Case No: 2301842/2017
2301571/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr R Knights		**Orchard Hill College Academy Trust**

Heard at:	London South Employment Tribunal	**On:**	8, 9, 11, 12, 15, 16, 17, 18 & 19 March 2021 6, 7, 8, 9, 10 & 13 December 2021 In chambers on 1 & 3 March 2022

Before: Employment Judge Hyams-Parish
Members: Ms C Edwards and Ms N Christofi

Representation:
For the claimant: In person
For the respondent: Ms K Eddy, Counsel.

RESERVED JUDGMENT (CORRECTED)

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

(a) The whistleblowing detriment claim referred to at paragraphs 168 and 169 below is well founded and succeeds. The remaining whistleblowing detriment claims fail and are dismissed.

(b) The claim of constructive unfair dismissal fails and is dismissed.

(c) The claim of automatic unfair dismissal fails and is dismissed.

(d) The claims of failing to make reasonable adjustments fail and are dismissed.

(e) The claims of indirect discrimination fail and are dismissed.

REASONS

A. CLAIMS AND ISSUES

1. The claimant had originally lodged three claim forms with the Employment Tribunal. As becomes clear below, the claims set out in the second claim form were later withdrawn. This hearing was listed to determine those claims set out in the claimant's first and third claim forms. Those claims are as follows:

   (a) Constructive unfair dismissal (s.95(c) and s.98 Employment Rights Act 1996 ("ERA"))

   (b) Failing to make reasonable adjustments (s.20 Equality Act 2010 ("EQA"))

   (c) Whistleblowing detriment (s.47B ERA)

   (d) Indirect discrimination (s.19 EQA)

   (e) Automatic unfair dismissal (s.103A ERA)

2. Prior to the hearing, the parties had agreed a list of issues, which are set out in the Appendix to this judgment. These issues were referred to throughout the hearing and set out each of the allegations against the respondent.

B. CLAIM HISTORY AND HEARING CHRONOLOGY

3. This case has a long history to it, which it is necessary to set out briefly for reasons which become clear further on in this judgment.

4. The first claim form was presented on 14 July 2017. The claims contained in the first claim form were disability discrimination (failing to make reasonable adjustments), together with a claim for 'other payments', the

only description of which was stated as "*detrimental loss of progression with related training and pay*".

5. A case management hearing about the first claim was listed before Employment Judge Cheetham on 20 December 2017. No progress was made at that hearing due to the claims not being sufficiently particularised and the fact that the claimant had made an application for interim relief the day before the hearing.

6. It is evident from the file, and was repeated by the claimant during this hearing, that he had been dissatisfied about how the Employment Tribunal had managed his case. There were many lengthy emails on file in which the claimant complained about the Employment Tribunal's failures to make adjustments for his disabilities, those disabilities being autism, dyslexia, hypo-glycaemia, anxiety and depression.

7. The first claim was listed for a further case management hearing on 13 March 2018. In the meantime, a second claim form had been presented to the Employment Tribunal on 7 March 2018. The second claim form raised claims of failure to consult during the period leading to a TUPE transfer, and disability discrimination.

8. At the case management hearing on 13 March 2018, the claimant appeared in person and the respondent was represented by their solicitor. At this stage, only the first claim was before Employment Judge Pritchard because the second claim form was waiting to be vetted. The claimant was ordered, by 24 April 2018, to provide a schedule setting out particulars of each head of claim.

9. At around this time, the claimant was writing regularly to the Employment Tribunal, in lengthy emails, some of which related to an application to extend the deadline for providing the above mentioned particulars.

10. On 25 April 2018, the claimant was granted an extension of time, until 15 May 2018, to provide the information required by Employment Judge Pritchard.

11. A third claim form was presented to the Employment Tribunal on 1 May 2018. This followed the claimant's resignation with effect from 30 April 2018. The third claim form raised claims of constructive dismissal, whistleblowing dismissal, whistleblowing detriment and disability discrimination. Whilst the claimant attached two and a half pages of text to his claim form, it was not clear in this document what the specific allegations were.

12. On 10 May 2018, the Employment Tribunal wrote to the parties listing all three claims for a case management hearing on 10 July 2018. At that

hearing, Employment Judge Baron ordered the claimant to provide further particulars of claims in both the first and third claim forms by 28 September 2018.

13. A further preliminary hearing was held on 20 May 2019. As the claimant had still not supplied the further and better particulars ordered by Employment Judge Pitchard and Employment Judge Baron, Employment Judge Hyde made an unless order requiring the claimant to provide the further and better particulars by 1 July 2019.

14. The claimant instructed solicitors in mid-September 2019, who eventually provided the above ordered further and better particulars on 22 October 2019, many months after the claimant had been ordered to provide them. The further particulars went beyond what was contained in the claim form and therefore was treated as an application to amend. This application was allowed. The further and better particulars effectively became the claimant's pleaded case and were used as the basis for the agreed list of issues.

15. A further case management discussion took place before Employment Judge Hyde on 16 December 2019. The claimant was represented by Counsel and the respondent by their solicitor. A full merits hearing for the first and third claim forms was listed to commence on 1 February 2021.

16. Claims in the claimant's second claim form were withdrawn in April 2020.

17. The claimant was ordered to provide the respondent with a list of all relevant documents and copies of any documents not previously supplied, by 22 June 2020. The respondent, who had already provided one disclosure list, was ordered to provide an updated list. The parties were ordered to have agreed a hearing bundle by 4 December 2020, to be prepared by the respondent. The parties were ordered to exchange witness statements with references to page numbers in the bundle, on 2 October 2020.

18. A further preliminary hearing was listed before Employment Judge Hargrove on 16 December 2020. The claimant appeared in person and the respondent was represented by their solicitor.

19. From the case management order it is clear that the full merits hearing was postponed and relisted to commence on 8 March 2021. In addition, the respondent was ordered to send the claimant an updated document list by 8 December 2020 and the claimant was ordered to send the respondent copies of any additional documents relevant to the issues in the case which he wished to be added to the proposed bundle, by 8 January 2021.

20. By 15 January 2021, the respondent was ordered to compile a joint bundle for the final hearing. By 12 February 2021, the parties were ordered to exchange their witness statements.

21. The claimant was granted a further two weeks by Employment Judge Ferguson, until 22 January 2021, to provide his documents to the respondent.

22. On 22 January 2021, the claimant complied with the order of Employment Judge Hargrove, as amended by Employment Judge Ferguson, by sending to the respondent his documents attached to 78 emails. In total, the claimant had sent to the respondent in excess of 30,000 pages of documents.

23. The claimant made clear to the respondent that he wanted all 30,000 pages added to the consolidated bundle. It was, without doubt, an extraordinary number of documents and wholly unreasonable for the claimant to require the respondent to include them in the hearing bundle, particularly only weeks before the full merits hearing was due to start.

24. The respondent solicitors refused to include them, not least because, at that late stage, there would not have been time to have fully reviewed them

25. On 27 January 2021, the respondent's solicitor wrote to the Employment Tribunal seeking an order that the claimant limit the documents he wanted included in the consolidated bundle to a proportionate number.

26. On 10 February 2021, pending a response from the Employment Tribunal to their above letter, the respondent wrote to the claimant inviting him to send them his documents indexed, with duplicate copies removed, and with consideration given to whether it was necessary to include all of the documents in the bundle given the number of them. In their letter to the claimant, they wrote "*we are prepared to assist you as far as reasonably possible but it is neither feasible nor practical to produce a bundle on the basis of the way you have sent the documents thus far*". The letter went on to say "*we need to work together practically to ensure that the case can be heard on 8 March 2021*".

27. Faced with a final hearing that was fast approaching, the respondent attempted to put the documents in some kind of order to enable the final hearing to go ahead, thereby avoiding the need for a further postponement. This was sent to the claimant in PDF format in 16 parts on 22 February 2021. Each part was paginated, indexed and hyperlinked.

28. By email dated 1 March 2021, the claimant wrote to the respondent's solicitors and the Employment Tribunal setting out his dissatisfaction with the bundle and the way it was structured.

29. The hearing eventually started on 8 March 2021. On the morning of the first day of the hearing the Tribunal discussed what adjustments the claimant would need to enable him to fully participate in the hearing. A time table was agreed for each day to enable him to have sufficient breaks but also to enable him to take his children to school and pick them up. It was agreed that the Tribunal would proceed at a pace which the claimant was comfortable with and that if the claimant needed additional time to read through documents he could be given it.

30. The Tribunal also took the time to discuss the bundle with the claimant. The Tribunal's concern was that the claimant's witness statement did not refer to documents in his bundles. The claimant initially said that he did not know he needed to refer to page numbers of documents; that was until he was shown the order requiring the parties to do so.

31. It is fair to say that the claimant expressed his dissatisfaction at the way the respondent had compiled his documents. It was suggested to the claimant by the Tribunal that he could have put the document bundle(s) together himself, if he wished, but that the respondent had tried their best to put them together in an order which seemed sensible according to the emails they were attached to. In any event, the Tribunal agreed to give the claimant the first two days of the hearing to look through the documents and identify the important ones he needed to refer to in support of his case.

32. By the third day of the hearing, the claimant had prepared a further version of his witness statement which signposted documents in the hearing bundle, albeit not by page number. The Tribunal informed the claimant that the hearing needed to start or it would not complete.

33. The claimant therefore began his evidence on the third day of the hearing and was cross examined by Counsel for the respondent.

34. On day 5 of the hearing, the claimant notified the Tribunal that he had a migraine and was too unwell to attend the hearing. On day 6, again the claimant was too unwell to attend the hearing and supplied a doctor’s note to that effect. On days 7 and 8 the claimant continued to be too unwell to participate in the hearing. Whilst the claimant attended the hearing on the morning of day 9, the Tribunal was not happy to continue as the claimant did not look well enough to participate and the claimant said he was still suffering from a migraine. The Tribunal had no choice, having listened to representations by the respondent, to postpone the hearing with the claimant's evidence incomplete.

35. The hearing was postponed to a future date. It was again postponed as the claimant was unwell on the date the hearing was due to be resumed.

The hearing eventually resumed on 6 December 2021, nine months after the first part of the hearing.

36. The Tribunal spent day 1 of the resumed hearing reading papers. The claimant completed his evidence on the morning of day 2. Over the course of the following days, the following witnesses gave evidence for the respondent and were questioned by the claimant:

- Jayne Hammond-Smith, Former HR director.
- Danielle Harry, Teacher.
- Janet Sherborne, Chief Operating Officer.
- Diane Brazier, Head of Estates and Facilities Management.

