EMPLOYMENT TRIBUNALS

Claimant:	**Mr Nikoloz Papashvili**
Respondents:	**(1) Governing Body of A School & (2) AB & (3) Ms Maria Stock & (4) London Borough of Ealing**
Heard:	**Watford Hearing Centre**
On:	**13, 17, 18, 19, 20 and 21 October 2022**
Before:	**Employment Judge G Tobin**
Members:	**Mr D Sutton** **Mr D Walton**
Representation	
Claimant:	**In person**
Respondent:	**Ms A Dannreuther (counsel)**

JUDGMENT having been given at the hearing and reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, judgment and written reasons are set out as follows.

It was the decision of the Employment Tribunal that:

1. **The claimant was unfairly dismissed, pursuant to s94 Employment Rights Act 1996. The Employment Tribunal has exercised its discretion under s123(6) and/or s123(1) Employment Rights Act 1996 and will reduce the claimant's compensation both to his basic award and his compensatory award by 70% for his contributory or blameworthy conduct.**

2. **The claimant made 2 protected disclosures, specifically in January 2020 and on 11 November 2020. The claimant's claim that he was subjected to 11 detriments because he had made a protected disclosure is rejected; those claims fail.**

3. The claimant was not automatically unfairly dismissed because he had made a protected disclosure, in breach of s103A Employment Rights Act 1996.

4. The claimant's 12 claims of direct disability discrimination under section 13 Equality Act 2010 fail.

5. The claimant was not subject to discrimination arising from his disability, under s15 Equality Act 2010.

6. The respondent did not fail in its duty to make reasonable adjustments pursuant to ss 20 and 21 Equality Act 2020

7. Of the claimant's 18 complaints of sexual harassment, in breach of s26 Equality Act 2010, 7 of those complaints succeed. The Tribunal determines that it is just and equitable for those complaints to proceed, pursuant to s123 Equality Act 2010.

8. The claimant was not victimised, in breach of s27 Equality Act 2010.

REASONS

The proceedings

1. The claimant made complains of; unfair dismissal; direct disability discrimination; discrimination arising in consequence of disability; breach of a duty to make reasonable adjustments; detriment on grounds of a protected disclosure; automatically unfair dismissal on grounds of a protected disclosure; sexual harassment and victimisation.

2. The complaints were summarised by Employment Judge George following a private Preliminary Hearing on 4 February 2022 [see Hearing Bundle pages 220-241] and on 30 June 2022 [HB pages 334-350]. Judge George identified the issues to be determined at this hearing [see HB338-350].

3. Judge George issued a Restricted Reporting Order on 30 June 2022 [HB351].

4. On 30 June 2022 Judge George determined that the claimant was a disabled person, under the Equality Act 2010 ("EqA"), during to period relevant to the claim. The claimant's disability was depression and anxiety. The Judge did not address the question of whether the respondent had actual or constructive knowledge that the claimant was disabled at any time prior to his dismissal [see HB355-366].

The relevant law

5. The relevant applicable law for the claims considered is as follows.

<u>Unfair dismissal</u>

6. The claimant claims that he was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

7. Section 98 ERA sets out how the Employment Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

8. The s98(4) test can be broken down to two key questions:

   a. Did the employer utilise a fair procedure?

   b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

9. The respondent said that it dismissed the claimant for a conduct-related reason, pursuant to s98(2)(b) ERA. Although the claimant denied the misconduct in question, there was no dispute between the parties that allegations of failing to attend work when specifically instructed to do so and misleading the employer about the reason for absence were conduct-related matters. For misconduct dismissals, the employer needs to show:

   a. an honest belief that the employee was guilty of the offence;

   b. that there were reasonable grounds for holding that belief; and

   c. that these came from a reasonable investigation of the incident.

   These principles were laid down in *British Home Stores v Burchell [1980] ICR 303.* The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that they have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief based upon a reasonable investigatory process.

