EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 19, 20, 23, 24 May 2022 and in Chambers on 25 May 2022

Claimant: Ms F Rasekh

Respondent: St Benedict's School Ealing Ltd

Before: Employment Judge Mr J S Burns
Members Mr T Robinson and Mr A Adolphus

Representation
Claimant: Ms G Nicholls (Counsel)
Respondent: Mr S Redpath (Counsel)

JUDGMENT

1. The Claimant's application dated 13/5/22 to amend her claim to add a claimed detriment (paragraph 48 in Appendix 1) to her victimisation claim is allowed
2. The claims are dismissed.

REASONS

For paragraph 1 of the judgment:

1. We applied the Selkent principles. It had was not possible for the Claimant to have included this within her claim when it was previously issued or amended because the additional act relied upon had not yet happened. The amendment relates to a communication made by Mr Peacock on 16/2/22 in response to which on 1/3/22 the Claimant's solicitors gave notice that the Claimant may apply to add this as a further complaint. Witness statements were exchanged over a month later in April 22, so the Respondent had a lengthy opportunity to deal with the matter, although in the event Mr Peacock served his witness statement about this only on 19/5/22. Even without Mr Peacock's statement, both parties' witness statements had referred expressly to the claimed detriment which the Claimant wished to add and therefore it was a matter which was in both parties' minds when preparing their cases for final hearing. The new matter relates to the same factual matrix as the existing claim. The Claimant already had a live claim for victimisation which the Tribunal had to consider. Mr Peacock stated he was involved in other cases running in Reading and Croydon on 19, 20, 23 and 24 May 22, offering this as a reason why he may not be available to give oral evidence in support of his witness statement. We offered to accommodate him by hearing from him by telephone or video and if necessary by sitting early or late - and thus provided a reasonable opportunity for the Respondent to call him if so advised. In the event he was called to give oral evidence on 24/5/22. Thus, allowing the amendment did not cause any forensic prejudice. If we did not allow the amendment the Claimant would still have been in time to issue a separate claim so allowing it avoided this possibility and hence assisted the Tribunal in dealing with the proceedings efficiently and fairly in accordance with the overriding objective.

For paragraph 2 of the judgment

2. The claims were disability and sex discrimination, harassment and victimisation. Disability was in dispute. After some claims were withdrawn and with the addition of the recent amendment, the remaining specific claims and issues were as listed in Appendix 1.

3. It was accepted at the outset that no act or omission before 9/3/21 (the commencement of the limitation period) was relied on as a cause of action, so no time point had to be considered.

4. We decided to hear evidence and make our findings about liability first.

5. We heard evidence from the Claimant and then from the Respondent's witnesses Mr A Johnson (Headmaster); Ms M Dryden (Head of HR); Mr J Berger, (Chair of Governors); Dr D Robb, (Head of Maths) and then Mr S Peacock, partner with conduct for the Respondent's solicitors. The documents were in a main bundle of 424 pages and a supplementary bundle of 63 pages. We also listened to part of an audio recording of a conversation between Dr Robb and the Claimant which the latter had made covertly on 21/5/21. The Respondent provided late disclosure of a 15-page bundle and one additional email trail between the Claimant and Andrew Johnson, both on 24 May 2022.

Findings of fact

6. The Claimant started working as a maths teacher for the Respondent at a school in London on 1/9/2019. The description in her employment contract of her duties included the following; *"Planning and preparing courses and lessons; Teaching, according to their educational need, the pupils assigned to you; setting and marking work (including examinations) to be carried out by the pupils in school or elsewhere. Assessing, recording and reporting on the development, progress and attainment of pupils. Advising and co-operating with the Head and other teachers (or any one or more of them) on the preparation and development of courses of study, teaching materials, teaching programmes, methods of teaching and assessment of pastoral arrangements*.'

7. The contract also included the following regarding obligations during any notice period; *"Attendance: You will continue to perform your duties during any period of notice (whether given by you or the School) unless the School requires that you refrain from so doing and remain away from the School." "Garden leave: If the School requires you to be absent during any such notice period or any other period then you will comply with any conditions laid down by the School during this period. You will be entitled to full pay and benefits but will not be required to carry out any of your duties under this agreement unless requested to do so by the School. You will nonetheless be available to carry out such duties if requested to do so and will not be permitted to work for any other person or body without the prior written consent of the Head."*

8. The Claimant has suffered from recurrent severe migraine headaches over many years. The migraines which can occur several times (3 to 10 times) per month. She has taken various medications for this over the years - of which Botox injections into the scalp and face have been the most effective. She has not been taking medication since she became pregnant because taking such medication while pregnant or breast-feeding can cause harm to a baby.

9. The Claimant explained in her impact statement that when she suffers migraines, the pain prevents her driving, reading, (particularly on screens), concentrating, caring for her children or even going for walks. None of this (the effect of the migraine on activities) is referred in any of the medical evidence now provided for the tribunal, although the treatment is. When not absent as a result of migraine, the Claimant was able to perform her full-time teaching role fully, and she had evidently done so well at her previous school before working for the Respondent.

10. The Claimant's line manager Dr Robb was aware from November 2019 that the Claimant suffered migraine headaches such that she was on occasion unable to work and had to take days off. Both Dr Robb and the Headmaster Mr Johnson knew by 19 May 2021 that subsequent to the Claimant returning from maternity leave to the school on 16/4/21, she had been absent from work or went home early because of migraine headaches on a further three separate occasions. The Claimant told Mr Berger at the subsequent grievance hearing that she suffered from migraines.

11. However, the Claimant did not disclose to the Respondent as part of the recruitment process that she suffered from or was disabled by migraines. During employment she did disclose that she suffered migraines but we do not find it proved that she referred to any medication or treatment she received. The Claimant did not discuss with her managers the effect of her migraines on her ability to do day-to-day activities. Before the Claimant's maternity leave her pregnancy-related health issues also somewhat obscured the issue. Apart from the few occasions she was absent, she was able to function satisfactorily as a teacher and did not show any adverse effects. The migraine-related absences were comparatively few. Looking at the Claimant's absence record, migraines do not stand out as a significant cause. Overall the absence record attributable to migraine was not at a level that alerted HR, the Headmaster or the Claimant's line manager to the fact she was disabled or that any particular adjustments were required in response to any substantial disadvantage she may have been at. The Claimant did not suggest to any of the Respondent's managers during her employment that she was disabled. As Dr Robb told us, he himself and also other people that he has worked with and managed, suffer migraines from time to time, but without more that is insufficient as a basis for concluding that such people are disabled.

12. For these reasons we find that the Respondent did not know and should not have known that the Claimant was disabled.

13. On 28/10/2019 the Claimant told the Respondent that she was pregnant.

14. The Claimant expressed some difficulties with her pregnancy - there were concerns about how large the baby was, and that the Claimant had pregnancy-related diabetes. There were difficulties between the Claimant and other staff which Dr Robb believed might have been contributed to by these pregnancy issues.