37. During the resumed hearing, the claimant again complained about the way in which the respondent had compiled the documents he had provided, alleging that the solicitors for the respondent had deliberately manipulated the documents to make it harder for him to find what he wanted. The claimant was asked what he was inviting the Tribunal to do about matters he was raising, to which he replied that he wanted the response struck out. The Tribunal retired to consider the comments being made by the claimant and concluded that it would hear an application by the claimant even though it was half way through the resumed hearing. The Tribunal considered it important to provide a formal ruling to all parties on the issue.

38. Having heard submissions by both parties, the Tribunal reminded itself of the powers contained in Rule 37 of the Employment Tribunal Rules, that permitted an Employment Tribunal to strike out a claim or response in a number of defined circumstances, including where the manner in which the proceedings had been conducted by or on behalf of the claimant or the respondent (as the case may be) was scandalous, unreasonable or vexatious; alternatively for non-compliance with any of the Employment Tribunal rules, or with an order of the Employment Tribunal.

39. The Tribunal reminded itself that the power to strike out was a discretionary power, which meant that, even if one or more of the grounds were made out, the Tribunal was not obliged to strike out, it being a draconian power that needed to be exercised sparingly.

40. The Tribunal concluded that it was clearly inappropriate to strike out the response. The Tribunal rejected the suggestion that solicitors for the respondent had deliberately manipulated the claimant's documents, there being no evidence whatsoever to support such a serious allegation. It was simply unreasonable to expect the respondent to comply with a request to incorporate 30,000 pages into a hearing bundle at such short notice.

The order that the respondent would be responsible for compiling the hearing bundle would never have been made, in the Tribunal's view, in anticipation that the claimant would produce so many documents at such short notice. The Tribunal accepted that it took a considerable amount of time (80 hours) for the respondent solicitors to organise the claimant's documents in the way they had. As has already been said, each bundle was indexed and hyperlinked, making it much easier to identify the documents needed.

41. The Tribunal informed the parties that it was continually mindful of adjustments that needed to be made for those appearing before the Tribunal who were disabled. It had gone to great lengths to establish with the claimant what reasonable adjustments should be made for him at the beginning of the hearing. Even if the claimant was not familiar with his bundles in March 2021, which the Tribunal considered that he ought to have been, he had had the benefit of a nine month break during the first and second parts of the hearing, to familiarise himself with his own documents and to re-order them, if he wanted to, in a way which he was comfortable with. If he was unsure whether he could do that, he could have written to the Employment Tribunal at any point.

42. The Tribunal concluded that it was not in accordance with the overriding objective to postpone the proceedings given the delays that had occurred already, albeit there was no application by the claimant to postpone. This ruling was given to the parties with reasons.

43. The respondent concluded its case on day 5. The parties presented their closing submissions on the morning of day 6. The parties were informed that the decision would be reserved.

44. Despite the claimant having resisted putting page numbers in his witness statement and complaining about the bundle generally, the claimant presented a written document for the Tribunal on day 6 of the resumed hearing, in which he identified all of the page numbers in the bundles that were relevant to the issues in the case. This was something he should have done at the outset when asked to do so and placed the Tribunal in a difficult position because many of these documents had not been referred to at all during the hearing. The Tribunal did refer to such documents when deliberating, simply to be clear what they were. It took these documents into account but did so with extreme caution so as not to make this unfair for the respondent who had not cross examined the claimant about these documents. The Tribunal had also decided that it could not take into account any document relating to a crucial issue that had not been identified during the hearing.

C. BACKGROUND FINDINGS OF FACT/CHRONOLOGY OF EVENTS

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

46. The respondent is a company limited by guarantee and exempt charity which operates 15 schools in London, Surrey, Sussex and Berkshire for pupils and students with special needs, one of which is Brantridge School ("the School"). The School had approximately 35 pupils on roll. Most of the pupils had very significant problems with behaviour, and most had come to the School after having been excluded from other schools for violence.

47. The claimant commenced employment at the School on 1 September 2015 when it was part of another Trust called the Radius Trust. At that stage he had been teaching since approximately 2007. The claimant had been working at the School via an agency before being interviewed for a teaching post in July 2015. On 1 January 2018, the School transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

48. The claimant was interviewed by the then Head of School, Ms Wagland, and then Head of Education, Mr Warner. In his application for the post, it is not in dispute that the claimant informed his employer that he was dyslexic and had reactive hypo-glycaemia.

49. The claimant requested that reasonable adjustments be made to the shortlisting process, such as being given written copies of questions, word processing facilities, an opportunity to measure sugar levels and take a snack if necessary. In his supporting statement accompanying his application, the claimant wrote, "*I have good oral and written communication skills. I am very personable and enjoy working with others….My written skills are very good also. I am very good at planning and report writing, however, with my Dyslexia I word process my work to be more effective*". He said that he was "*used to planning assessment and report writing to timetable, whilst being organised enough to allow for unexpected demands of the job*". He said because of his reactive hypoglycaemia, he would need to monitor and maintain his blood sugar levels by "*healthy eating and grazing throughout the day on wholemeal foods as well as keeping active*", but did not suggest that it would require any special arrangements. Indeed, he said "*This fits in perfectly with the pattern of the school day….*".

50. The classes at the School were named after the planets in the solar system: Saturn, Titan, Mercury, Jupiter, Mars and Neptune. A new Pluto class was added in September 2018, and a new class teacher was recruited to teach it. The claimant was initially the class teacher for Jupiter when he joined the School in September but subsequently set up and taught Mercury class in February 2016 to cater for the most severely autistic children at the School. As such, he was given autonomy to set up the classroom as he wished and to adapt the learning environment as he saw fit. Mercury class was a very small class, which, for most of the period to which the claim relates, had two members of staff for three pupils. This is to be contrasted with the size of the other classes in the School, which had up to eight pupils supported by 2 members of staff.

51. On 26 April 2016, the claimant wrote to the then CEO of the respondent, Mr Williams raising a number of concerns "*regarding poor practice at Brantridge School and the Radius Trust in relation to my recruitment, induction and supervision*". The concerns he raised were as follows [sic]:

- Not having a contract of employment despite being in post for almost nine months.
- Receiving an offer letter in December and being asked to falsely backdate the start.
- Not being paid at the correct rate for nine months.
- Not receiving pay slips for four months.
- Not having a line manager for four months.
- Not receiving adequate induction and being asked to falsify his induction pack to make it appear as though he had received certain training.
- Not receiving the training to enable him to perform his role effectively.
- Not receiving adequate PPA time or breaks.
- Having no consideration made for the claimant's dyslexia and hypo-glycaemia.

52. Ms Brazier and Mr Mason subsequently met with the claimant to discuss the claimant's above grievances. That meeting was positive. The claimant was given an additional two extra lessons free a week of PPA to allow him to pursue an autism accreditation at the request of the claimant. His contract was amended so that he was paid the sum that he said had been

agreed at the outset of his employment. Ms Brazier spoke with payroll, who confirmed the email address they had used was incorrect. Ms Brazier then arranged for the claimant's payslips to be resent to the claimant.

53. By letter dated 8 March 2017 the claimant raised a formal grievance (albeit it was dated 1 March 2018) about what he alleged to be safety concerns in the working environment and the negative effect on his dyslexia and hypo-glycaemia. In it he wrote [sic]:

> ***I have repeatedly raised my concerns over safety within the working environment along with the poor coordination by the head of education and the negative effect that this has had on all aspects of my work. This has caused me considerable difficulties with my Dyslexia and Reactive Hypo-Glycaemia as disclosed in my application. My workload has increased substantially with the ongoing ineffective coordination by the head of education, the increased incidents and subsequent reports due to unaddressed violent behaviour of students and reduced class support that has resulted in substantially protracted hours that is exacerbated by No PPA, increased responsibilities without allocated time and inadequate breaks. The stress from protracted hours without adequate breaks, in the working environment of extremely volatile, dangerous and violent behaviours of the students and their extremely poor hygiene. All of which has lead to a detrimental effect to my health leading to protracted illness and bringing on states of hypo glycaemia from not having opportunity to eat little and often as I had made clear I required on numerous occasions. This has been a direct result of failing to make reasonable adjustments in the workplace for my disability. I have repeatedly returned from work with no return to work interview or opportunity to discuss the cause of my absence to address the cause.***
>
> ***I have been refused lunch on several occasions at the direction of Miss Johns when I was timetabled to be in the dining Hall on lunch duty. Lunch duty is constantly changing without notice depending on whether or not care will support education staff leaving me without the opportunity to order an alternative lunch when I was timetabled to be in the dining room but then removed without good notice.***
>
> ***I am with the students from 08:30 until 16:30 often without breaks sometimes beyond that. Often on my own without support having to cover all breaks, that is especially difficult when some learners refuse to go out when others need and insist on having their outside time. Since we have had no behaviour lead and often because staff do not even reply to calls over the radio for support during incidents, I have frequently had to resort to asking domestic staff to supervise the boys whilst I literally run to the toilet.***
>
> ***I have repeatedly raised concern about ineffective practice that unnecessarily increases my workload exacerbating my dyslexia and I was treated unfavourably for doing so. Despite your being fully aware of my disability no support was offered or occupational health referral carried out. I was made to feel inadequate and told to work faster and told to restrict the hours I work at school resulting in me***

> ***having to take more work home out of hours causing more stress. I have even been told not to complete paperwork by Mr. warner only to subsequently be harrassed for the work knowing that there has been insufficient time due to loss of PPA and the high level of incident reports to complete. Mr Warner has consistently refuted that the boys were a real challenge and has actively discouraged the head of school in pursuing my request last summer for 1:1 funding for CH,JM & ND to ensure safety in the class and I have had to endure months of repeated assaults without adequate support.***

54. The claimant alleged that the respondent had breached sections 15 and 20 of the EQA, setting out a list of adjustments that he said that the respondent had failed to make. He further alleged that he had been subject to detriments for making protected disclosures. It was a lengthy 25 page letter in which he also informed the respondent that he had recently been diagnosed with autism.

55. There followed a meeting between Mr Mason, the claimant and Ms Hammond-Smith as a result of which the following actions were agreed:

- The claimant was concerned about the lack of regular education team meetings, therefore it was agreed that regular meetings would be implemented.

- Mr Mason moved pupils with more challenging behaviour to another teacher.

- The claimant was concerned about the leadership of his line manager, Mr Warner; it was therefore agreed that Mr Mason would help both parties in building a better working relationship.

- The claimant was concerned that Mr Warner did not understand and appreciate the concerns he had raised and it was agreed that a meeting would be arranged between Mr Mason, Mr Warner and the claimant in order to discuss those concerns.

- The claimant had a number of concerns about the way safeguarding issues were reported to the Designated Safeguarding Lead and the records retained by the School. It was therefore agreed that the respondent would review its safeguarding procedures.

- In light of the claimant's disclosure of his medical conditions and his request for adjustments to his working environment, it was agreed that the respondent would arrange for the claimant to meet with an occupational health practitioner to obtain recommendations, such as dragon software, a different computer screen and adaptations to the School pod.