10. Accordingly, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to his purported misconduct.

11. ACAS has issued a Code of Practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:
    - Deal with the issues promptly and consistently;

- Make sure the employee was informed clearly of the allegation;
- Ensure that the nature and extent of the investigation reflect the seriousness of the matter, i.e. the more serious the matter then the more thorough the investigation should be;
- Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
- Keep an open mind and look for evidence which supports the employee's case as well as evidence against;
- Established the facts before taking action;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal the decision.

12. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can appropriately reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

13. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

14. In this case, the respondent asserted that, if the claimant succeeded in his complaint of unfair dismissal, then he should be subject to a possible reduction of any compensation payable (to nil) under the principles set out in the leading case of *Polkey v A E Dayton Services [1988] ICR 142*. Where a Tribunal finds that the dismissal was unfair it still may reduce the award payable by any amount if it is persuaded that, had the employer followed the correct procedures then, it was likely that the employee's dismissal would have been fair. So if a Tribunal thinks it was only a matter of time before the employee would have been dismissed (usually for a different and fair reason) or, alternatively, where there was only a minor defect in the procedures applied and had this been corrected the employee would have been dismissed fairly then the Tribunal could make a finding of unfair dismissal but only award compensation to reflect this "lost time" or the minor defect.

15. S123(6) ERA states that "[W]here the Tribunal finds that the dismissal was to an extent caused or contributed to by the action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding". This ground for making a reduction is commonly referred to as "contributory conduct" or "contributory fault". Three factors must be satisfied if the Tribunal is to find contributory conduct: (a) the relevant action must be culpable or blameworthy; (b) it must have actually caused or contributed to the dismissal; and (c) it must be just and equitable to reduce the award by the proportion specified.

16. There is a wide discretion under s122(2) ERA to possibly reduce the basic award on the grounds of *any* kind of conduct on the employee's part that occurred prior to his dismissal. There is a similar just and equitable discretion to reduce the compensatory award under s123(1) ERA.

17. Unfair dismissal proceeding must be commenced within 3-months from the effective date of dismissal under s111 ERA. S18A Employment Tribunals Act 1996 allows for a further period of up to 1-month (or in exceptional circumstances 1-month and 2-weeks) for ACAS Early Conciliation. There is some discretion to extend this time limit if it was not reasonably practical to issue proceeding within time and the complaint was issued proceeding within a reasonable time thereafter. There is no dispute that the unfair dismissal claim was brought in time.

Whistle-blowing detriments and automatic unfair dismissal

18. The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The aim is to give protection to workers (which is wider than employees) who disclose specified forms of information using the procedures laid out in the Act. That protection is achieved through the insertion of relevant sections into the ERA which focuses on providing protection to workers in cases of action short of dismissal which has been taken against them, as well as dismissal itself, following their disclosure of information.

19. S47B(1) ERA deals with non-dismissal detriments. It states that:

> 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.

20. S103A ERA deals with *automatic* unfair dismissal. That 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.

21. In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

22. Under s43B(1) ERA a qualifying disclosure means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:
    (a) a criminal offence has been committed or is likely to be so;
    (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
    (c) a miscarriage of justice has occurred or is likely to occur;
    (d) the health and safety of any individual has been, is being or is likely to be endangered;
    (e) environment has been, is being or is likely to be damaged;
    (f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

In this instance, we are dealing with s43B(1)(b) ERA and also s43B(1)(d) ERA.

23. The whistle-blower must establish a reasonable belief that the information disclosed tends to show 1 or more of the s43B(1)(a)–(f) category. The belief can be reasonably held and wrong belief. Reasonable is subjective followed by an objective test: see *Babula v Waltham Forest College [2007] EWCA Civ 174*.

24. There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. A disclosure could convey information as part of an allegation and thereby be covered by the act: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*. Therefore, the disclosure must be sufficiently factual and specific: *Kilraine v LB Wandsworth [2018] EWCA Civ 1436*.