15. The Claimant had three migraine-related absences in the period November 2019 to January 2020.

16. On 20/1/20, the Claimant's work responsibilities were changed - her responsibility for one of her classes (which contained pupils who were due to sit public exams later in that academic year in May) being removed and taken over by other teachers. The Respondent's purpose in so doing was to ensure continuity and avoid disruption in the teaching of those students. This was partly prompted by the absences but also by the general difficulties which the Claimant was finding with her pregnancy. Mr A Johnson felt that it would be best, particularly for those facing important public exams, to make the change in January 2020 rather than in March 2020 which was when the Claimant's maternity leave was due to start. This would avoid a hand-over in the critical few weeks

before the exams. We accept this was a sensible business decision - and the Claimant did not complain about it at the time.

17. The Claimant had meetings with Dr Robb and another colleague Ms F Allen on 25/2/20 to discuss problems with the Claimant's marking of students' work. The Claimant became stressed, and subsequently complained that Ms Allen had shouted at her. Dr Robb and Ms Allen for their part thought that the Claimant had been '*argumentative', 'quite aggressive',* and *'expressing resistance*'. The Claimant signed off from work on 4/3/2020 - and did not return to work before the end of her maternity leave which started on 27/3/2020 and lasted until mid-March 2021.

18. The school was closed for two extended lockdowns during the Claimant's maternity leave and teachers were at home during this period. Nevertheless, when the Claimant's baby was born Ms Dryden phoned her to congratulate her and Dr Robb and others clubbed together to buy and send her a present,- and there were several other communications between the Respondent and the Claimant during her maternity leave - for example contact with an HR colleague regarding maternity allowance and with another (Audrey) in October 2020 regarding a mortgage reference. While making a generalised complaint about the level of contact she had during maternity leave - the Claimant did not point to anything in particular that was omitted. In the circumstances, which included lockdowns and extended school holidays during the maternity leave, we find that contact was adequate.

19. The school re-opened after a lockdown in early March 2021. There was a lot of catching-up to do generally in the school and the Respondent's managers were anxious to ensure that the pupils regained momentum with their studies as quickly as possible.

20. On 19/3/21 Dr Robb sent the Claimant a detailed email with information as to the classes for her return to school and a timetable for her first week back. The intention was for her to teach newly created classes in Years 7, 8, 9 and 10. These are the same years that she taught prior to maternity leave, but with smaller sets in each year group .

21. On 22/3/21 Dr Robb had a Teams meeting with the Claimant to discuss arrangements and details for her return. She was shielding from Covid 19 and so it was agreed that she would not physically return to the school to start teaching until 16/4/21 after the Easter break. Dr Robb arranged for the Claimant to start observing Teams classes remotely as a means of induction back into teaching after her extended leave. She did this several times a day over a week. She also spoke to teachers over Teams.

22. On 23/3/21 Dr Robb copied in the Claimant to an email sent to the Maths Department to inform them of the arrangements for her return to school and to seek their engagement in supporting her with her return following over a year away. He offered her the opportunity to meet with him later that day for a catch-up.

23. Dr Robb continued to liaise with the Claimant both by email and TEAMS. On 26 and 27/3/21 there were a series of emails between them regarding the arrangements for her return to school. Dr Robb provided the proposed teaching timetable, class lists and list of duties. Dr Robb also explained that he had arranged for a desk for her in the E-Learning room where a number of her colleagues in the Maths Department also had their desks.

24. As is evident from the good nature and tone of the emails between them, the Claimant displayed no unhappiness and there was nothing contentious with the proposed arrangements or quality of information provided for her return. However, the Claimant told Dr Robb and Ms Dryden that she was finding it difficult to cope with her separation from her baby caused by her return to work.

25. On 10/2/21 the Claimant, the Claimant had sent Mr Johnson an informal proposal that she be allowed to work reduced hours from 1/9/21 to assist with her childcare arrangements. Mr Johnson and Ms Dryden had a Teams meeting with the Claimant on 25/2/21 to discuss this. The Claimant explained that she would like one day off per week.

26. Mr Johnson discussed the matter with Dr Robb on 16/3/21 whose view was that it would be difficult to accommodate the request at that time having regard to anticipated timetabling pressures with maths teaching from the start of the new school year, which included having to accommodate already a number of part-time members of staff. The school already had 4 part-time maths teachers (out of 12) and increasing the number of part-timers above this level would have caused difficulties.

27. Mr Johnson refused the request on 25/3/21, Ms Dryden sending the Claimant a lengthy explanation that this would not suit the Respondent's operational needs, as it already had others working part-time. In an email on 26/3/21 Ms Dryden set out the Claimant's options further at some length. The Claimant was invited to appeal the refusal of her informal request if she wished, but also told that she could make a formal application (with associated appeal rights) if she wished,- but told that it might be better for her to wait to do this until conditions may have made it easier for any new request to be accommodated. For example, if one of the existing part-timers stepped up to full-time, that might have create an opportunity for the Claimant to reduce her hours.

28. The Claimant did not make a formal application to the Respondent for part-time working but instead accepted an offer to start part-time work for another employer with effect from 1/9/21; and on 4/5/21 she gave notice of her resignation from her employment with the Respondent with effect from the end of August 2021. In her email of resignation she made no complaints but instead offered her thanks for the opportunities afforded to her through her employment and she offered her help during the transition period leading to the end of her employment.

29. The notice given was short as the Claimant's contract required her to give notice of at least a whole term, - however the Mr Johnson waived this requirement and accepted the resignation as tendered.

30. On 16/4/21 she arrived back at the school. During her maternity leave seating arrangements in the staff room for teachers had been changed in response to the pandemic. The Claimant was shown her new seating at a table in the staffroom where other staff were also based, and arrangements had to be made to supply her with a laptop and set up the necessary IT connections. Everyone was under pressure at this time and everyone had to take some responsibility for arranging details such as pigeon holes, that computers were correctly connected etc.

31. New classes of pupils had been formed for her to teach.

32. The Claimant sought permission to go home early after teaching ended at 3pm instead of staying at school until the end of the school day at 4pm, and Mr Johnson agreed to this.

33. In addition to the shielding period up to 16/4/21, since then the Claimant had further absences from work on 8 days between 23/4/21 and 19/5/21 including absences of a whole day on each of 11/5/21 and 19/5/21 and a half day on 18/5/21 for migraines, the other absences being caused by matters such as her attending a job interview and dentist and her child's vaccination appointments. As a consequence, by 20/5/21, she had only completed fully around one third of the available working days since her return to the school on 16/4, and in addition she was going home early when not time-tabled for classroom teaching.

34. Mr Andrew and Dr Robb were concerned that the migraines might have been brought on by stress. They had in mind the circumstances in which the Claimant commenced the period of long-term absence in early March 2020 that merged into maternity leave, following the difficult discussions around her marking. On her return from maternity leave the Claimant had told both Ms Dryden and Dr Robb that she was finding separation from her baby difficult. Mr Johnson and Dr Robb wished to minimise the risk of further intermittent or long-term absences impacting on the teaching at that time.