56. It was Mr Mason's and Ms Hammond-Smith's belief that they had begun to resolve the claimant's grievances informally.

57. Between 13-16 March 2017, there were three incidents involving the claimant which resulted in him taking sick leave with effect from 17 March 2017 and not returning to work again before his resignation. These were as follows:

    57.1. On 13 March 2017, a male student picked up a four foot pole and started to attack the claimant. The claimant took the pole away from the student and held him in a small child hold. As he did this, the student jumped in the air, swung his head back with full force, thereby hitting the claimant in the face.

    57.2. The second incident occurred on 15 March 2017, when a male student hit the claimant with his coat, the zip making contact with the part of the claimant's face that had been hit the previous day.

    57.3. Finally, on 16 March 2017, the claimant attempted to break up a fight between two male students. One of them struck the claimant on the back of his head with a hard backed book, whilst the other hit the claimant on the hand.

58. The respondent made several attempts to contact the claimant when he was on leave. Mr Warner called the claimant and left a voice mail message for him on 28 March 2017. He then wrote to the claimant on 30 March 2017 asking the claimant to get in touch by email or telephone to discuss his injury. The claimant did not respond. Mr Warner contacted the claimant again on 6 April 2017, asking the claimant to contact him by email or telephone to allow the school to fulfil its responsibilities. He provided the claimant with a copy of the absence policy, and explained that contact would allow him and the School to support the claimant during his period of absence. Again, the claimant did not respond.

59. On 3 April 2017, the claimant wrote to Mr Mason complaining about his failure to deal with the grievances raised by the claimant in his grievance dated 1 March 2017.

60. Ms Hammond-Smith replied to the claimant setting out her understanding that there had been a productive discussion between Mr Mason and the claimant as a result of which certain actions had been agreed. She said that she thought the grievance had been handled informally (notwithstanding the fact that his grievance had been headed "formal grievance") but that if he wanted to pursue a formal grievance, he could still do so.

61. On 5 May 2017, the claimant's union representative contacted Mr Mason, to ask why there had been "no progress" with the claimant's grievance. Mr Mason responded to explain that the claimant had not responded to the School or the respondent's attempts to contact him, nor to his (Mr Mason's) two attempts to contact him by email. The claimant's union representative then replied with a complaint to the effect that the claimant had sent in his GP sick certificates, and it had been inappropriate to contact him over the school holidays.

62. As the claimant had, in his grievance letter, specifically requested an Occupational Health ("OH") referral, this was taken forward by his line manager on 16 March 2017. Thereafter, OH made several, unsuccessful, attempts to contact the claimant by email, text, landline and mobile phone.

63. In July 2017, the claimant made allegations to Ofsted, and the local authority asked Radius to carry out of an investigation.

64. Attempts were made by the School to have the claimant attend an investigation meeting on 15 August and 1 September 2017. The claimant declined. Ms Sherbourne was tasked with carrying out the investigation, which she did in September and October 2017. The claimant declined a further request to meet with Ms Sherborne before her report was finalised.

65. On 1 March 2018, Ms Sherborne sent a welcome letter to the claimant in which she sought a meeting with the claimant either in person or by telephone, and sought to progress an OH referral for him. Further attempts to engage the claimant were unsuccessful.

66. The claimant resigned on 30 April 2018. This was the same day that his entitlement to sick pay expired. He presented a claim in the Employment Tribunal (his third claim form) the following day, which included a claim for interim relief.

D. LAW

Constructive unfair dismissal

67. Section 95(1)(c) ERA defines a constructive dismissal as follows:

> ***(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.***

68. In order to claim constructive dismissal, the employee must establish that:

- there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment;

- the employer's breach *caused* the employee to resign; and

- the employee did not *delay* too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

69. The claimant in this case relies on a breach of the implied term of mutual trust and confidence, which means that the employer "*shall not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee*": ***Malik v BCCI [1997] ICR 606.*** The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

70. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA*** the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.

71. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.

72. The court in ***Kaur*** identified the following questions to be asked in a constructive dismissal case:

- What was the most recent act that the employee said had caused their resignation?

- Had the employee since affirmed the contract?

- If not, was the act by itself a repudiatory breach of contract?

- If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

- Did the employee resign in response to that breach?

73. If the Tribunal finds that the claimant was constructively dismissed, it must then go on to decide whether the dismissal was unfair.

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

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

75. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the respondent acted fairly in treating that reason

as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

Whistleblowing Detriment

76. The term "protected disclosure" is defined in section 43 of the ERA as follows:

> ***43A. Meaning of "protected disclosure"***
>
> ***In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.***
>
> ***43B. Disclosures qualifying for protection***
>
> ***(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—***
>
> ***(a) that a criminal offence has been committed, is being committed or is likely to be committed,***
>
> ***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***
>
> ***(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,***
>
> ***(d) that the health or safety of any individual has been, is being or is likely to be endangered,***
>
> ***(e) that the environment has been, is being or is likely to be damaged, or***
>
> ***(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.***

77. A disclosure of information must be one that conveys facts rather than simply makes an "*allegation*" or "*mere assertion*". That said, it is important not to draw a rigid distinction between them as they are not mutually exclusive concepts. Importantly, the disclosure of information has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s.43(B)(1).

78. Section 43(B)(1) ERA requires that the disclosure of information must "*in the reasonable belief of the worker……tend to show*" one of those matters at s.43(B)(1)(a)-(f). The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established,

and that the belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure. It is a subtle but important distinction.

79. A worker does not therefore have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. The wording of S.43B(1) ERA indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. This introduces a requirement that there should be some objective basis for the worker's belief. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

80. In determining public interest, a tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view. The reasons why a worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

81. Section 47(B) ERA states the following:

> ***(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.***
>
> ***(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—***
>
> ***(a) by another worker of W's employer in the course of that other worker's employment, or***
>
> ***(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.***

82. The term 'detriment' is not defined in the ERA, but it clearly has a broad ambit. Its meaning has been given extensive consideration in case law, much of which has examined the term in the similar context of the anti-

discrimination legislation, which makes it unlawful for an employer to discriminate against an employee by subjecting him or her to 'any other detriment'. In ***Ministry of Defence v Jeremiah 1980 ICR 13, CA***, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL***. Subsequent cases have established that detriment covers such things as failure to promote, refusal of training or other opportunities, disciplinary action and reductions in pay, as well as general unfavourable treatment

83. Section 48 ERA states the following:

> ***(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.***

84. As is clear from the above extract from the ERA, with a whistleblowing detriment claim, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (s.48(2) ERA). It does not mean that, once the claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e., that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

85. As to causation and whether a whistleblower was subject to a detriment because s/he made a protected disclosure, the law was clearly stated by Elias LJ in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372 CA*** where he made clear that a tribunal's task is to decide whether the protected disclosure *materially influenced* (in the sense of more than trivially) the employer's treatment of the whistleblower.

Automatic unfair dismissal

86. Here, once it is established that the reason for dismissal is the fact that the claimant made a protected disclosure, the dismissal is automatically unfair. Section 103A ERA states:

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

protected disclosure.

Failing to make reasonable adjustments

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

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

88. Section 21 EQA states as follows:

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

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

    (a) What was the PCP?

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

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

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

91. The burden is on the claimant to prove facts from which this tribunal could, in the absence of hearing from the respondent, conclude that the respondent has failed in that duty. The claimant therefore has to prove that a PCP was applied to him and that it placed him at a substantial

disadvantage. The claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

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

93. To test whether the PCP is discriminatory or not, it must be capable of being applied to others: ***Ishola v Transport for London 2020 ICR 1204, CA.*** However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words '*provision, criterion or practice*' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not *necessarily* one.

Indirect discrimination

94. The law relating to indirect discrimination is set out in s.19 EQA, which states:

> ***(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.***
>
> ***(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—***
>
> ***(a) A applies, or would apply, it to persons with whom B does not share the characteristic,***
>
> ***(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,***
>
> ***(c) it puts, or would put, B at that disadvantage, and***
>
> ***(d) A cannot show it to be a proportionate means of achieving a legitimate aim.***

95. References to 'group' and 'individual' disadvantage in this judgment are to to requirements of sections 19(2)(b) and (c) EQA above.

96. Section 136 EQA, which applies to any proceedings brought under the EQA, requires the claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination. Section 136 EQA goes

on to provide that once the claimant has shown a prima facie case, the tribunal is obliged to uphold the claim of discrimination unless the respondent can show that no discrimination occurred.

97. The matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged others with the same protected characteristic generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification.

98. On this basis, the burden therefore lies with the claimant to establish the first, second and third elements of the statutory definition of indirect discrimination. Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

Time limits

99. Section 123 EQA deals with time limits for bringing discrimination claims in the employment tribunal and states the following:

> ***(1) [Subject to [sections 140A and 140B] 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.***
>
> ***……***
>
> ***(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.***

100. In ***British Coal Corporation v Keeble [1997] IRLR 336*** the court gave guidance on the factors which may be taken into account when deciding whether it is just and equitable to extend time, quoting the factors set out in s.33(3) Limitation Act 1980. These include:

- The length of, and reasons for, the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

101. Decisions since then have stressed that employment tribunals need not stick slavishly to these factors. Furthermore, whilst the reasons for any delay in presenting a claim need to be considered carefully by a tribunal, a crucial part of this exercise is considering the balance of prejudice between the parties, which means that the tribunal must weigh up the relative hardship caused to either party by extending the time limits.

102. Whilst employment tribunals have a wide discretion to allow an extension of time under the "*just and equitable*" test, the Court of Appeal said in ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA***, that "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*." The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be *extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.*

103. The time limit for bringing whistleblowing detriment claims are set out in s.48(3) and (4) ERA as follows:-

> ***An [employment tribunal] 1 shall not consider a complaint under this section unless it is presented—***
>
> ***(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or,***

where that act or failure is part of a series of similar acts or failures, the last of them, or

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

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

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

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

104. In ***Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193, CA***, the Court of Appeal held that S.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. It may not be possible to characterise the circumstances as an act extending over a period within the scope of s.48(4) by reference, for example, to a connecting rule, practice, scheme or policy; but, in Lord Justice Mummery's words, 'there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them'. Such a link might be established by considering whether the acts had all been committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised in any way. It would also be relevant to inquire why the perpetrators did what was alleged.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

105. The Tribunal considered each of the claims, applying the facts to the legal principles. Numbered references below are to the paragraphs in the list of issues.