25. The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:
    a. disclosures to the worker's employer or other responsible person: s43C ERA;
    b. disclosures made in the course for obtaining legal advice: s43D ERA;
    c. disclosures to a Minister of the Crown: s43E ERA; and
    d. disclosures to a "prescribed person": s43F ERA. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

    Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:
    e. in "other cases" which fall within the guidelines laid out in s43G ERA. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;
    f. in cases of "exceptionally serious" breaches: s43H ERA.

    S43C ERA is the relevant provision in this case, but s43F ERA is also alleged.

26. Detriment is not defined in the ERA, however, it is a concept that is familiar in discrimination law. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to him had, in all the circumstances, been to his detriment. An unjustified sense of grievance cannot amount to a detriment, but it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of: see *Lord Hope in Shamoon v Chief Constable of the RUC* [2003] IRLR 285 per Lord Hope at [34] and [35]. Lord Scott held that the test must be considered from the point of view of the Claimant, thus: "…*if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought, in my opinion, to suffice*…" *Shamoon* per Lord Scott at [105].

27. In respect of causation, as is clear from the statutory language of s47B(1) ERA, it must be shown that any detriment was caused by some act or deliberate failure to act by the employer. Further, that there is a causal connection between the act relied

on and the protected disclosure, specifically that the act was '…*done on the ground that*…' the claimant had made a protected disclosure. Thus, it is not sufficient for a claimant to show that he had made a protected disclosure and suffered a detriment as a result of an act done by the employer, there must be a clear causative link between the detriment or dismissal alleged and the disclosure before protection is given: see *London Borough of Harrow v Knight [2003] IRLR 140*.The question at this stage will be what was the *reason* for the respondent's act or deliberate failure to act? In this context the Tribunal's attention is drawn to *Fecitt v NHS Manchester [2011] EWCA Civ 1190*, and in particular paragraphs 43-45, which includes "…*s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*…" *Fecitt* per Elais LJ at [45]. It is for a respondent to show the ground on which any act was done: s48(2) ERA. *Fecitt* held that it was for the employer to prove that the disclosure "*in no sense whatsoever*" played any part in the detriment.

28. S103A ERA provides the test for causation that is familiar for automatic unfair dismissals, and in this instance, the statutory language requires that a protected disclosure be *the reason (or, if more than one reason, the principal reason) for the dismissal*. Paradoxically, that test is stricter than *whether the protected disclosure materially influences the employer's treatment of the whistle-blower* for the seemingly lesser detriment of action short of dismissal.

29. S17 Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced the requirement that the disclosure must be in the public interest. The public interest test requires a genuine belief that this disclosure is made in the public interest and that such belief is objectively reasonable (from the whistle-blowers' prospective): *Chesterton Global Limited & Verman v Nurmohamed & Public Concern At Work [2017] EWCA Civ 979*. Motive is different from belief. A claimant alleging whistle-blowing should have the opportunity to explain whether they had a subjective belief that they were acting in the public interest at the time of making a disclosure: *Ibrahim v HCA International Limited [2019] EWCA Civ 2007*.

30. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow Tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA.

31. In whistleblowing claims the usual 3-month time limit applies for bringing a claim, subject to the extension for ACAS Early Conciliation. Where an employee is dismissed, time runs from the date of dismissal: s111 ERA. Where the complaint is 1 of detrimental treatment, time runs from the date of the act which has been done on the grounds that the worker/employee has made a protected disclosure and not from any later date in which he felt the consequence of that act, see s48 ERA. If it is found not to have been reasonably practical to bring a complaint earlier, a claim may be admissible if it is bought within a further reasonable period.

<u>Discrimination - Protected characteristics</u>

32. Under s4 Equality Act 2010 ("EqA"), a protected characteristic includes the claimant's disability and his sex. So, an employee should not be discriminated against on the basis of his disability or his sex.

Disability

33. S6(1) EqA defines disability:

> A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

34. As identified above, Judge George had previously determined that the claimant met the s6 EqA definition. The key question was whether the respondents knew or ought to have known this.