35. Furthermore, the Claimant's teaching of the newly-created smaller classes in the lead-up to the exam period did not work as well as had been hoped. There was some dissatisfaction among some pupils and parents about children having been moved into new classes under the Claimant. There was a sense that the arrangement was yet another disruption for pupils who had already suffered through the series of lockdowns over the previous 12 or so months. One girl left the Claimant's class and went back to the class she had come from and a lady governor complained about the situation to Mr Johnson. The feedback was that the pupils wanted to remain in their original classes and did not like the disruption arising from the change, particularly as they had experienced such a difficult year with various lockdowns and were approaching the end of year exams and assessments.

36. On 20/5/21 the Claimant attended work and had a meeting with Mr Johnson and Dr Robb. They told her that her classes would be removed from her and the children sent back to the classes under other maths teachers, in which they had been taught up to 16/4/21. Instead the Claimant would assist those other teachers by teaching with them in their classes. The decision was prompted by the Claimant's absences since 16/4/21 coupled with the fact that Mr Johnson believed that the arrangements were unpopular. The Claimant's title as maths teacher and her pay were unaffected.

37. Mr Johnson explained that he considered that the new arrangement to be in the best interests of the pupils. The arrangement had the added advantage of offering in-built cover in the event that the Claimant may have needed further intermittent absences following the return from maternity leave.

38. Mr Johnson had not intended at the meeting on 20/5/21 to tell the Claimant she would simply become a support/cover teacher and we do not find that he had used that description. Equally however we do not find he had used the term "*team teaching"* on 20/5. He did explain that the Claimant would be working collaboratively with other teachers, which in the Respondent's view can be an effective short-term arrangement.

39. Mr Johnson and Dr Robb found the Claimant's manner at the meeting somewhat rude and disrespectful.

40. The next morning the Claimant sent an email to Mr Johnson as follows: "*Dear Andrew,I trust all is well. Based on your instructions per our meeting on Thursday 20th May 2021, my regular timetable is being dissolved as of Monday 24th May 2021 and I will be assigned support/cover responsibilities indefinitely. Please let me know what my timetable is as of Monday 24th May 2021 by the end of the day, under my newly assigned responsibilities so that I can prepare to deliver excellent work as always. Kind regards Tima"*

41. The Claimant did not suggest in her email that she had been told she had been demoted to a support teacher but simply that she would have support responsibilities - which is consistent with the collaborative team-teaching model.

42. Mr Johnson's reply was "*Dear Tima Thanks for your email. I know you already have a meeting arranged with your Head of Department for lunchtime, and he will give you your timetable when you meet. Kind regards Andrew Johnson Headmaster".*

43. The Claimant appeared from her email to have accepted the new arrangement, and the Respondent's purpose of the ten-minute meeting (which then took place at the end of the lunch hour on 21/5/21 between the Claimant and Dr Robb) was simply to discuss the time-table, rather than explain or justify the reasons for the change.

44. The lack of time available for an extended discussion contributed to how it ended. The Claimant made a covert audio recording of their discussion.

45. Instead of simply discussing the time-table, she persistently challenged and questioned why the collaborative arrangement had been put in place. In so doing she spoke with a degree of disrespect both about Mr Johnson and to Dr Robb. She demanded an explanation of "*why her classes had been removed*". At one point the Claimant accused Dr Robb of "*beating around the bush*".

46. Dr Robb explained that one or two parents had queried the arrangement which had been put in place for the Claimant's return from maternity leave. He also referred to the fact that a lady governor had contacted Mr Johnson about the matter. Dr Robb repeatedly stated that the recent decision (to change to team teaching0 had been Mr Johnson's and that if the Claimant wanted a further explanation she should go back to him. The Claimant did not accept this and repeatedly pressed Dr Robb to justify the decision.

47. Dr Robb stated : "*But Tima, youve got to understand that this , yeah but youre making it all about yourself. There are situations that need to be dealt with in a school particularly after something like Covid lockdown, particularly after the fact that these sets weren't there already beforehand we were creating these for you for when you came back. Sets cant remain there and be untaught for a whole year until someone comes back from maternity leave"*

48. What Dr Robb was referring to at this point was the fact that as no full-time temporary maternity cover maths teacher had been employed during the Claimant's maternity leave, her pupils (who could not be left untaught) had been taken over by other maths teachers during that leave, and therefore new classes had to be formed afresh to give the Claimant pupils to teach on her return. The reference to the situation after the Covid19 lockdown was a reference to the fact that teaching had been disrupted in any event by the pandemic.

49. Shortly afterwards Dr Robb explained further *"…your three absences were due to illness. I think there is a recognition that that might happen again and its to make sure that the kids aren't in any way disrupted between now and the end of year exams"*

50. The discussion continued reasonably cordially and calmly although it is clear that Dr Robb wanted to bring the discussion to a close so he could go to his next class, while the Claimant continued challenging and pressing Dr Robb. The Claimant knew at the time that she was recording the conversation for later use, and would therefore have been careful about what she said and how she said it, while Dr Robb did not have those advantages.

51. Eventually until Dr Robb offered a further explanation namely "*And it will also take a little bit of pressure off you too*". He said this in order to be supportive, and it reflected the fact that the

Claimant appeared to him to be struggling somewhat with the return to work after maternity leave, a matter which she had stated expressly to him previously.

52. However, the Claimant replied angrily "*There is no pressure on me. I don't want this putting on me. I don't understand where this is coming from, its quite offensive. There is no pressure on me".*

53. Dr Robb finally stated "*Right well youll just do as you are …if your not happy you take it immediately to the Head."*

54. The Claimant interjected "*No but Im doing what Ive been told but…"*

55. At this point Dr Robb stated in an angry raised voice "*Tima stop right now…because your offending me and I am your Head of department. You spoke to Andrew* (a reference to the Headmaster Mr Johnson) *yesterday in a very very up-hand way as if you were in charge. Your coming back into the school, the Head has asked you to do it, you either do it or you go and speak to the Head. That is the end of the matter. If you do speak to me like that again I will make a formal complaint against you to HR and to the Head Master, do you understand it? I am not putting up with anymore of this nonsense, Now please go back to your room and get ready for this afternoon. I will be recording this with the Head".*

56. While these last words were uttered by Dr Robb in a raised and angry voice, it is not accurate to suggest, as the Claimant did subsequently, that Dr Robb had "*shouted/screamed at the top of his voice*" or "*shouted at her non-stop*".

57. The meeting then ended but shortly afterwards at 14.10 Dr Robb sent an email to Mr Johnson and Ms Dryden in which he complained that the Claimant had been extremely rude and continually complained to him, refusing to accept the new arrangements.

58. The Claimant for her part emailed Ms Dryden at 15.58 complaining about "*David…shouting at me non-stop. I have been shivering since the meeting which ended at 2pm. …I wanted to inform you that I do not feel safe to come to work on Monday"*

59. The Claimant then remained away from work on Monday 24/5 and in fact never returned to teaching for the rest of her employment.

60. On 24/5/21 she had lengthy telephone conversations (also clandestinely recorded by her) with Ms Dryden in which the Claimant doing most of the talking continued to ventilate her complaints both about the new arrangements and about her interaction with Dr Robb on 21/5. Ms Dryden was supportive and understanding, offering assurances to the Claimant that she was 'safe' to return to work.