106. It was a feature of this case that despite the voluminous documents provided by the claimant, and a lengthy witness statement, many of his allegations remained so vague and lacking in detail that the Tribunal found it difficult to reach the conclusions sought by him. At various points during

the claimant's questioning of the respondent's witnesses, the Tribunal attempted to refer the claimant back to the allegations in the list of issues. This was in order to assist him focus his questions on the issues the Tribunal needed to determine. Even though the claimant acknowledged that assistance, he tended to ignore it and continue to question witnesses about irrelevant matters. Indeed, at one point, when asked to justify why he persisted in continuing with a certain line of questioning, he retorted that he "*did not realise that he had to serve it up [to the Tribunal] on a silver platter*". The claimant was told that it was not for the Tribunal to go in search of the evidence but rather it was for the parties to present their evidence to the Tribunal.

107. The end result, as can be seen from the Tribunal's conclusions below, was that insufficient evidence was provided by the claimant to prove the essential elements of many of his claims.

Indirect discrimination

108. The claimant's case (as was clear from his further and better particulars and the list of issues) was that, for the purposes of his indirect discrimination claim, the disabilities he relied on were autism and dyslexia only.

109. The Tribunal approached its consideration of these claims by first looking at whether they had been brought in time. It then looked at each of the PCPs, whether the factual premise of the PCP was correct and whether it could properly be considered a PCP (s.19(2)(a)). The Tribunal then considered whether group or individual disadvantage had been established (ss.19(2)(b) and (c) EQA). Finall it considered the defence of justification, where applicable.

The policy to disperse children across other classrooms in the event of a teacher's absence [2.1]

110. The Tribunal concluded that this allegation was out of time. This policy had been in operation well before February 2017; in fact as far back as 2015. The Tribunal considered whether there was good reason why such a claim was not brought sooner, but concluded that there was not. The Tribunal was satisfied that the claimant knew about Tribunal time limits, and even if he did not, he had the benefit of trade union advice and support. The Tribunal considered the balance of hardship and concluded that there was greater hardship to the respondent, due largely to the considerable time that had elapsed since the claim should have been presented, and the difficulty the respondent had in securing witnesses to these events because the relevant staff had left. Taking into account the merits of the claim, as well as all of the above factors, the Tribunal concluded that it was

not just and equitable to extend the time limits to enable the claimant to pursue this claim.

111. Even if the Tribunal had extended the time limits to allow the claimant to bring this claim, it would still have failed because the claimant had not established group or individual disadvantage. The claimant's case concentrated on it being disadvantageous to the students rather than the claimant or others who had the same disabilities.

112. In any event, the Tribunal concluded that the dispersal of students was a proportionate means of achieving a legitimate aim, the legitimate aim being the need to ensure that students were cared for and received an education when a teacher was absent from work.

Failure to meet EHCP (Education Health and Care Plan) requirements [2.2]

113. The Tribunal could find no evidence of such a failure. The statutory obligation to make the provision set out in an EHCP was on the local authority. Whilst the claimant argued, when cross examined, that there was a failure to provide 1:1 support for him, the Claimant conceded that the EHC Plans for the pupils in his class did not in fact stipulate that they required 1:1 support. This much could be seen from the copies of the EHCPs that the Claimant provided in his evidence.

114. Furthermore, the alleged failure could not properly be termed a PCP. It was not a PCP that was applied to the claimant or his non-disabled colleagues.

115. Finally, the Tribunal concluded that the claimant had not established group or individual disadvantage.

The failure to provide adequate transition time [2.3]

The failure to follow planned procedures [2.4]

Placing ASC (Autistic Spectrum Condition) students with SEMH (Social Emotional Mental Health) students [2.5]

116. The only concrete example given by the claimant in his evidence to support these allegations, related to pupil A. Pupil A was moved urgently, in circumstances which did not allow for a long transition time. This was because pupil A was in a class of 9 pupils, with two members of staff. It was not a safe situation for him, and needed a swift resolution. The Claimant had only three pupils in his class at the time, and two qualified teachers. Further, despite the Claimant's insistence at the hearing that it was inappropriate to group Pupil A with the ASC pupils in his class

because he was an SEMH pupil, the Claimant had himself identified this same pupil as one with ASC needs in his class grouping proposals document from January 2016.

117. In any event, the alleged failures could not properly be termed PCPs. They were not PCPs that were applied to the claimant or his non-disabled colleagues. Furthermore, the claimant had not established group or individual disadvantage.

Making classrooms too stimulating for students [2.6]

118. On the Claimant's own evidence, during the February 2016 half-term he was given permission to re-design his classroom and make it an autism specific environment, which he then did. The claimant described the extent to which he had modified his classroom to make it suitable for autistic pupils, and said "*Mr Mason was full of praise and always brought visitors to the class to show off the classroom and resources*".

119. The Tribunal concluded that this was not a PCP which was applied to the claimant and non-disabled colleagues. Furthermore, the claimant had not proved group or individual disadvantage.

The failure to provide teachers with adequate training, induction and supervision [2.7]

120. The Tribunal concluded that the factual premise of this allegation was incorrect. The Tribunal was not satisfied that there was a failure to provide teachers with adequate training. There was no PCP and no group or individual disadvantage. The Claimant had an extensive induction, he accepted that there were 5 inset days a year, and that there was additional in-house training provided by the school's therapists, middle leaders and senior leadership team. There was also a period of intensive additional training provided to staff in January and February 2016.

The failure to provide permanent members of staff [2.8]

121. This claim fails for the same reason as provided at paragraph 120.

The failure to allow teachers to take planned time [2.9]

122. This allegation was first made in March 2016. It is therefore an allegation that has been presented outside the permitted time limit of three months. The Tribunal decided that it was not just and equitable to extend time for the same reasons as provided at paragraph 110. In any event the Tribunal did not accept the factual premise of this allegation. Teachers were provided with PPA albeit from time to time, they could not take it because they had to cover for other staff.

The failure to consider how these policies would affect the Claimant [2.10]

123. The Tribunal concluded that this could not properly be described as a PCP. The "*failure to consider*" was not a PCP that was applied to the claimant and his non-disabled colleagues. Neither could the claimant establish group or individual disadvantage.

124. For the above reasons, the claims of indirect discrimination fail and are dismissed.

Failing to make reasonable adjustments

125. The PCPs relied on for the reasonable adjustments claim are the same as those relied on for the indirect discrimination claim. As well as the Tribunal being satisfied that the PCP can properly be described as such for the purposes of s.20 EQA, taking into account the ***Ishola*** case, the Tribunal must be satisfied that the PCP put the claimant to a "*substantial disadvantage*" compared to non-disabled persons. There is no requirement to prove "*group disadvantage*" as there is under s.19 EQA, but there is a need to demonstrate that the PCP was at least capable of being applied to others (per ***Ishola***)

126. As a starting point, the Tribunal relied on its above findings which apply equally to the claims of failing to make reasonable adjustments. The Tribunal was also not satisfied that the alleged PCPs were, in fact, PCPs within the meaning of s.20 EQA, applying the ***Ishola*** case. Importantly, the Tribunal also concluded that the claimant failed to establish that each of the PCPs put him to a "*substantial disadvantage*" by reason of his disabilities. Furthermore, and as a consequence of the above, the Tribunal was not satisfied that the proposed adjustments mitigated the effect of any of the alleged PCPs.

127. Whilst it did not need to consider knowledge in light of the above conclusions, the Tribunal concluded that although the claimant was diagnosed as autistic in September 2016, he did not inform the respondent until he referred to it in his grievance in March 2017. That is the date, the Tribunal concluded, that the respondent had knowledge of the claimant's disability within the meaning of s.20 EQA. Whilst the claimant's evidence was that colleagues must have known that he was autistic and indeed made comments to that effect, the Tribunal was not satisfied on the basis of the very limited evidence it heard, that the respondent had constructive knowledge before March 2017.

128. For the above reasons, the Tribunal concluded that the claims that the respondent failed to make reasonable adjustments fail and are dismissed.

Protected disclosures

129. The claimant's case is that he had made 16 protected disclosures. The Tribunal considered these in turn, considering carefully the evidence presented during the hearing and the legal principles set out above.

PD1: To Mark Warner (then Head of Education) at almost every weekly meeting between October 2015 and December 2015

130. The evidence regarding the content of these conversations was lacking in anything like the detail needed for the Tribunal to be satisfied that the claimant made such disclosures. There were no dates of meetings provided in evidence, or specifics as to what was actually said. The Tribunal was shown no documentary evidence in support of these conversations. For the above reasons, the Tribunal was not satisfied that the claimant made the protected disclosures he alleged.

PD2: To Gina Wagland (then Headteacher) in December 2015

131. The Tribunal was satisfied that the claimant had conversations with Ms Wagland about his concerns, but there was insufficient evidence as to the detail of those conversation such that the Tribunal could be satisfied that the claimant made protected disclosures to her.

PD3: To Trystan Williams (then CEO) and the visiting consultants in December 2015

132. In evidence, the claimant said that he had "*numerous conversations with the consultants regarding my concerns and shared my recommendations for improvements*". Yet it was not at all clear from his evidence, or from the documents the Tribunal was referred to, what was said during these conversations. The Tribunal concluded there was insufficient evidence to be satisfied that the claimant made the protected disclosures he alleged.

PD4: In writing to Trystan Williams in April 2016

133. The Tribunal accepted that in April 2016 the claimant wrote to Mr Williams. The letter started "*I wish to raise my concerns about poor practice at Brantridge School and the Radius Trust in relation to my recruitment, induction and supervision*". The letter goes on to list a number of complaints, including lack of payslips, lack of a contract, incorrect pay, no line manager, no training, and so on. He lists as one of those complaints "*no consideration for my dyslexia or reactive hypo-glycaemia*"

134. The Tribunal was not satisfied that the claimant believed at the time that what he was complaining about tended to show any of those matters set out at 43B(1) ERA. The Tribunal did not think the reference to his

disabilities (above) was sufficient to demonstrate that he was referring to a belief that the respondent was breaching its legal obligations. Neither did the claimant believe he was raising concerns in the public interest; on the contrary he was raising concerns about his personal situation and his own terms and conditions. The Tribunal concluded that this was not a protected disclosure.

PD5: At a meeting with Diane Brazier (then School Manager) and Heath Mason (then Headteacher designate) in April 2016

135. The Tribunal was not satisfied that the claimant made this protected disclosure. There was no evidence from which the Tribunal could draw this conclusion.

PD6: On 21 July 2016 by email to Heath Mason

136. The respondent accepted that this was a protected disclosure within the meaning of s.43B ERA. In this email, the claimant raised his concerns about the risk to visitors from the behaviour of a student, referring to legal duties owed by the respondent to visitors. The Tribunal accepted that this was a protected disclosure.

PD7: On 9 August 2016 by email to Heath Mason

137. On 9 August 2016, the claimant wrote to Mr Mason requesting that the school obtain funding from the local authority to enable additional support to be given to cater for a pupil whose behaviour was violent, severely disruptive and abusive. It was not a letter which suggested that the claimant believed the respondent had breached, or was in breach of, its legal obligations. Indeed, the Tribunal concluded that was not the purpose of the letter, which was to present a case to Mr Mason to persuade him that additional funding needed to be obtained from the Local Authority to support the student. It was not a protected disclosure within the meaning of s.43B ERA.