Direct discrimination

35. S13(1) EqA precludes direct discrimination:

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

36. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

Discrimination arising from disability

37. S15 EqA precludes discrimination arising from a disability:

> (1) A person (A) discriminates against a disabled person (B) if –
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

38. S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because he had taken periods of disability-related absence and this had caused her dismissal, the person may not suffer a detriment because he was disabled as such, but because of the effect of that disability.

39. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the Employment Appeal Tribunal ("EAT") emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If

the *something* is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing discrimination arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

Failure to make reasonable adjustment

40. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in 3 situations:

    i. where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;

    ii. where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers the situation of *where* the job is done;

    iii. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

    A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the first provision identified above.

41. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a “substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. In order to undertake the comparative exercise, the EAT held in *Environment Agency v Rowan 2008 ICR 218 EAT* that a Tribunal must identify the: (a) the PCP applied; (b) the identity of the non-disabled comparators (where appropriate); and (c) the nature and extent of the substantial disadvantage suffered by the claimant. We address the necessity for identifying properly the PCP both above and below.

42. Possibly counter-intuitively, s212(1) EqA states that "substantial" means more than minor or trivial. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled, the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan*. The Tribunal should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

43. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the

disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

44. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. There is a requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

Harassment

45. The definition of harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
> (a)A engages in unwanted conduct of a sexual nature, and
> (b)the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
> - age;
> - disability;
> - gender reassignment;
> - race;
> - religion or belief;
> - sex;
> - sexual orientation.

46. Sexual harassment encompasses any conduct of a sexual nature which has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. Conduct of a sexual nature is not defined in the EqA. The example given by the Equality & Human Rights Commission's unwelcome sexual advances, for example touching, standing too close, the displaying of offensive pictures.

Victimisation

47. Victimisation under s27(1) EqA is defined as follows:

> *A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*

48. A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

The burden of proof and the standard of proof

49. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

50. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

51. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

52. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. sex) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

53. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's race. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

54. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

55. In the case of *Nagarajan v London Regional Transport [2000] 1 AC 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

56. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

<u>Time limits for discrimination proceedings</u>

57. Claims of discrimination in the Employment Tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

The evidence

58. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had been identified for preliminary reading.

59. The Tribunal was provided with a bundle of documents from the respondent of 1,321 pages. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

60. We heard direct (i.e. oral) evidence from the claimant. The claimant also called Mr Roland Byrne, a former work colleague of the claimant. We heard directly from 9 witnesses for the respondent:
    i. "AB" who was the second respondent, the Chair of Governors and who chaired the claimant's dismissal hearing and determined his grievance;
    ii. "CD" who was the Head Teacher;
    iii. Ms Dawn Carmichael-John, the Deputy Head Teacher and the disciplinary investigation officer;
    iv. Ms Helen Green, a school governor and chaired the dismissal appeal hearing;
    v. Ms Joan Gibson, class teacher;
    vi. Ms Maria Stock, human resources representative
    vii. Ms Victoria Jude O'Malley, the fourth respondent's personnel manager.

Our findings of fact

61. We set out the following findings of fact, which were relevant to determining whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

62. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events and also on the absence of evidence which give an interpretation of what occurred. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

63. The claimant started work initially as a Teaching Assistant and then moved up a grade to work as a Cover Supervisor from 1 September 2012 [HB373]. The school in question deals with pupils with special educational needs.

64. On 15 November 2019 the claimant raises a complaint about being assaulted by a pupil [HB705-706]. The respondents had redacted surrounding emails, so we were not presented with a full picture of the contemporaneous exchange. From the material that has not been redacted, it was clear to us that the claimant was assaulted by a pupil. It is significant that Ms Carmichael-John, the Deputy Headteacher was unmoved by this occurrence, although when the claimant reported it to "CD"[1], the Head Teacher was sympathetic.

65. On 25 March 2020 the school was closed for most students due to the covid-19 pandemic and a rota was created for staff attendance at the school.

66. During the course of an all-staff meeting, on Wednesday 15 July 2020, the Head Teacher advised that staff were required to attend the school site during the final week of the school term, i.e. from Monday 20 July 2020 to Friday 24 July 2020. This was irrespective of the rota being in place, which allowed the claimant not to be in school.