61. On 26/5/21 the Claimant had meetings with Mr Johnson and Ms Dryden - also clandestinely recorded by the Claimant. During the discussion, there was a recognition by the Claimant that the arrangement whereby smaller classes had been created for her to teach for the Trinity term had resulted in some parents expressing unhappiness and it had not worked as had been hoped.

62. Mr Johnson explained why he believed that the 'team teaching' arrangement would benefit the pupils, and why it should not be in any way considered a demotion and he urged her to embrace the opportunity and return to school. He also asked her what needed to happen to ensure she felt safe to return to school and what steps she felt ought to be taken to enable the return to teaching. The Claimant was unable to offer any suggestions. Mr Johnson suggested that it might be helpful

to arrange a meeting with Dr Robb, whether that be by way of a mediation or some other facilitated meeting.

63. After the meeting there was an exchange of emails with Ms Dryden. The Claimant emailed to say she would be willing to return to work only if she was not managed by Dr Robb and was *"given a cohort of pupils to teach and will not be taking orders from another teacher".* Ms Dryden replied on 27/5/21 saying that the Claimant would have to continue reporting to Dr Robb and that she would be given further clarity about the timetable - which she then sent in a further email. On 28/5/21 Ms Dryden emailed the Claimant again assuring her that the environment was perfectly safe and that there was no reason why the Claimant should not feel able to return.

64. This assurance from Ms Dryden was reasonable. Dr Robb and the Claimant had had a good relationship until 21/5/21. The incident in 21/5/21 had been an isolated incident at which cross words had been exchanged in a pressured situation - which is common in most workplaces. Reasonable people in a pressured teaching situation should be a willing to try to work together to resolve minor differences. Changing the whole reporting line was unjustified. If the Claimant wished to act reasonably and return to work to perform her contractual obligations could and should have made peace and moved on. Instead she refused mediation and raised difficulties about returning.

65. On 1/6/21 (the beginning of the half term week) the Claimant sent by email a formal grievance mainly against Dr Robb but also referring to Ms Dryden and Mr Johnson, and asking to be put on garden leave for the rest of her notice period.

66. Term started again on 7/6/21 and the grievance and request for garden leave were brought to Mr Johnson's attention. He did not see any justification for paying full pay whilst the Claimant remained at home serving notice in circumstances where he wished her to teach, and had made efforts to engage with her over any steps necessary to enable her to return.

67. On 8/6/21 Ms Dryden responded to the grievance - telling the Claimant that she should return to work - and that she would be managed by a new manager namely Mr Williamson - while the deputy head Mr Ramsden would investigate the grievance. Mr Williamson himself reported to Dr Robb but seeing that the Claimant had now made a formal grievance against Dr Robb and had also, the previous year, fallen out with Ms F Allen (Dr Robb's manager), this was the only arrangement which could be offered.

68. The Claimant then countered by saying she was unfit to work and on 9/6/21 provided a sick note signing her off with work-related stress until 9/7/21 - ie for the rest of term.

69. Also on 9/6/21 the Claimant applied for and obtained an ACAS certificate. She then presented her ET1 claim on 16/6/21.

70. The Claimant was offered but did not accept a grievance hearing on 14/6/21 but agreed to a meeting on 28/6/21.

71. Mr Ramsden on Mr Johnson's instructions compiled and collated an information pack for the grievance, a copy of which pack was sent to the Claimant on 22/6/21. She did not complain that any information was missing. While the Respondent could have instructed outside agents to deal with all aspects of the grievance, it was a reasonable decision to use the school's own existing resources to do so.

72. On 28/6/21 Mr Berger Chairman of the Board of Governors chaired a grievance hearing. The Claimant attended with a companion and again made a covert audio recording, despite there being an official note-taker present. During the hearing the Claimant was given a full opportunity to say whatever she wished and she also produced and played her covert recording of Dr Robb which

she had made on 21/5/21. Mr Berger was alarmed to learn that the Claimant had made this recording covertly and raised his concerns about this with the Claimant during the grievance hearing itself. Mr Berger told the Claimant that the Respondent may follow the matter up as a potentially serious matter. However, Mr Berger agreed to listen to and did listen to and consider such parts of the covert recording as the Claimant chose to play to him.

73. Despite this, the Claimant did not disclose that she had made several other covert recordings of the Respondent's staff since 21/5 and that was, at that very time, making yet another covert recording of the grievance hearing itself.

74. After the grievance hearing Mr Berger reported his concerns about the covert recording that the Claimant had revealed, to Mr Johnson.

75. After the grievance hearing with the Claimant Mr Berger had conversations with Dr Robb, Ms Dryden and Ms Allen.

76. An email dated 1/7/21 from Dr Robb to Mr Berger which reads as follows *""having had the chance to review the issues that we discussed and also chat with some trusted friends and supporting parties I would like to ask you if you would proceed in the way that you and the school considers to be most appropriate in the circumstances".*

77. This email is in slightly strange terms and could mean a number of different things. However despite the Claimant being given an opportunity, Mr Berger was not cross-examined about it and we do not feel able to make any findings about what, if anything, lay behind it.

78. Dr Robb on 5/7/21 sent an email to Ms Dryden detailing the previous difficulties which he claimed he and others had experienced with the Claimant.

79. Mr Berger did not go back to the Claimant for her comments on what Dr Robb and others had told him, but that was not required by the Respondent's grievance procedure.

80. On 29/7/21 Dr Berger issued his decision about the grievance which was lengthy and carefully considered - the grievance was not upheld in any respect. The Claimant failed to acknowledge or respond to the outcome letter and did not appeal.

81. On 14/7/21 Mr Johnson invited the Claimant to a disciplinary investigation hearing about the fact that she had made the covert audio recording of Dr Robb. In the letter he went too far in expressing his views about the matter which he had already formed but his motivation in wishing to investigate was reasonable. On 20/7/5 the Claimant responded in writing. She failed to attend any disciplinary hearing about this and the Respondent decided not to take the matter further at that stage.

82. In her oral evidence at the Tribunal, the Claimant said she had made these audio recordings "*as her notes*" because she "*didn't feel able to take notes in any other way*". This is implausible - as a teacher she would have been able to take notes. She did not explain in any event why it was necessary to record covertly. Nor did she explain why she made a covert recording even though she knew that an official note taker was present at the grievance hearing. Nor did she explain why she had not disclosed the fact that she engaged in making another covert recording when Mr Berger expressed his concern about this during the grievance hearing itself.

83. In her oral evidence the Claimant accepted that making a covert audio recording of a colleague is an invasion of their privacy and could be seen as a serious breach of trust, and as deceitful; and that teacher standards include requirements to act honestly and with integrity, and to forge and promote good personal relations with colleagues. She also accepted that within St Benedict's School there is a strong ethos/culture that everyone must be dealt with courteously and with dignity and respect.

84. The Claimant's employment came to an end on 31/8/21 on expiry of her notice.

85. Following a direction in these proceedings for disclosure by 28/1/22 which direction was issued at a PH on 1/11/21 , the Claimant by degrees and after delays finally revealed that she had made the following further covert audio recordings during her employment as follows; 27.01.22 disclosure of 2 recordings calls with Melissa Dryden (24.05.21); 04.02.22 - disclosure of recording meeting Claimant, Melissa Dryden & Andrew Johnson (26.05.2021) and 14.02.22 -disclosure of recording from Grievance Hearing (28.06.21).