PD8: Throughout November 2016 and December 2016 the Claimant raised a number of concerns about Child T

138. There was a lack of evidence containing detail about what was actually said, to enable the Tribunal to conclude that any protected disclosure had been made.

PD9: On 9 December 2016 by email to Carole Johns (then Head of Care)

139. In this email the claimant raised some concerns about a student who he said was disruptive and attended school not adequately cleaned or dressed. The Tribunal considered this to be the normal type of email a

teacher might send a line manager to report concerns about students. The Tribunal was not satisfied that the claimant believed at the time that the issues he was raising tended to show any of those matters set out at 43B(1) ERA. Neither did the Tribunal consider that the claimant believed he was raising matters in the public interest. For these reasons, the Tribunal was not satisfied that this was a protected disclosure.

PD10: On 20 January 2017 by email to Heath Mason

140. It was admitted by the respondent that this email was a protected disclosure within the meaning of s.43B ERA. This was an email to Mr Mason in which the claimant complained about his working conditions, most notably the physical abuse he had received from a pupil on a number of occasions and its impact on his ability to do his job. The Tribunal was satisfied that this email was a protected disclosure.

PD11: On 27 January 2017 by email to Heath Mason

141. This email to Mr Mason took the form of an update on a particular pupil and what was happening with him in school. The Tribunal concluded that this was not a protected disclosure. There is nothing in the email which demonstrated to the Tribunal that the claimant reasonably believed, at the time he wrote the email, that the respondent had breached, or was in breach of, a legal obligation or that the concerns he was raising tended to show any of the matters at s.43B(1) ERA.

PD12: On 8 March 2017 in writing to Heath Mason

142. It is admitted by the respondent that the claimant's grievance was a protected disclosure within the meaning of s.43B(1) ERA. The Tribunal also accepted that this was a protected disclosure.

PD13: On 10 March 2017 in the course of a meeting with Heath Mason and Jayne Hammond-Smith

143. This meeting was convened to discuss the grievance raised by the claimant but there was insufficient evidence at the hearing for the Tribunal to be satisfied that what was said was a separate protected disclosure within the meaning of the ERA.

PD14: The claimant's letter to Heath Mason dated 3 April 2017

144. The claimant wrote to Mr Mason, copying it to Ms Hammond-Smith, Mr Cole (Chair of Brantridge Governing Body) and David Hope (Chair of Trust Board) complaining of the respondent's failure to respond to his formal grievance of 8 March 2017. The letter included the following extracts:

> ***I am frustrated that I have suffered this injury despite repeatedly raising myconcerns over safety since last academic year that has repeatedly not been adequately addressed. I have suffered months of assaults without adequate staffing levels and repeatedly been assigned untrained supply staff that were unable to support safe working practice as highlighted in my formal grievance, as was the inadequate post incident access to the nurse and lack of debriefing to ensure staff are safe to continue working.***
>
> ***Disappointingly my injuries occurred after raising a formal grievance on 08/03 and meeting with yourself and Jayne Hammond-smith HR Director on 10/03, when I was assured that my Public Interest Disclosures over Safety, Safeguarding, Teaching practice and Staff conduct would be addressed. I was reassured that my full Teaching position and ASC accreditation role would be reinstated with appropriate support put in place.***
>
> ***.....***
>
> ***Your failure to respond to my formal grievance in line with policy and procedure is further evidence of the schools noncompliance and poor practice and compels me to now take next steps. I clearly stated in my formal grievance and our subsequent meeting that I am aware of my responsibilities and that failure to address my concerns internally would professional oblige me to seek external agency support to ensure that they are. Despite your verbal reassurances I have had safety in the workplace compromised further with increased risk, leading to incidents that have caused me brain injury.***
>
> ***In light of your failure to respect either ACAS guidance or our own policies and procedures, along with your continued failure to appropriately address the concerns that I have raised within the workplace, make reasonable adjustments for my disabilities, investigate incidents appropriately or in good time. I shall raise my concerns with external agencies to resolve the Public Interest Disclosures I have raised internally, that continue to be unresolved to ensure that they are addressed. Additionally I shall contact ACAS to make a claim against the school with the Employment Tribunal for the discrimination and detriment that I have suffered in the workplace for raising my concerns.***

145. The Tribunal concluded that this email could properly be considered a protected disclosure, given its content, but particularly taking into account 8 March 2017 grievance to which it referred, and which the Tribunal found was a protected disclosure. In effect, the Tribunal found the claimant to have re-stated, in this letter, the disclosures he made in his 8 March grievance.

In July 2017, to OFSTED

146. Save as set out below at paragraph 147, the Tribunal found there was insufficient evidence about what OFSTED was told by the claimant for it to be satisfied that he made a protected disclosure.

PD16: In September 2017, to the DFE and HSE

147. The claimant wrote to the OFSTED, DFE and HSE on 29 September 2017 in which he said: "*I write to raise my concern over health & safety at Brantridge school, Staplefield,West Sussex. The Senior Management Team have not fulfilled their duty of care toward students and staff by not adequately managing the risks presented by the Special Needs Learners and their challenging behaviours, leaving everyone exposed to a dangerous and violent working environment*".

148. The Tribunal was satisfied that the above email was a protected disclosure within the meaning of the ERA.

Whistleblowing detriments

149. In summary the Tribunal concluded that the claimant made five protected disclosures, namely, PID6, PID10, PID12, PID14 and PID16 referred to above.

150. The Tribunal struggled when considering the claimant's detriments. There was a lack of evidence about many of the allegations in his witness statement, little relevant documentary evidence, and the claimant refused to concentrate his questioning of witnesses on the allegations, despite being urged by the Tribunal on numerous occasions to do so. Whilst the claimant made a total of 60 detriment claims, it was not clear which detriments were the consequence of making which protected disclosure. Again, the claimant failed to provide specific detail about many of the detriments, leaving the Tribunal unable to conclude that the claimant had suffered the detriment alleged.

151. The Tribunal found it easier and more logical to consider the detriments in groups according to the named person who was alleged to have subjected the claimant to the relevant detriment.

(i) Allegations against Mr Warner

152. A total of 25 detriments were alleged against Mr Warner (paragraphs 14.1-14.18, 14.26-14.27 and 14.29-14.33 of the list of issues).

153. Turning first to the allegations which the claimant did refer to in his evidence, the Tribunal made the following findings:

153.1. The claimant alleged that Mr Warner said about him, and in front of everyone, "*don't be so autistic*". The claimant's further and better particulars do not identify a date, or even a range of dates, when this comment was said to have been made. Two of the

respondent's witnesses were working at the school at the time, and did not remember Mr Warner saying anything of the kind to the claimant. The Tribunal was not satisfied that the comment was made. In his oral evidence, the claimant said that he believed it had been said in a morning briefing, in front of the whole staff, "several" weeks before his 8 March 2017 grievance letter was submitted, and in any event before the February half-term in 2017. Even on that basis the allegation was out of time and the Tribunal did not consider it just and equitable to extend the time limit for the same reasons as already stated.

153.2. The Claimant claims that Mr Warner "*repeatedly harassed*" him for using MAKATON, and that Mr Warner criticised his use of certain educational practices and materials. This evidence appeared to relate to the allegation 14.9 of the list of issues. There is no dispute that Mr Warner disagreed with the claimant about the best educational strategies necessary to support the pupils in his class. Even if this was a detriment, the reason had nothing to do with the fact that the Claimant had made protected disclosures, but instead with a genuine disagreement as to which educational practices would best support the educational needs of the pupils at the school. As the claimant himself appeared to acknowledge, this frustration went both ways: the claimant said in his witness statement "*I was frustrated by Mr Warner's lack of understanding of the learners EHCP's and SEND teaching practices…"*

153.3. Similarly, the claimant made various complaints to the effect that Mr Warner "*undermined*" him and/or failed to progress his requests for additional support for his learners (14.13 and 14.18 of the list of issues). Mr Warner's perspective on these allegations was evident from the interview notes of his investigation interview with Ms Sherborne in September 2017. In short, he disagreed with the claimant that 1:1 support was necessary for every pupil in the claimant's class, saying, "*We can't make LA's give us extra money for 1:1's. [X] hadn't been 1:1 in all the time he was with us so why did we need that now in the last two terms of year 8? HM presented evidence so we could get a 1:1. But when RK went off sick, there was a reduction in restraints so he didn't need a 1:1*." He also explained that there had been a 58% reduction in restraints since the claimant had been on sick leave, and they had not had to change teaching assistants. The claimant clearly disagreed with Mr Warner, but the Tribunal concluded that this did not amount to a detriment. Even if it did, the reason was not because the claimant made any of the protected disclosures.

153.4. The claimant alleged that Mr Warner shouted at him, in front of other staff members, that his reference was inadequate and that

he needed to sort it out (14.11 of the list of issues). He also alleged that Mr Warner's request for his reference was a detriment done to him because he had made protected disclosures. There is no dispute that the claimant was asked about his references. Ms Brazier wrote to him on 10 February 2017 to explain that there had been a review of personnel files following the Ofsted residential inspection, and asked for the claimant's permission to take up references from his former employers to meet DfE Safer Recruitment Guidelines. The Tribunal concluded that these were not detriments and in any event had nothing whatsoever to do with any protected disclosure that he had made.

153.5. The claimant alleged that Mr Warner "*tried to intimidate the Claimant to forge induction documents and when the Claimant refused was very upset with the Claimant*" (14.15 of the list of issues). The claimant was taken to the induction documents in the bundle, and agreed that he had, in February 2016, signed that he had completed his induction, and had initialled the topics that had been covered. In evidence he said the dates were wrong, and were false, and he had signed his initials next to false dates because Mr Warner had forced him to. The Tribunal noted that the claimant did not say this in his claim form, his witness statement or in the letter to Mr Williams in April 2016. The Tribunal did not believe the claimant's evidence on this issue and therefore did not accept that he had been put to a detriment. Neither did it accept that anything done by Mr Warner in relation to this complaint was done because the claimant made a protected disclosure.

153.6. The Claimant complained in his witness statement that Mr Warner "*promoted*" Mr Giovanni and Mrs Cooper above him to judge his teaching practice (the Tribunal assumed this was the complaint at 14.16 and 14.17 of the list of issues). There is no dispute that Mr deLucia conducted a lesson observation/learning walk for the claimant with Mr Warner, which was entirely common practice. The claimant clearly disagreed with what was recommended, and felt that he knew better (referring in his witness statement to their "*ill informed critique*"), but the Tribunal concluded that the claimant suffered no detriment. Even if he had, it was not because the claimant made a protected disclosure.