67. The claimant then approached the Head Teacher and requested to take his holidays early as he said he wanted to visit his parents in Georgia for his birthday. The Head Teacher had granted the claimant special leave previously to enable him to visit Georgia, although the claimant had returned to work late. The Head Teacher considered the claimant's request and decided not to grant the absence on this occasion.

68. Joan Gibson, a Class Teacher, sent the claimant an email confirming that this request had been declined [HB727]. Ms Gibson's email was clear:

> [CD] has asked me to inform you that she has considered your request, but at this time there is no special leave. All TAs are expected to be in on Monday to undertake the jobs she mentioned, on both sites, and/or to work with the students who are in for their final days before our two days of training.
> If you are unsure of the tasks that need doing, please liaise with Lisa.

69. Later that day the Head Teacher discovered the claimant had gone to the pub for purported "leaving drinks" and she was told by a colleague that the claimant was setting off on a European tour with his girlfriend the next day. The Head Teacher wrote to the claimant the first thing the following morning, i.e. Thursday 16 July 2020, requesting to see him, with his trade union representative, on Tuesday 21 July 2020 [HB727].

70. On Monday 20 July 2020 the claimant left a message at the school that he was unable to attend work as he was suffering from Covid-19-related symptoms and self-isolating.

71. On 21 July 2020 the claimant made a complaint regarding the school to Ofsted [HB730-732].

72. On 28 July 2020 the Head Teacher sent the claimant a letter which the respondents contend informed him of a disciplinary investigation, although it is not possible for the Tribunal to ascertain what was supposed to be investigated because the letter set

[1] "CD" is also subject to the Restricted Reporting Order. For clarity we shall refer to her as the Head Teacher hereafter.

out the case against him and drew the conclusion that the claimant's behaviour was unacceptable. [HB735].

> It has been brought to my attention that you have misrepresented yourself regarding your absence during the last 7 working days of term.
> On Wednesday 15 July you and your classteacher came to inform me that your classroom was clear and to ask whether it was therefore essential that you came into school the following week, as you would like to be able to celebrate your birthday with your family at home, on the coming Saturday. I was unable to provide you with an answer at that point, as your request to take me by surprise. I emailed you on Thursday 16th July to request a meeting with you for the following week, which you agree to. However on Monday 20th July you informed the school that you were presenting with symptoms of C19 and therefore was sick and unable to attend work and our agreed appointment.
> I have now been advised that you were in fact leaving your holiday with your partner on Thursday 16th July and that this was the reason why you are not in school and not because you are displaying symptoms of Covid-19.
> These actions are not acceptable and I now wish to meet with you to discuss this matter on a formal basis. I have appointed Dawn Carmichael-John is investigating officer and she will meet with you at the start of term. I will write to you separately detailing the date and time of the investigation meeting which will take place once investigation has been concluded.

73. The claimant was off sick from 2 September 2020 [HB1214] His sicknotes said "work related stress" and was issued on 3 September 2020 for 12 days.

74. Following return from the summer holidays a copy of 2 boarding passes turned up [HB728-729]. These identified the claimant and a female had checked-in for a flight from Luton airport to Split (Croatia) for 16 July 2020. The respondents contend that these were left on the school admin manager's desk and that someone had probably moved them from the printer. The Head Teacher speculated that this arose from the claimant either printing of one too many copies or forgetting that he printed it. The claimant subsequently contended that he had printed these boarding passed to try to obtain a refund, although we saw no further documents in this regard. We note Ms Carmichael-John's contention that the claimant originally said no holiday had been booked and Split is around 3,000 kilometres from Georgia, with many countries in-between.

75. On 8 September 2020, whilst the claimant was on certified sick leave, the Head Teacher wrote to the claimant telling him that she would suspend his salary if he did not contact her [HB744]. There was no contractual basis for this threat of non-payment of wages.