86. The Claimant suggested in her oral evidence that the reason for this pattern of disclosure was that she had forgotten about various of the recordings and discovered them later on her phone. This is also implausible.

87. Mr Johnson become aware in February 2022 of these additional covert recordings, one of which involved an informal meeting between Mr Johnson and the Claimant on 26/5/21 which he had no idea until that point had been covertly recorded. He was concerned about the integrity of the Claimant and, in particular, about the late 'drip' emergence of the covert recordings. This was not the type of conduct he had expected from a member of the teaching profession or anyone within the St Benedict's community. He felt it contradicted the principles of the school and the 'Teachers' Standards' which require teachers to act with honesty and integrity.

88. He was also aware of the fact that Sections 141D and 141E of the Education Act 2002 impose a duty on a relevant employer or an agent to consider whether it would be appropriate to provide prescribed information about the teacher to the Secretary of State when they have ceased to use the services of a teacher because the teacher has been guilty of serious misconduct, or might have done so had the teacher not ceased to provide those services or to be available for work.

89. Mr Johnson approached the Respondent's solicitor Mr Peacock for advice on whether the duty to make a report to the Teaching Regulation Agency was triggered. Mr Peacock advised him that it might be.

90. Mr Johnson had been willing to let the matter go (not pursue the issue beyond receipt of the Claimant's response to the invitation dated 14/7/21 to the investigation meeting) when he knew about the single covert recording - but when he discovered in February 22 that the Claimant had made numerous covert recordings, including of himself and Mr Berger, he was shocked and wanted to do something about it.

91. Following that discussion, Mr Peacock on the Respondent's behalf sent an email on 16/2/22 to the Claimant's solicitor referring to the matter as follows "*Now that further covert recordings have emerged and continue to emerge, our client is concerned that it will need to report the conduct as a potential breach of Teachers' standards and reserves its right to do so at the conclusion of the Employment Tribunal litigation."*

92. Mr Peacock explained in his evidence that in his past experience of dealing with such reporting, an important consideration is any delay in making the report. Hence following the intensification of concern in February 22 about the matter, he felt it would be best in the interests of transparency to inform the Claimant without further delay.

93. On 1/3/22 the Claimant's solicitor responded warning "*Our client reserves the right to treat this communication as a further act of victimisation in the circumstances, with our client's belief being that this threat would not have been made if she had not raised allegations of discrimination and/or pursued a Tribunal claim relating to those matters.*'

The law

94. Section 4 Equality Act 2010 (EA) provides that disability and sex are protected characteristics.

95. Per section 6, a person has a disability if they have a physical or mental impairment which has a substantial (which means "more than minor or trivial" per section 212) and long-term adverse effect on his ability to carry out normal day to day activities. In assessing whether there is or would be a substantial effect, one disregards measures such as medical measures which are being used to treat it. Sch 1 para 5(1) and (2).

96. Normal day to day activities are activities such as walking, driving, typing and forming social relationships.

97. The effect is long-term if it has lasted or is likely to last 12 months or for the rest of the persons life (Sch 1 para 2)

98. Under Section 6(5) EA 2010 The Secretary of State has issued 2011 issued guidance on matters to be taken into account in determining questions relating to the definition of Disability 2011.

99. At paragraph D15 of that guidance the following appears as an example of how an impairment can have adverse effects: "*A journalist has recurrent severe migraines which cause her significant pain. Owing to the pain, she has difficulty maintaining concentration on writing articles and meeting deadlines"*

Direct Discrimination

100. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

101. Section 13 does not apply to cases covered by section 18(2) and or 18(3) which relates to maternity pregnancy and maternity leave.

102. It is necessary that an employer have actual knowledge of disability in order to directly discriminate because of disability. For that purpose, the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as defined in s.6 EA. Moreover, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a disabled person as defined in the Act: N.J. Gallop v Newport City Council [2013] EWCA Civ 1583, at [36]. It is not necessary that the employer know the exact diagnosis or cause of the impairment or that each and every element of the definition of a disability is satisfied at the time. The point at which an employer will be found to have actual or constructive knowledge will depend on the particular facts including such matters as to the extent of any sickness absences, what the employee has told the employer, and what

other pertinent information is within the knowledge of relevant managers or other relevant officers of the employer.

Failure to make Reasonable Adjustments

103. Section 20 read with 21 provide that a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments.

104. Section 20(1)(3) provides that where a provision criterion or practice (PCP) of A's puts the disabled person concerned at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is the duty of A to take such steps as it is reasonable to have to take to avoid the disadvantage.

105. In the absence of a provision or criterion, there has to be something that can qualify as a "practice" in order for the duty of reasonable adjustment to apply. The term "practice" has something of the element of repetition about it. A one-off application of a disciplinary process cannot reasonably be regarded as a practice. If it relates to a procedure, it must be something that is applicable to others than the disabled person. If that were not the case, there would be no comparative disadvantage between the disabled person and the others to whom the alleged practice would also apply. (Nottingham CT v Harvey 2013 EAT).

106. A PCP connotes a *'state of affairs, indicating how similar cases are generally treated or how a similar case would be treated if it occurred again*.' In relation to practice, this implies the way in which things are generally done or will be done. It is not necessary for a practice to already have been applied to another person, if there is an indication that it would be done again in future if a similar case were to arise." (Simler LJ in Ishola v TFL EWCA Civ 112 7/2/2020)

107. Employment and offering employment are relevant matters and Schedule 8 sets out the various detailed provisions in different scenarios.

108. The EHRCs code at 6.28 sets out various matters which must be considered in determining whether it is reasonable to make an adjustment, ie effectiveness, practicability, cost, size of undertaking etc.

109. Para 20(1) of Part 3 of Sch 8 provides that there is no duty to make adjustments if the employer does not know and could not reasonably be expected to know both that a disabled person has a disability and is liable to be placed at the disadvantage.

110. The test whether or not the Respondent has fulfilled or breached its duty to make reasonable adjustments is an objective one. The Respondent does not have to show that it consciously considered what steps it ought to take in the context of its statutory duty nor that it consulted with the Claimant about what reasonable adjustments should be made. The question is not one of awareness but what steps the Respondent took or did not take (British Gas Services Ltd v. Mr. B J. McCaull EAT/379/99, Tarbuck v. Sainsbury's Supermarkets Ltd[2006] IRLR 664).

Disability Related Discrimination

111. Section 15 provides that a person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

112. It is a defence if the employer shows that it did not know and could not be reasonably expected to know that the Claimant was disabled.

113. In Homer -v- Chief Constable of West Yorkshire Police [2012] UKSC 15, the SC made clear that, to be proportionate, a PCP must be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. The burden of proof is on the R. "Appropriate" means that there must be a rational connection between the legitimate aim relied on and the measure by which it is sought to give effect to the aim. "Reasonably necessary" means that the PCP should disadvantage the protected group no more than is reasonably necessary in order to achieve the legitimate aim.

114. It is for the ET to weigh the reasonable needs of the R's business against the discriminatory effect of the decision to dismiss and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc -v- Lax [2005] EWCA Civ 846).

