship of trust and confidence and nothing which the reasonable person would expect the claimant not to have to put up with. The complaint of unfair constructive dismissal is not well-founded and is dismissed.

118. The parties will be provided with details of a private preliminary hearing by telephone with a time estimate of 90 minutes at which arrangements will be considered for the listing of a remedy hearing to consider what remedy should be awarded to the claimant.

G Johnson

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
11 February 2022

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