76. The claimant provided another sicknote [HB1215] again signed by his GP on 14 September 2020. This identified "work related stress" and stated he was not fit to attend work until 27 September 2020.

77. Ms Carmichael-John instructed the fourth respondent's Occupational Health Unit and on 16 September 2020 Caroline Ward, Senior Occupational Health Specialist telephoned the claimant and then provided a report. Ms Ward did not appear to have medical (i.e. doctor) qualifications and there is no reference to her having any nursing or occupational health qualifications. Ms Ward did not consider the claimant's GP or other medical or therapeutic records and as her enquiries were limited to discussing the matter on the telephone, she did not undertake any physical examination (whether or not she was trained or equipped to do so). Ms Ward confirmed that the claimant remained on certified sick leave and that he was to be

reviewed by his GP again on 28 September 2020. She advised that the claimant could benefit from further counselling sessions, and he was due for an NHS assessment. She said that she believed that the claimant could attend a "management meeting" to reduce his stated anxiety and address matters quickly. She also recommended a stress risk assessment [HB745-746]. There was no stress risk assessment undertaken. Significantly, she did not address whether the claimant was fit to participate in disciplinary proceedings.

78. On 25 September 2020 the claimant's GP, Dr Muse, signed him off sick for just over 3 months, i.e., until 4 January 2021 [HB1216]. Without any engagement with the claimant's doctor, Ms Carmichael-John took Ms Ward's report to be sufficient to proceed with the disciplinary investigation meeting, which she set for 6 October 2020 [HB752]. Ms Carmichael-John did enquire further from the fourth respondent's occupational health, although we have not been provided with her correspondence, but the response from a Sandra Wilkins was equivocal and deflective [HB1312].

79. The claimant did not attend the investigatory meeting. On 6 October 2020 he informed Ms Carmichael-John, MS and the fourth respondent's occupational health service that he was off sick with work related stress and did "not have the mental capacity to be involved in anything work related" [HB762].

80. On 7 October 2020 the claimant contacted Dr iQ to request general advice. We accept that this was a service provided by the claimant's surgery. Sumayyah Akhtar (Clinician[2]) gave advice as follows:

> We have provided you with a sick note which clearly states that 'you are not fit for work'. This means you should not be working at all. We do not specify what work you can or cant do as the note signs you off from doing any work related duties.

81. The claimant was sent a letter on Friday 6 November 2020 instructing him to attend a disciplinary hearing for the following Friday. He was told that the allegations were gross misconduct and that the allegations were as follows:

> Allegation 1; Misrepresented reason for absence at the end of Summer term
> - Alleged that the reason for not wishing to come into school was that he wished to visit his family if Georgia.
> - Did not leave to visit family in Georgia but went on a tour of Europe with his new partner.
>
> Allegation 2: Loss of trust and confidence
> - Abused the trust of the leadership team and gave false information relating to the reasons for his absence at the end of the summer term

82. The claimant was emailed the disciplinary investigation report on Monday afternoon 9 November 2020 together with detail of the 2 allegations and instructions to attend a disciplinary hearing for the Friday afternoon [HB768, 769-770]. The letter was from Ms Carmichael-John, Disciplinary Manager, and referred to being advised by the disciplinary officer (i.e. herself) that the claimant had not co-operated with the process. The letter included the disciplinary investigation report [HB771-775] and Ms Carmichael-John was identified as the investigation officer. The investigation report was short, emotive and categorical.

[2] We do not know what this title means, but it does not identify the individual as a medic or holding a nursing or other similar registration.

83. The report made certain findings of fact:
    1. The Head Teacher agreed to the claimant's request to leave early [which was wrong].
    2. The head teacher was "shocked…"
    3. The claimant was "in fact" in the pub
    4. The Head Teacher soon discovered the "true reason"…
    5. The Head Teacher had "no alternative"…
    6. It is clear that the claimant "has misrepresented the reason for his absence"
    7. "Were it not for the fact that the school holidays were fast approaching consideration would have been given for his suspension in order for the matter to be investigated appropriately as the allegations amount to gross misconduct"
    8. "whilst every effort has been made to interview Nik he has repeatedly ignored the reasonable management instruction to attend an interview to the point that he has become obstructive as part of the investigation. [The claimant was on certified sick leave absence].
    9. Despite these actions Nik has still refused to engage with the process [wrong].