Harassment

115. Section 26 provides that a person harasses another where the harasser engages in unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating the others dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. In deciding whether conduct has this effect the following must be taken into account : the perception of the other, the other circumstances of the case and whether it is reasonable for conduct to have that effect.

116. Pregnancy and maternity are not included as protected characteristics under section 26.

117. Victimisation is defined in section 27 of the EA and it occurs where the victimiser subjects another to detriment because the other has done a protected act or the victimiser believes the other has done or may do a protected act. A protected act is defined to include bringing proceedings under the EA or giving evidence in such proceedings or doing anything in relation to the Act or alleging a breach of the Act.

118. A detriment is an act or omission by the employer which would cause an employee to have a legitimate sense of injustice - in other words- treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment

Onus of proof

119. Section 136 provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

120. The fact that discrimination was not ill-intentioned is not a defence because motive is irrelevant. James v Eastleigh Borough Council 1990 IRLR 288.

Conclusions

121. Having considered all the evidence, we have concluded that by 20/5/21 the Claimant, who had already given notice of resignation, had no interest in continuing with her teaching at the Respondent's school and was careless about preserving cordial relationships with her colleagues. From then on, at the latest, she was intent on creating or finding a pretext for absenting herself from the school, preferable on full-pay, for the rest of her employment with the Respondent, and she was taking steps preparatory to presenting an ET claim.

122. If this was not so, she would have accepted the reasonable proposals put in place by the Headmaster and Dr Robb, and worked out her notice for the rest of term under the easier proposed

collaborative teaching conditions which were, objectively considered, both sensible and easily understandable to an experienced maths teacher.

123. Instead she adopted a confrontational and obstructive approach, made numerous covert recordings, pushed Dr Robb on 21/5/21 under covert recording to make unguarded angry comments, then refused mediation, absented herself from the school and requested garden leave, and presented her ET1 claim without waiting for the outcome of the lengthy grievance, the determination of which caused the Respondent a considerable amount of work.

DISABILITY

124. The Claimant's tendency to suffer migraine is an impairment and by the relevant time it had lasted more than 12 months. It is a recurrent condition. We accept that the migraines when they occur cause the Claimant acute pain and this happens more frequently when the Claimant does not have medication.

125. The Claimant's evidence in her impact statement about the effect on her day-to-day activities was not really challenged in cross-examination. Although the effect on day-to-day activities is not referred to in the medical notes, the medication and treatment she has taken is referred to. If the Claimant did not suffer severe debilitating effects from her migraines it is unlikely that she would not have sought and taken medication, (some of which such as the Botox injections - is quite invasive) over the years.

126. We accept that the Claimant was disabled at the relevant time.

127. However, for the reasons given in paragraphs 10 - 12 above, we have found that the Respondent did not have no actual or constructive knowledge of the Claimant's disability at the relevant time.

s13 EQA: DIRECT SEX DISCRIMINATION

128. The Claimant was not subjected to less favourable treatment because of her sex by Dr Robb during the meeting on 21 May 2021 when he stated that "*Sets cant remain there and be untaught for a whole year until someone comes back from maternity leave"*.

129. He stated this not because of the Claimant's gender but in order to explain that as no temporary maternity cover maths teacher had been employed during the Claimant's maternity leave, her pupils (who could not be left untaught) had been taken over by other maths teachers during that leave, and therefore new classes had to be formed afresh to give the Claimant pupils to teach on her return. The provision of this information was a reasonable explanation in the circumstances and was not less favourable treatment in any event. Had the Claimant been a man who had been absent for a year Dr Robb would have made the same point.

130. To the extent that the statement references the fact that the Claimant had been on maternity leave, that is not a matter to which section 13 applies in any event.

s13 EQA: DIRECT DISIBILITY DISCRIMINATION

131. If we should have found that the Respondent had knowledge of the Claimant's disability, then our conclusions would have been as follows:

132. The decision to remove all of the Claimant's classes from her, as communicated on 20/5/21 was not because of the Claimant's disability, but because of a need to ensure continuity and avoid disruption to pupils and to respond to parents and pupils' negative feedback about the arrangements which had been put in place on 16/4/21. The Claimant's absences, of which 3 out of 8 had been migraine-related, were part of the reason for the decision, but the disability itself was not.

133. The comment made by Dr Robb during a meeting on 21 May 2021 that the removal of classes would "*also take a little bit of pressure off you too*" was not unfavourable treatment because of the Claimant's disability but a reasonable explanation of part of the motivation behind the decision, namely to make the work easier and less pressurising for her, and it was well-motivated, being inspired by Dr Robb's sympathy for the fact that the Claimant appeared to be finding the return to work difficult.

s15 EQA: DISCRIMINATION ARISING FROM DISABILITY

134. If we should have found that the Respondent had knowledge of the Claimant's disability, then our conclusions would have been as follows:

135. The arrangements (the Claimant's own classes removed with effect from 24 May 2021) communicated by Mr Johnson and Dr Robb on 2021 and 21/5/21 and Dr Robb's comment that they would "*also take a little bit of pressure off you too*" were in part because of something arising from the Claimant's migraine-related absences on 11, 19 and 20 May 21, but also because of other absences and also other factors such as the unpopularity of the arrangements, concerns about the Claimant suffering stress etc.

136. We accept that the arrangements were a proportionate means of achieving a legitimate aim, namely ensuring a reasonable degree of consistency of maths teaching leading up to year-end exams and assessments, a matter which pupils and parents including a governor had been concerned about.

137. Dr Robb's comments at the end of the conversation on 21/5/21 which he delivered in a loud and angry voice were not because of something arising from the Claimant's migraine-related absences on 11, 19 and 20 May 21) but rather from the fact that he finally lost his temper in response to what he perceived as the Claimant's persistent resistance, arguing, lack of co-operation, selfishness, and disrespect to both him and others such as Mr Johnson the day before, and to himself and Ms Allen a year before.

s20 EQA: FAILURE TO MAKE REASONABLE ADJUSTMENTS

138. If we should have found that the Respondent had knowledge of the Claimant's disability, then our conclusions would have been as follows:

139. The Claimant claimed that the Respondent had a PCP of "*removing pupils or classes from the Claimant in response to absences".*

140. The Respondent on 20/1/20, following three migraine-related absences on the part of the Claimant, changed the Claimant's work responsibilities by removing one of her several classes (which contained pupils due to take public exams in May 2020). The circumstances in which this decision was taken have been described above - the main reason being that Mr A Johnson felt that it would be best for pupils facing public exams to make the change in January 2020 rather than in March 2020 which was when the Claimant's maternity leave was due to start.

141. On 20/5/21, in the circumstances and for the reasons already described above, which again included, but were not limited to, three migraine-related absences, her classes "were removed" in the sense that she was asked to move to team teaching of those and other pupils.

142. To this extent, there was a limited element of repetition and consistency in so far as the Respondent's response to the Claimant's absences were concerned.

143. However, in her oral evidence, she made it clear that she did not contend that the Respondent made a practice of "removing classes" in response to absences on the part of teachers generally. Hence this is not a mode of treatment applicable to others than the disabled Claimant. Hence it was not a PCP as referred to in section 20(3) of the Equality Act 2010.