153.7. The claimant suggested that Mr Mason and Mr Warner criticised him for working too late (14.27 of the list of issues). In his witness statement, the claimant said "*towards the end of January 2017, I was approached by Mr Mason and Mr Warner and told that I should not be working late at the School*". It came as no surprise to the Tribunal that, if the Claimant was working late, his line manager and the Head of the School would have encouraged him

not to. The Tribunal concluded that this was not a detriment. Further, their actions had nothing to do with the claimant making protected disclosures.

153.8. There is no dispute that Pupil A was placed in the claimant's class on 13 March 2017. The claimant suggested (at paragraph 14.31 of the list of issues) that Mr Warner placed Pupil A into the claimant's class because the claimant made protected disclosures. The Tribunal rejected this suggestion. Pupil A was placed into the Claimant's class because he was not safe where he was. The Claimant only had three learners in his class at the time, and two members of staff. It was a step taken by Mr Warner in the child's best interests and not because the claimant made protected disclosures.

153.9. The claimant alleged that the respondent placed Mr Fletcher in the Claimant's class in January 2017 (14.29, 14.30 and 14.31 of the list of issues). The Tribunal rejected the suggestion that this was a demotion of the claimant. It was intended to support the claimant and help him manage the workload. The Tribunal concluded this was not a detriment and this decision had nothing whatsoever to do with any protected disclosures made by the claimant.

153.10. The claimant alleged that Mr Warner deleted his incident reports because he made protected disclosures. However, the Tribunal was not satisfied that such reports had been deleted or that Mr Warner was responsible for deleting them.

154. Regarding other detriments for which Mr Warner was allegedly responsible, the Tribunal found them to be completely unproven. This is because they lacked anything like the detail needed for the Tribunal to be satisfied, on the balance of probabilities, that these things happened to the claimant. There was a lack of detail as to when incidents happened, what happened and who specifically said what. The Tribunal could not be satisfied that the claims had been brought in time; they were also not of a type which the Tribunal could conclude that there was a continuing act. In these circumstances, the Tribunal concluded that it was reasonably practicable for such claims to have been presented in time.

155. The Tribunal accepted that the relationship between Mr Warner and the claimant was very strained. The claimant did not respect him and did not consider that Mr Warner should be in a more senior role than the Claimant. Mr Warner considered that the Claimant tended to dominate meetings and raise matters that were not relevant to matters being discussed. They had very different views on pedagogy and there is little doubt that they clashed on occasions.

156. The allegations against Mr Warner ranged from February 2016 to March 2017. The connection between protected disclosures and the detriments was therefore always going to be that much more difficult, not knowing precisely when Mr Warner did what is alleged of him.

157. The Tribunal found as fact that Mr Warner was not influenced by the protected disclosures. Only two of them pre-dated March 2017; the third (the claimant's grievance) was on 8 March 2017. All three of the grievances were made to Mr Mason.

(ii) Allegations against Ms Johns

158. There are six detriment allegations against Ms Johns (paragraphs 14.19-14.23 and 14.28 of the list of issues).

159. Allegations at paragraphs 14.19, 14.21 and 14.22 of the list of issues were out of time and the Tribunal did not think there was a sufficient nexus between them and other allegations to form part of a continuing act. The Tribunal concluded that it was reasonably practicable for such claims to have been presented in time.

160. The Tribunal reached the following conclusions on the remaining allegations:

Failing to address safeguarding complaints [14.20]

161. The Tribunal heard or saw no evidence from which it could be satisfied that this allegation was correct.

Deciding not to arrange cleaning of the claimant's classroom [14.23]

162. The claimant's view was that there was a threadworm infestation and a deep clean was required. Ms Johns and Ms Bourns disagreed with the Claimant's assessment of the risk. In any event, even on the face of his own grievance document, the approach to deep cleaning of his classroom had nothing to do with any protected disclosures that he had made. The cleaning staff were short staffed, but the claimant's room was nonetheless given a deep clean on the last day of term. The Tribunal was not satisfied that the claimant was put to a detriment and in any event any decision whether or not to clean his classroom had nothing whatsoever to do with any protected disclosures made by the claimant.

Failing to provide care team support [14.28]

163. This was another allegation that lacked any specific detail. Ms Johns was not responsible for providing "support" for the claimant in any event. The

Tribunal was not satisfied that her actions were in any way influenced by the protected disclosures.

(iii) Allegations against Mr Mason

164. There were four detriments alleged against Mr Mason (paragraphs 14.24, 14.25, 14.27 and 14.34 of the list of issues). The Tribunal has already made findings in relation to some of these. Again, others such as "failing to provide adequate support, lacked the detail necessary for there Tribunal to conclude that the claimant had suffered a detriment.

165. The claimant said in his oral evidence that he and Mr Mason had a positive working relationship and that it remained positive following the Claimant's submission of his grievance document on 8 March 2017. In fact the Tribunal's clear impression from the evidence was that Mr Mason was keen to try to resolve the claimant's complaints. The Tribunal found that Mr Mason was extremely accommodating of the Claimant's requests, and did his best to facilitate the additional support that the Claimant considered necessary for his pupils. The Tribunal did not accept the factual premise of the above four allegations and certainly found no causative link between them and the protected disclosures. To be clear, Mr Mason did not put the claimant to a detriment because of any protected disclosures made by the claimant.

(iv) Allegations against Ms Hammond-Smith

166. There are three detriments alleged against Ms Hammond-Smith (paragraphs 14.35, 14.36 and 14.38 of the list of issues).

167. The Tribunal concluded that none of these allegations could properly be described as detriments. She did not insist that the claimant's grievance be dealt with informally, but rather had understood that the claimant was attempting to deal with his complaints informally with Mr Mason. Even if it was a detriment, the reason for Ms Hammond-Smith's actions had nothing to do with the protected disclosures.

(v) Allegation against Mr Cole

168. There is one allegation against Mr Cole [14.37]. In response to the claimant's letter to Mr Mason dated 3 April 2017, which was copied to Mr Cole, Mr Cole wrote to Ms Hammond-Smith on 6 April 2017 as follows:

> ***I will write to this man to let him know I have his letter, and to politely say that his lack of professional attitude and legalistic approach to this issue will not help him in the least. We also need to let him know that we are aware of the circumstances under which he left his previous post since the agenda here seems to be that he is looking for a pay off. Let's not give in to this kind of blackmail, Is there any***

> ***chance Jayne of starting counter-proceedings against him i.e. competency procedures? Or what other ways are there to give him notice?***
>
> ***Your advice on my reply to him please.***
>
> ***Martin***

169. When Ms Hammond-Smith subsequently wrote to the claimant, she included Mr Cole's email in error. Given its content and the threat to "*start counter proceedings*" against the claimant in the form of a competency process, the Tribunal concluded that the claimant suffered a detriment. Mr Cole was not called as a witness by the respondent and therefore the Tribunal heard no evidence from him. The Tribunal concluded that the email spoke for itself and that Mr Cole was materially influenced by the content of 3 April 2017 letter which the Tribunal found to be a protected disclosure. Accordingly, this allegation was well founded.

(vi) Remaining allegations

The Respondent encouraged, supported or failed to prevent the detriments listed above [14.39]

170. The claimant did not provide any evidence or clarity as to what was meant by this detriment, over and above the detriments themselves, many of which were unclear.

Failed to address the Claimant's grievances [14.40]

171. This was factually incorrect. The respondent did attempt to address the claimant's grievances.

Failed to address the Claimant's public disclosures [14.41]

172. The Tribunal did not accept that the respondent failed to address the concerns raised by the claimant.

Failed to provide adequate support to the Claimant [14.42]

173. The claimant did not provide evidence of the support referred to. In any event, the Tribunal was not satisfied that the respondent failed to provide adequate support.

Failed to make reasonable adjustments [14.43]

174. The Tribunal did not accept that the respondent failed to make reasonable adjustments.

Blocked the Claimant's access to emails in May 2017 [14.44]

175. The claimant's access to emails was not "blocked" in the way suggested by the claimant. The Tribunal accepted the respondent's evidence that the claimant's password expired, and he would have needed either to come on site, or to contact IT, to renew it. He did not do so. Even if this was a detriment, it was not in any way influenced by the claimant's protected disclosures.

Intimidated the Claimant with the absence policy [14.45]

176. The claimant was not intimidated by the respondent using their absence policy. The Tribunal saw absolutely no evidence from which it could find this allegation proven, namely that the claimant was intimidated by the respondent as alleged or at all.

Intimidated the Claimant with requests to come to investigation meetings following his OFSTED disclosure [14.46]

177. The claimant was invited to an investigation meeting. There was no evidence of intimidation.

Tried to delete evidence that would support Claimant's version of events [14.47]

178. The Tribunal saw no evidence to support this allegation.

Tried to negate that the incident where the Claimant sustained head injury happened [14.48]

179. The Tribunal saw no evidence to support this allegation.

Engaged in discussions on how to get rid of the Claimant [14.49]

180. This allegation has been upheld as it is the same as the detriment dealt with at paragraphs 168 and 169 above.

Failed to offer a promised pay rise to the Claimant [14.50]

181. The claimant relied on an email from his supply agency telling him that his salary would be £36,995. The Claimant's offer letter had set out a lower salary of £35,640. The claimant's evidence is that he raised the issue of the discrepancy between the sum he thought had been agreed and his offer letter with the then Trust's CEO (Mr Williams) and Ms Hammond-Smith in December 2015. This meeting, or discussion, took place some six years ago. The claimant and Ms Hammond-Smith have different recollections of it. Ms Hammond-Smith did not recall a formal, minuted,

meeting, but a brief discussion with the claimant in which he alluded to a concern *about* his pay, when she and Mr Williams bumped into him when she was on sight for a Governors meeting.

182. On 23 March 2016, the claimant wrote to Mr Williams with a "*reminder of my outstanding contract*"; in that communication, the claimant said that his pay was agreed at the level of Brantridge 12, but set at 11 and raised with a "*Recruitment & retention payment to meet the agreed rate*". The agreed rate was (on the face of the claimant's own evidence) "*at the level of Brantridge 12*". The claimant was paid at the level of Brantridge 12 from June 2016 onwards and he was paid an additional sum to make up the difference between the agreed rate and the lower rate that he had been paid for the previous nine months. The agreement reached with the claimant was reflected in the amended version of the claimant's contract which contained an entire agreement clause. The Claimant signed his agreement to the new terms in May 2016, which did not (for the avoidance of doubt) include provision for any "*recruitment and retention*" payment.

183. Given the above, the Tribunal concluded that the factual premise of this allegation was incorrect and the claimant suffered no detriment. Even if he did, it had nothing to do with any of the claimant's protected disclosures.