    The report referred to the investigation process and statements contained at appendix A - but Ms Carmichael-John did not provide these to the claimant.
    The conclusions are emphatic.
    11. "Disappointing to learn that Nik has been obstructive and not adhered to the policies and procedures of the school in reporting his absence and failing to cooperate with the investigation. I believe that this was a tactic to delay any action being taken…"
    12. "I would consider Nik actions to be misleading and untruthful."
    13. "His actions amount to gross misconduct and the school has been manipulated into believing that he wanted the time off to visit his family."

84. On 11 November 2020 the claimant made a complaint regarding: (1) sexual harassment by the Head Teacher. He identified an incident in the summer of 2010 (10 years previously) and referred to unspecified incidents in staff meetings "year by year" although he referred to 2017 in which the Head Teacher started talking about the 2010 matter. This was supposedly raised again in July 2010 by another member of the management team. There were other unspecified incident in which the Head Teacher supposedly made unwanted sexual advances to the claimant. Finally, he contended that the Head Teacher said in June 2020 that she wanted him to take her to meet his parents. The claimant informed Ms Carmichael-John, the Head Teacher, Occupational Health and Ms Stock that he had previously made an Ofsted complaint. He further complained about: being held back from professional development by the Head Teacher; being used and abused in this position; and that only management was allowed to give work references [HB787, 788-791].

85. On 13 November 2020 the disciplinary hearing proceeded [HB793-796]. The claimant did not attend, which was confirmed in his partially disclosed email of 11 November 2020 [HB792]. He said that he was unfit, and he made occupational health aware of this. AB, the Chair of Governors, chaired the hearing. MS attended the hearing in her human resources capacity. MS decided that because the claimant had raised a grievance against the Head Teacher they would not come to any conclusion at that meeting; however, she directed that the hearing proceed to consider the respondents' witness evidence. This was the witness statements that had not been sent to the claimant. The witnesses were: DOB who had gone to the

pub and said that he believed that the claimant was going on holiday early with his girlfriend to tour Europe; LB the Class Teacher who was non-committal about whether or not the claimant's early departure caused any problems; and the Head Teacher. The meeting was clearly short. AB asked some questions; the other panel member, Ms Lyn Young's contribution was limited to confirming that she had no questions (twice).

86. The disciplinary hearing was adjourned for an investigation into the claimant's complaint of 11 November 2020 which was taken as a grievance [HB799]. It was clear that the Head Teacher was unhappy with this as she pressed Ms Carmichael-John to justify her position [HB822 and 823].

87. On 18 November 2020 the claimant wrote to Ms Blair querying various aspects of his grievance. Ms Blair responded to Ms Stock, the human resources lead, as follows:

> Where does this idiot think he's going with this… As far as I'm concerned his official complaint was the letter of last week wtf[3] is the last sentence in this nonsense? His formal complaint process will begin… Behave!!!
> Heaven help us
> Sorry to send this in the evening

88. It is clear to us from Ms Blair's hostile and intemperate email that, whether or not there was any merit in his grievance, the claimant was not going to get a fair determination of this complaint.

89. The disciplinary hearing was reconvened on 4 December 2020. Again, the claimant was not in attendance and Ms Blair immediately excluded the claim's evidence on the basis that it should have been presented 5-days before the previous hearing. Ms Young's input was significantly greater than at the last hearing, but this was limited to agreeing with whatever the Chair of Governors said [HB909-910]. Both of the allegations were upheld.

90. By letter dated 14 December 2020 Ms Blair advised the claimant of his dismissal [HB915-917]. The letter had been drafted by MS [HB914] and was accepted unaltered. The claimant was told that he was dismissed for gross misconduct and that – incorrectly – this dismissal was with effect from 4 December 2020. The claimant was dismissed for (allegation 1) misrepresenting the reason for his absence at the end of the summer term and (allegation 2) loss of trust and confidence.