144. The Claimant misconstrued the arrangement which was explained on 20 and 21/5/21. It was not a demotion for the Claimant and no negative stigma would have been caused to her. Team teaching was a recognised and sensible response to the situation which the Respondent found itself in, and would not have placed the Claimant at a substantial disadvantage in comparison with non-disabled teachers. Other teachers would also have been teaching collaboratively with her - and on some occasions she would have taken the lead.

145. In any event it would not have been a reasonable adjustment to leave the Claimant alone in charge of maths classes, given her inconsistent attendance (for various reasons) and the negative feedback about the situation from pupils, parents and a governor.

146. The Respondent did not have a PCP of not permitting employees on notice to go on garden leave. The terms of the Claimant's contract (cited above) -which together with the oral evidence of Mr Johnson about this, is the best evidence of the Respondent's policy on garden leave - shows that sometimes garden leave is/can be permitted to employees on notice. The decision to refuse the Claimant garden leave was a one-off decision in relation to her request based on the particular circumstances.

147. In any event refusing her garden leave did not place her at a substantial disadvantage in comparison with others and it would not have been a reasonable adjustment to grant her garden leave. The fact that she had had an unpleasant meeting with Dr Robb did not make the school unsafe for her. With a reasonable co-operative attitude and if she had put the interests of the school first the Claimant could and should have returned to work. The school needed her to teach and reasonably concluded that it did not want to pay her for staying at home.

s26 EQA: HARASSMENT RELATED TO SEX AND/OR DISABILITY

148. A timetable was in place for the Claimant's return to work on 22 March 2021.

149. We have already dealt with the comment by Dr Robb that "*Sets cant remain there and be untaught for a whole year until someone comes back from maternity leave".*

150. The response to the Claimant's flexible working request was reasonable and based on the Respondent's anticipated operational needs.

151. The Claimant had a sufficient return to work induction being allowed to observe Team lessons, team meetings and emails with HR and Dr Robb, being allocated a seat and laptop in the staffroom on 16 April 2021 etc.

152. The removal of all classes from the Claimant's personal and sole supervision announced on 20/5/21 was a reasonable decision based on the Respondent's operational needs. The Claimant was not demoted.

153. The fact that Dr Robb became angry and loud on 21 May 2021 was unfortunate but simply reflected a deteriorated relationship between him and the Claimant for which the Claimant must bear her share of the responsibility. The contents of his comments were reasonable.

154. Ms Dryden on 24 May 2021 and Ms Dryden and Mr Johnson on 26/5/21 did not seek to minimise the Claimant's concerns. On the contrary they acted in a caring and responsible manner and did everything they could reasonably to try to resolve the situation.

155. The suggestion that the Claimant undergo mediation with Dr Robb was reasonable and appropriate.

156. The emails of 27 and 28 May 2021 regarding proposed return to work arrangements including the Claimant continuing reporting to Dr Robb - were reasonable.

157. There was one week's delay in the response to the Claimant's grievance on 1 June 2021 and request for garden leave, caused by the Claimant choosing to lodge her grievance at the beginning of half term when the Head and others were trying to have a break.

158. The management and outcome of the grievance process was reasonable. The deputy head collated all relevant information and Mr Berger conducted a careful hearing and issued a reasonable outcome.

159. We do not find that the process was manipulated by Mr Berger or that he was biased. We reject the Claimant's submission to the contrary which was based on the email from Dr Robb to Mr Berger dated 1/7/21, which email was not put to Mr Berger in cross-examination, despite him having made himself available for the purpose.

160. Mr Berger did consider such of the Claimant's covert recording of 21 May 2021 as she chose to play to him.

161. The invitation to an investigation meeting in relation to the covert recording was reasonable and appropriate seeing that making the recording breached the culture and ethos of the school and had been a deceitful invasion of Dr Robb's privacy.

162. In any event none of the above or any other matters relied on as harassment are related to either the Claimant's sex or disability. Furthermore, in taking account of the matters in section 26(4) EA 2010, none of these matters had the purpose or effect in section 26(1)(b).

s27 EQA: VICTIMISATION

163. The Respondent acknowledges the following are protected acts for the purposes of the victimisation claim:

- The discussion with Ms Dryden on 24 May 2021
- The discussion during the meeting with Ms Dryden and the Headmaster on 26 May 2021
- The grievance dated 1/6/21
- The Claimant submission of her ET1 form, which the Respondent became aware of on 24 June 2021.

164. The Claimant claims she was subjected to the following claimed detriments because she had done, intended to do, or was suspected of doing or intending to do, any of the protected acts:

- The meeting on 26 May 2021.
- The email of 27 May 2021. (in which Ms Dryden tried to assure the Claimant it was safe to return)
- The email of 28 May 2021 (in which Ms Dryden further tried to assure the Claimant it was safe to return)
- The alleged failure to respond to the Claimant's formal grievance in a timely fashion

- The alleged failure to place the Claimant on garden leave or respond to the request in a timely fashion.
- The conduct of the Respondent during the grievance meeting.
- The alleged refusal to listen to the recording of 21 May 2021.
- The decision not to uphold the Claimant's grievance on 9 July 2021.
- The statements made in the grievance outcome letter dated 9 July 2021 as summarised in the claimant's particulars of claim at paragraphs 38 and 46 (which relate to Mr Berger's comments about the Claimant's covert recording of Dr Robb on 21/5) .
- The invitation to an investigation meeting while the Claimant was unfit to work to discuss with the Claimant the circumstances in which she covertly recorded a private conversation with a colleague and then produced the covert recording during the grievance meeting without any advance notice.
- The email of the Respondent's representative of 16 February 2022 in which it was relayed that the Respondent was reserving its right to report the Claimant at the conclusion of the Tribunal process, for breaching the Teachers' standards, which was repeated within Mr Johnson's witness statement, at paragraph 119.

165. We do not consider that any of these matters were detriments because none of them should have caused the Claimant a legitimate sense of injustice.

166. We have already considered and found no fault on the part of the Respondent in dealing with the Claimant in the last week in May 21 and in responding to and dealing with her grievance and garden leave request.

167. The criticism of the Claimant for her having made a covert recording and the attempt to carry out a disciplinary investigation into this, was a reasonable management response as it was rightly regarded as dishonest and deceitful behaviour which undermined the Respondent's trust and confidence in the Claimant.

168. Despite the Claimant's sick note produced on 9/6/21, she had been well enough to attend a grievance hearing on 28/6/21 and in any event it had expired by the time the invitation to the investigation was issued. Furthermore, the Respondent did not pursue the matter then.

169. The recent warning (that the Respondent may, following the conclusion these proceedings, report the covert recording by the Claimant to the Secretary of State), is also not something which objectively speaking should give the Claimant a legitimate sense of injustice.

170. In any event none of these matters have been victimising in their motivation - they occurred not because the Claimant has done protected acts but rather as normal management responses.

171. The recent warning that the Respondent may, following the conclusion of these proceedings, report the Claimant to the Secretary of State, was also not because of the protected acts (if it was the Respondent could and would have issued such a warning after the grievance hearing or after the service of the ET1 both of which it was aware of by 28/6/21).