Failed to consult the Claimant under TUPE [14.51]

184. The claimant was informed of the TUPE transfer, and sent the information relevant to it. He wrote a long email taking issue with the decision. The Tribunal found as fact that the claimant was consulted and therefore the factual premise of this allegation was incorrect. Accordingly, he suffered no detriment.

Failed to provide reasonable adjustments for consultation under TUPE [14.52]

185. The Tribunal was not satisfied that the respondent was under a duty to make reasonable adjustments. It became a feature of this case that the claimant would often complain about reasonable adjustments but then refuse to articulate the disadvantage or the adjustments required. The Tribunal was not satisfied that the claimant suffered any detriment.

Failed to pay the Claimant correctly in December 2017 [14.53]

186. The Claimant was paid correctly for December 2017. There was an error with the payroll, which was explained to the Claimant in the Respondent's letter of 19 December 2017. The claimant suffered no detriment.

Failed to honor the promise that no deductions will be made for January 2018 and February 2018 [14.54]

187. The Claimant was paid in full for January 2018 and February 2018. He was paid in excess of his contractual entitlement. The respondent elected not to recover the overpayment. The claimant therefore suffered no detriment.

Failed to pay the Claimant on time in April 2018 [14.55]

188. The Claimant was paid on 27 April 2018. This was because there was a change in pay days as part of the measures introduced following the TUPE transfer. Even if the claimant suffered a detriment, it was not in any way connected with the protected disclosures.

Removed the Claimant's profile from the website in April 2018 [14.56]

189. The Claimant was not listed on the school's website as class teacher for Mercury because he had been off on sick leave for over a year at this stage. Even if this was a detriment, the Tribunal did not think it was in any way connected with any protected disclosures made by the claimant.

Failed to inform the Claimant about change to system to notify of sickness absence and/or removed the Claimant from employee list in April 2018 [14.57]

190. The claimant was not "removed" from the employee list. The claimant called First Care on 27 April 2018, having received the "standard" text asking him to close his absence, and identified himself as an employee of Orchard Hill Academy Trust. First Care still had him listed on their systems as an employee of Radius Trust, and so could not find him. He was therefore not "removed" as suggested. Even if he was, the reason had nothing to do with any protected disclosures made by the claimant.

Advertised for the Claimant's position in April 2018 [14.58]

191. The respondent did not advertise for the claimant's position. It advertised for a class teacher. The reason the respondent advertised was because it was seeking to recruit an additional teacher for a new Pluto class. It had nothing whatsoever to do with any protected disclosures made by the claimant.

Generally treated the Claimant in a way that made other members of staff deem the Claimant as unworthy of assistance [14.59]

192. The claimant failed to provide sufficient detail about this allegation and therefore the Tribunal was not satisfied that the claimant had suffered any detriment.

Conducted employment tribunal proceedings vexatiously [14.60]

193. The Tribunal rejected any suggestion that the Tribunal proceedings had been conducted vexatiously.

Constructive dismissal

194. The Tribunal considered each of the matters which the claimant alleges amounted to a breach of the implied term of mutual trust and confidence.

(i) Manipulation of pay

195. The Tribunal rejected any suggestion that there was a manipulation of the claimant's pay. The Tribunal refers to its previous findings regarding the claimant's pay. The factual premise of this allegation is incorrect.

(ii) Threatening to dismiss the claimant

196. It was not clear to the Tribunal whether the claimant was referring to the email from Mr Cole which is referred to at paragraphs 168 and 169 above. The Tribunal was not satisfied that any other threat was made. Even if the email from Mr Cole was, on its own, a repudiatory breach, the claimant took no action on it and therefore, the Tribunal concluded that the claimant affirmed the contract.

(iii) Failure to pay wages

197. This has been dealt with above. There was no failure to pay the claimant's wages.

(iv) Failing to inform the claimant of changes in absence procedures

198. The Tribunal could not understand what this allegation related to. The Tribunal was not satisfied that this amounted to a breach of contract.

(v) Repeated harassment to attend non-existent Occupational Health appointments

199. The claimant was not harassed, as he suggested, or at all. The Tribunal accepted that the claimant was asked to consent to an occupational referral.

(vi) Threats for not keeping in touch

200. The claimant was not threatened in the way suggested. He was correctly told that a failure to maintain contact would be a breach of the respondent's policies and procedures.

(vii) Non-receipt of payslips

201. There was an innocent explanation for this, namely that the respondent did not send the payslips to the correct email address.

(viii) Purposefully causing him stress and triggering his disability traits

202. The Tribunal was not satisfied that the factual premise of this allegation was correct.

(ix) Ignoring ET directions and infringing on his ability to fulfil directions

203. The Tribunal completely rejected this allegation. There was simply no evidence of it.

(x) Removing his name from the school staff list

204. The claimant complains that his name was removed from the school staff list, something he says he discovered towards the end of April 2018. Ms Sherborne explained in her witness statement that the school did not include on its staff list the names of members of staff who were on long term sick leave so as not to confuse parents and other stakeholders. The claimant had not been teaching in the school for over a year. There is no dispute that Liam Fletcher was, at this stage, listed on the School's website as the class teacher for Mercury. Liam Fletcher was, at the time, working as the class teacher for Mercury.

(xi) Advertising his role the following working day (on 30 April 2018)

205. This is alleged as the last straw relied on by the claimant. On 30 April 2018, the claimant saw that the respondent was advertising for a role which he assumed was his role. However, having looked at the advert, the Tribunal concluded that it was a generic advert for a class teacher role as the respondent was recruiting for a teacher for a new Pluto class.

206. It is a pre-requisite of the last straw doctrine that the last straw contributes, however slightly, to the breach of the implied term of mutual trust and confidence. In this case, the Tribunal concluded that it did not. It was an entirely innocent and innocuous act. Even if it did, the suggestion that the respondent's above alleged conduct, cumulatively over time, amounted to a breach of the implied term of breach of trust and confidence, was completely without merit when considered against the above findings.

207. For the above reasons, the Tribunal concluded that the claimant was not dismissed by the respondent. His claim of constructive unfair dismissal therefore fails, as does the claim brought pursuant to s.103A ERA.

.....
Employment Judge Hyams-Parish
27 April 2022

APPENDIX
AGREED LIST OF ISSUES

1. It is agreed by both parties that the claimant has the following (and only the following) disabilities (as defined by s. 6 EQA) for the purposes of his claims: dyslexia, reactive hypo-glycaemia and autism. On what date did the respondent become aware that the claimant experienced each of these conditions?

Disability discrimination under section 19 EQA – indirect disability discrimination

2. Did the respondent, at the times material to the claimant's claim, have in place any of the alleged "provisions, criteria or practices" referred to at §125 of the claimant's Further and Better Particulars ("FBP") dated 22 October 2019:

    2.1. The policy to disperse children across other classrooms in the event of a teacher's absence;

    2.2. The failure to meet EHCP requirements (as alleged at §19 FBP);

    2.3. The failure to provide adequate transition time (as alleged at §22 FBP);

    2.4. The failure to follow planned procedures (as alleged at §22 FBP);

    2.5. Placing ASC students with SEMH students (as alleged at §23 FBP);

    2.6. Making classrooms too stimulating for students (as alleged at §24 FBP);

    2.7. The failure to provide teachers with adequate training, induction and supervision (as alleged at §25 FBP);

    2.8. The failure to provide permanent members of staff (as alleged at §26 FBP);

    2.9. The failure to allow teachers to take planned time;

    2.10. The failure to consider "how these policies would affect the claimant" (as alleged at §126 FBP).

3. If so, in respect of each such PCP as the Tribunal finds:

    3.1. Did the respondent apply the PCP to the claimant?

    3.2. Did the respondent apply the PCP or would it have applied the PCP to disabled and non-disabled persons?

    3.3. Did the PCP put or would it put disabled persons at a particular disadvantage when compared with non-disabled persons?

    3.4. Did the PCP put the claimant at that particular disadvantage?

3.5. Was the PCP a proportionate means of achieving a legitimate aim within the meaning of s. 19(2)(d) EQA? (Note: The respondent relies on the legitimate aims of meeting the needs of the pupils; keeping them safe; and using the resources available to the School in an equitable manner in order to achieve the best possible education for the School's pupils.)

Disability discrimination under sections 20(3), 20(5) and 21 EA – failure to make reasonable adjustments

4. Did the respondent have, at the times material to the claimant's claim, in place the following PCPs (as alleged at §125 FBP):

4.1. The policy to disperse children across other classrooms in the event of a teacher's absence;

4.2. The failure to meet EHCP requirements (as alleged at §19 FBP);

4.3. The failure to provide adequate transition time (as alleged at §22 FBP);

4.4. The failure to follow planned procedures (as alleged at §22 FBP);

4.5. Placing ASC students with SEMH students (as alleged at §23 FBP);

4.6. Making classrooms too stimulating for students (as alleged at §24 FBP);

4.7. The failure to provide teachers with adequate training, induction and supervision (as alleged at §25 FBP);

4.8. The failure to provide permanent members of staff (as alleged at §26 FBP);

4.9. The failure to allow teachers to take planned time;

4.10. The failure to consider how these policies would affect the claimant (as alleged at §126 FBP).

5. If so, in respect of each such PCP as the Tribunal finds, was the claimant thereby placed at a substantial disadvantage in comparison to non-disabled colleagues?

6. Did the respondent know that the claimant had a disability and that he was likely to be placed at the substantial disadvantage relied upon (within the meaning of para 20(1)(b) of Sch 8 to the EQA) at the times material to the

claim?