172. The reason for the warning having been issued recently is because (and as stated in the email from Mr Peacock) the Respondent has discovered that the Claimant did not make a covert recording on a single occasion, but had done so systematically and methodically on numerous occasions, and had then failed to come clean straight away but had disclosed the various covert recordings late and sequentially.

S39(2)(c) EQA: DISCRIMINATORY DISMISSAL

173. The Claimant was not dismissed but resigned. She did not resign because of discrimination but because she had obtained another job, which in turn she had obtained because the

Respondent, for operational reasons, and as it was fully entitled to do, had not agreed to her informal flexible working request .

174. For these reasons all the claims are dismissed.

J S Burns Employment Judge
London Central
26/5/2022
For Secretary of the Tribunals
Date sent to parties: 26/05/2022

APPENDIX ONE – LIST OF ISSUES

DISABILITY

1. Whether the claimant was disabled for the purposes of section 6 of the Equality Act 2010.
2. Whether the claimant has a physical or mental impairment.
3. Whether the impairment had an adverse effect on their ability to carry out normal day-to-day activities.
4. Whether that effect was substantial.
5. Whether that effect was long-term.

DISABILITY DISCRIMINATION: KNOWLEDGE

6. Whether the respondent knew, or should have known, about the claimant's disability.

s13 EQA: DIRECT SEX DISCRIMINATION

7. Whether the claimant was subjected to less favourable treatment because of sex by way of: Comments made by Dr Robb during a meeting on 21 May 2021 that no one would wait around a year for the Claimant to return from maternity leave.

s13 EQA: DIRECT DISIBILITY DISCRIMINATION

8. Whether the decision to remove all of the claimant's classes from her, as communicated on 20 May 2021 was because of disability.
9. Whether the comment made by Dr Robb during a meeting on 21 May 2021 that the removal of classes would 'take a load' off the claimant was because of disability.

s15 EQA: DISCRIMINATION ARISING FROM DISABILITY

10. Whether the respondent treated the claimant unfavourably as a result of something arising from her claimed disability (namely disability related absences on 18 and 19 may 21) by
11. telling her that her classes would be removed with effect from 24 May 2021. (Legitimate aim ensuring a reasonable degree of consistency of maths teaching leading up year end exams and assessments.)
12. telling her that she would work as a teaching assistant in practice. (LA Same as above)
13. during the discussion with Dr Robb on 21 May 2021. (telling her new arrangements would "Take a bit of pressure off her"; acting aggressively shouting at top of voice - telling her to do as she is told and threatening to lodge a complaint with headmaster.

(LA as above and discussing further with Claimant the revised timetabling arrangement).

s20 EQA: FAILURE TO MAKE REASONABLE ADJUSTMENTS

The practice of removing pupils or classes from the Claimant in response to absences

14. Whether the respondent applied to the Claimant a PCP of removing pupils or classes from the claimant in response to absences.
15. Whether the claimant was placed at a substantial disadvantage - a stigma of having her pupils removed
16. Whether the respondent failed to make a reasonable adjustment - not removing the pupils
17. Whether the respondent knew or ought reasonably to have known that the claimant was disabled and likely to be placed at a substantial disadvantage because of their disability.

The Respondent's practice of not permitting employees on notice to go on a period of garden leave

18. Whether the respondent applied to the Claimant a PCP of not permitting employees on notice to go on a period of garden leave.
19. Whether the claimant was placed at a substantial disadvantage - being subject to further acts of harassment while not on GL
20. Whether the respondent failed to make a reasonable adjustment - by not permitting her to go on garden leave
21. Whether the respondent knew or ought reasonably to have known that the claimant was disabled and likely to be placed at a substantial disadvantage because of their disability.

s26 EQA: HARASSMENT RELATED TO SEX
Whether the claimant was harassed as alleged below, whether this was related to sex and whether this had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment:

22. The alleged failure to ensure that a timetable was in place for the claimant's return to work on 22 March 2021.
23. The alleged comment by Dr Robb that the Respondent could not wait for the Claimant to return from maternity leave.
24. The response to the claimant's flexible working request.
25. The alleged failure to conduct a return to work induction and/or allocate a desk to return to work on 16 April 2021.
26. The alleged removal of all classes from the Claimant (except for a Year 7 class) and alleged demotion to the role of Teaching Assistant.
27. The comments made to the claimant on 21 May 2021 during a meeting regarding the Claimant's new timetable.
28. The alleged discussion during a call on 24 May 2021 where it is alleged the HR Manager sought to minimise the Claimant's concerns.
29. The meeting with the claimant on 26 May 2021 where it is alleged further attempts were made to minimise the Claimant's concerns.
30. The suggestion that the Claimant undergo mediation.
31. Emails of 27 and 28 May 2021 regarding return to work arrangements.
32. The alleged delay in responding to the Claimant's grievance on 1 June 2021 and / or confirming its position in relation to garden leave
33. The management and outcome of the grievance process.

34. The alleged refusal to consider the claimant's covert recording of a private discussion with a colleague on 21 May 2021.
35. The invitation to an investigation meeting in relation to the covert recording.

s26 EQA: HARASSMENT RELATED TO OF DISABILITY

36. Whether the claimant was harassed as alleged above, whether this was related to disability and whether this had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment:

37. See above but not 21 and 22

s27 EQA: VICTIMISATION

The respondent acknowledges the following are Protected Acts for the purposes of the victimisation claim:

- The discussion with Ms Dryden on 24 May 2021
- The discussion during the meeting with Ms Dryden and the Headmaster on 26 May 2021
- The Grievance
- The claimant also relies on the submission of her ET1 form, which the respondent became aware of on 24 June 2021 as a Protected Act.

Whether the claimant was subjected to the following detriments because she had done, intended to do, or was suspected of doing or intending to do, any of the 'Protected Acts':

38. The meeting on 26 May 2021.
39. The email of 27 May 2021.
40. The email of 28 May 2021
41. The alleged failure to respond to the Claimant's formal grievance in a timely fashion
42. The alleged failure to place the Claimant on garden leave or respond to the request in a timely fashion.
43. The conduct of the respondent during the grievance meeting.
44. The alleged refusal to listen to the recording of 21 May 2021.
45. The decision not to uphold the Claimant's grievance on 9 July 2021.
46. The statements made in the grievance outcome letter dated 9 July 2021 as summarised in the claimant's particulars of claim at paragraphs 38 and 46.
47. The invitation to an investigation meeting while the claimant was unfit to work to discuss with the Claimant the circumstances in which she covertly recorded a private conversation with a colleague and then produced the covert recording during the grievance meeting without any advance notice.
48. The email of the Respondent's representative of 16 February 2022 in which it was relayed that the Respondent was reserving its right to report the Claimant to the Teachers' Regulation Authority at the conclusion of the Tribunal process, for breaching the Teachers' standards, which was repeated within Andrew Johnson's witness statement, at paragraph 119

<u>S39(2)(c) EQA: DISCRIMINATORY DISMISSAL</u>

49. Whether the claimant was dismissed by the respondent.
50. If so, whether the claimant was dismissed due to unlawful discrimination.