7. If so, were the adjustments set out at §§121, 122 and 123 FBP steps that the respondent was required to take to avoid the substantial disadvantage relied upon in respect of each PCP? The claimant relies on the following as reasonable steps that the claimant contends the respondent was obliged to take:

    7.1. Additional time to complete his work;

    7.2. An auxiliary aid to assist him with his work;

    7.3. Adequate assistance;

    7.4. Extra time processing information;

    7.5. Clear communication and explanations;

    7.6. Not placing children into his class without notice and appropriate transition;

    7.7. Extending time limits to write reports;

    7.8. Aid to assist dyslexia such as type assist;

    7.9. Additional support to allow him to take breaks;

    7.10. Not on occasions changing lunch break duty thereby letting the claimant go without lunch;

    7.11. Adhering to prearranged procedures and planned activities;

    7.12. Considering how not following company policies and procedures would affect the claimant in respect of his grievance;

    7.13. Not intimidating the claimant by absence procedures;

    7.14. Not deleting or amending logs;

    7.15. Providing and protecting adequate PPA time.

8. In respect of each of the steps relied upon:

    8.1. Would they have avoided the substantial disadvantage?

    8.2. Were they steps that the respondent was reasonably required to take in the circumstances?

Detriment due to protected disclosure – s. 47B of the Employment Rights Act 1996 ("ERA")

9. Did the claimant make disclosures as alleged at §115 FBP:

9.1. To Mark Warner (then Head of Education) at almost every weekly meeting between October 2015 and December 2015 (as alleged at §32 FBP)

9.2. To Gina Wagland (then Headteacher) in December 2015 (as alleged at §36 FBP);

9.3. To Trystan Williams (then CEO) and the visiting consultants in December 2015 (as alleged at §38 FBP);

9.4. In writing to Trystan Williams in April 2016 (as alleged at §43 FBP);

9.5. At a meeting with Diane Brazier (then School Manager) and Heath Mason (then Headteacher designate) in April 2016 (as alleged at §44 FBP);

9.6. 21 July 2016, by email to Heath Mason (as alleged at §51 FBP);

9.7. On 9 August 2016, by email to Heath Mason (as alleged at §52 FBP);

9.8. Throughout November 2016 and December 2016 (as alleged at §60 FBP);

9.9. On 9 December 2016, by email to Carole Johns (then Head of Care) (as alleged at §62

9.10. On 20 January 2017, by email to Heath Mason (as alleged at §70 FBP);

9.11. On 27 January 2017, by email to Heath Mason (as alleged at §71 FBP);

9.12. On 8 March 2017, in writing to Heath Mason (as alleged at §75 FBP);

9.13. On 10 March 2017, in the couse of a meeting with Heath Mason and Jayne Hammond-Smith (as alleged at §77 FBP);

9.14. On 3 April 2017, by means of an email to Heath Mason (as alleged at §89 FBP);

9.15. In July 2017, to Ofsted (as alleged at §101 FBP);

9.16. In September 2017, to the Dfe and HSE (as alleged at §101 FBP).

10. If so, in respect of each disclosure relied upon;

10.1. Was it a disclosure of information?

10.2. Did the claimant subjectively believe that the information disclosed tended to show one of the six relevant failures under s. 43B(1) ERA? (Note: The FBP do not identify in terms the legal obligations relied upon.)

10.2.1. If so, was that belief objectively reasonable?

10.3. Did the claimant subjectively believe the disclosure was in the public interest?

10.3.1. If so, was that belief objectively reasonable?

11. If so, in respect of each disclosure relied upon, does it meet the test for a "protected disclosure" pursuant to section 43C ERA i.e. was it made to the claimant's employer or some other responsible person?

12. In respect of each disclosure not made to the claimant's employer, was it a protected disclosure under [ss 43F or 43H ERA]? (Note: The FBP do not specify which provisions are relied upon.)

13. (It is admitted that the claimant's grievance dated 8 March 2017 is a qualifying disclosure pursuant to section 43B ERA and a protected disclosure pursuant to section 43C ERA.)

Detriments

14. Did the respondent engage in the conduct complained of at §§116 and 118 FBP? In particular, has the claimant shown that:

14.1. Mr Warner refused to engage with claimant;

14.2. Mr Warner ignored the claimant and his concerns;

14.3. Mr Warner would be dismissive of claimant's concerns;

14.4. Mr Warner would mock the claimant in front of other members of staff;

14.5. Mr Warner failed to address the concerns raised by claimant whilst fully aware of the effect that this was having on claimant's wellbeing;

14.6. Mr Warner would indicate to the claimant had he was annoyed by the claimant;

14.7. Mr Warner would tell the claimant to shut up in the meetings even when claimant was not speaking;

14.8. Mr Warner told the claimant, 'don't be so autistic' in front of everyone;

14.9. Between February 2016 and March 2017, Mr Warner criticised the claimant for the way he conducts his classes;

14.10. Between February 2016 and March 2017 Mr Warner demeaned the claimant by telling him that Mercury class never had so much troubles and that the disruption of the class is due to claimant's failures to teach properly;

14.11. Between February 2016 and March 2017 Mr Warner undermined claimant in front of other colleagues by shouting at the claimant;

14.12. Between February 2016 and March 2017 Mr Warner would generally be stroppy with claimant and would refuse to provide support;

14.13. Between February 2016 and March 2017 Mr Warner undermined the work that claimant had done in his absence as per request Ms Mason;

14.14. Between February 2016 and March 2017 Mr Warner shouted at a claimant in front of children;

14.15. In March 2016 Mr Wagner, tried to intimidate the claimant to forge induction documents and when the claimant refused was very upset with the claimant;

14.16. In March 2016 Mr Warner appointed members of staff to inspect the class whilst knowing that claimant was more qualified and trained than those appointed to observe his class;

14.17. Between February 2016 and March 2017 Mr Warner displayed favouritism to other members of staff by promoting them;

14.18. Mr Warner tried to undermine the efforts of the claimant with

Mercury Class;

14.19. Ms Johns's emailed to the claimant implying he should know his place in December 2016 and threatening him

14.20. Ms Johns's failed to address claimant's safeguarding complaints;

14.21. Ms Johns' refused to provide support in January 2017;

14.22. Ms Johns decided to withdraw support from the claimant in January 2017;

14.23. Ms Johns decided to not to arrange cleaning of the classroom of claimant;

14.24. Mr Mason failed to provide adequate support to the claimant;

14.25. Mr Mason failed to provide reasonable adjustments to the claimant;

14.26. Mr Warner demanded to see claimant's reference in January 2017;

14.27. Mr Mason and Mr Warner criticised the claimant for working too late;

14.28. Ms Johns failed to provide care team support to the claimant when requested between February 2016 – March 2017;

14.29. Mr Warner demoted the claimant in February 2017;

14.30. Mr Warner had claimant's teaching role split in February 2017;

14.31. Mr Warner placed child A into claimant's class in March 2017;

14.32. Mr Warner failed to provide a permanent member of staff to support the claimant;

14.33. Mr Warner deleted claimant's reports in April 2017;

14.34. Mr Mason deleted claimant's reports in April 2017;

14.35. Ms Hammond-Smith sent the absence policy to the claimant in March 2017;

14.36. Ms Hammond-Smith denied that a discussion with Trystam Williams took place in December 2016;

14.37. Mr Cole discussed ways to dismiss the claimant in March 2017;

14.38. Ms Hammond-Smith insisted that the grievance raised in March 2017 was not formal;

14.39. The respondent encouraged, supported or failed to prevent the detriments listed above;

14.40. Failed to address the claimant's grievances;

14.41. Failed to address the claimant's public disclosures;

14.42. Failed to provide adequate support to the claimant;

14.43. Failed to make reasonable adjustments to the claimant;

14.44. Blocked the claimant's access to emails in May 2017;

14.45. Intimidated the claimant with the absence policy;

14.46. Intimidated the claimant with requests to come to investigation meetings following his OFSTED disclosure;

14.47. Tried to delete evidence that would support claimant's version of events;

14.48. Tried to negate that the incident where the claimant sustained head injury happened;

14.49. Engaged in discussions on how to get rid of the claimant;

14.50. Failed to offer a promised pay rise to the claimant;

14.51. Failed to consult the claimant under TUPE;

14.52. Failed to provide reasonable adjustments for consultation under TUPE;

14.53. Failed to pay the claimant correctly in December 2017;

14.54. Failed to honor the promise that no deductions will be made for January 2018 and February 2018;

14.55. Failed to pay the claimant on time in April 2018;

14.56. Removed the claimant's profile from the website in April 2018;

14.57. Failed to inform the claimant about change to system to notify of sickness absence and/or removed the claimant from employee list in April 2018;

14.58. Advertised for the claimant's position in April 2018;

14.59. Generally treated the claimant in a way that made other members of staff deem claimant as unworthy of assistance; and

14.60. Conducted employment tribunal proceedings vexatiously.

15. If so, in respect of each allegation set out above as the Tribunal finds:

15.1. Does it amount to a "detriment" within the meaning of section 47B(1) ERA?

15.2. Was the claimant subjected to the detriment on the ground that he had made the protected disclosures relied upon or any of them (as set out at §9 above)?

Constructive Unfair Dismissal

16. Was the claimant constructively dismissed within the meaning of section 95(1)(c) ERA i.e. was he entitled to terminate his contract of employment by reason of the respondent's conduct? In particular:

16.1. Did the respondent breach the claimant's employment contract? (Note: The claimant relies on a breach of the implied term of mutual trust and confidence, but his FBP also refer to implied terms to the effect that he would not be subjected to detriment or disability discrimination. The FBP do not specifically identify the conduct said to be repudiatory in response to which the claimant is said to have resigned. The respondent understands that the conduct that the claimant contends that he resigned in response to was that complained of in his 1 May 2018 ET and, in particular:

16.1.1. The manipulation of his pay;

16.1.2. The threat to dismiss him;

16.1.3. The failure to pay his wages;

16.1.4. The failure to inform him of changes in absence procedures;

16.1.5. Repeated harassment to attend non-existent

Occupational Health appointments;

16.1.6. Threats for not keeping in touch;

16.1.7. Non-receipt of payslips;

16.1.8. Purposefully causing him stress and triggering his disability traits;

16.1.9. Ignoring ET directions and infringing on his ability to fulfil directions;

16.1.10. Removing his name from the school staff list; and

16.1.11. Advertising his role the following working day (on 30 April 2018).

16.2. Was the alleged breach repudiatory?

16.3. Insofar as the claimant relies on the last straw doctrine, what is the "last straw" relied upon? (Note: The respondent understands that the last straw relied upon is the claimant's allegation that he checked the respondent's website on 30 April 2018 and found that his role was being advertised.)

16.4. Did the claimant resign in response to the alleged breach, without waiving or affirming his contract?

17. If the respondent did dismiss the claimant, was the claimant's dismissal fair or unfair having regard to s 98 ERA?

Automatic Constructive Unfair Dismissal – s. 103A ERA

18. If the claimant was constructively unfairly dismissed, was the sole or principal reason for his dismissal that he had made the protected disclosures relied upon (or any of them)?

Jurisdiction (time points)

19. Does the Tribunal have jurisdiction to consider the claimant's unlawful detriment complaints under s. 48 ERA? In particular:

19.1. What is the relevant date on which the complaints were presented?

19.2. Are the acts/failures to act relied upon acts extending over a period or part of a series of similar acts or failures?

19.3. Have the complaints been brought before the end of the period of three months (as extended by the early conciliation provisions) of the act or failure to act to which the complaints relate?

19.4. Was it reasonably practicable for the claimant to present his complaints in time?

19.5. If not, have the complaints been presented within such further period as the Tribunal considers reasonable?

20. Does the Tribunal have jurisdiction under s. 123 EQA to consider the claimant's discrimination complaints? In particular:

20.1. What is the relevant date on which the complaints were presented?

20.2. Does the conduct relied upon constitute conduct extending over a period within the meaning of s. 123(3)(a) EQA?

20.3. Have the complaints been brought before the end of the period of three months (as extended by the early conciliation provisions) starting with the date of the act to which the complaint relates?

20.4. If not, have the complaints been brought within such other period as the Tribunal considers just and equitable?