91. The dismissal letter was emailed to the claimant on 15 December 2020 [HB919] so that is the effective date of termination and not the earlier date that Ms Blair contended in her letter.

92. The day after the claimant was told that he was dismissed, i.e. on 16 December 2020 Ms Blair advised the claimant that his grievance was dismissed [HB920-922].

93. On 21 December 2020 the claimant appealed the disciplinary outcome [HB924-925]. He complained as follows:
    - that the dismissing officers did not take into account his landlord statement saying that he was at home on the dates provided.

[3] When pressed by the Employment Judge, Ms Blair accepted that this meant "what the fuck".

- that he fully co-operated for investigation and that he had sent his evidence 2 working days before the hearing.
- the decision was not neutral and that he stress-related absence was used against him.
- the dismissal officers should have had more regard to his medical certificates rather than an outdated occupational health assessment, without follow-up appointments.
- he was not given any notes from the first disciplinary hearing, i.e. 13 November 2020.
- The claimant noted the discrepancy about his effective date of termination and effect was owed wages and accrued holiday.
- Finally he contended that the investigation was not fair.

94. The appeal proceeded 4 February 2021 [HB965-982]. The claimant attended the appeal so matters lasted 1 hour or more 40 minutes, which significantly longer than the previous hearings combined. The appeal did not proceed as a rehearing. Ms Blair presented her case on her disciplinary outcome and then the claimant was allowed his opportunity to have his say. At the end of the appeal hearing the claimant was told that he would hear within 10 working days. In fact after some correspondent in which Ms Blair sought reassurance from Ms Stock, in less than 50 minutes later Ms Stock informed Ms Blair that the dismissal was upheld at the appeal [HB984,986] and then slightly later that they would catch up in the morning.

95. The claimant was not told for a few further days. Ms Green provided a brief outcome letter [HB989-990]. She did not address grounds of appeal. In her reason for the decision, she said that the claimant had been evasive in providing the evidence that he claimed to have so investigation concluded on the basis that the evidence that was available at the time. Clearly, Ms Green did not give any indication why she did not deal with this evidence now. She merely restated that the claimant assumed that his request for leave will be granted based on previous request and he ignored instructions relating to the need for all term time only employees to be available. She referred to litigation relating to a refund of tickets and said that because of data protection the claimant made an incorrect statement.

96. The grievance appeal was dismissed by an unnamed Chair of the Grievance Panel because the claimant did not provide his grounds of appeal on 8 March 2021 [HB1022].

Our determination

Unfair dismissal

97. The claimant was summarily dismissed by letter sent to him by email on 15 December 2020. He was dismissed without notice, the reason being gross misconduct.

98. We are satisfied that the claimant was accused of gross misconduct offence in accordance with the disciplinary policy. The list of gross misconduct offences in appendix 1 was not an exhaustive list, but the claimant's probably fits into gross insubordination, e.g. wilfully disobeying a reasonable instruction [HB456]. But in any event the misconduct alleged was sufficiently serious that we regard the offence as a

dismissal offence, i.e. one that falls within the range of reasonable responses by an employer to be regarded as such. We reject the respondents argument that the claimant's absence thereby neglected the school children. This was not pursued in the disciplinary process, it was not the finding of the disciplinary panel nor the appeal hearing. Such a contention over-eggs the case against the claimant and brings little credit on the respondents by attempting to elevate the claimant's bad behaviour into a safeguarding issue, which was not even pursued at the time.

99. In respect of issue 3.2 and 3.3, the respondents say that the claimant committed misconduct and, having heard the evince, we are satisfied that the claimant committed the misconduct in question. However, the disciplinary process that the claimant undertook was substantially flawed.

100. Issue 3.4 to 3.7 represent the s98(4) ERA test. We believe the respondent followed an unfair process or procedure such that no similar employer in similar circumstances would follow, i.e. the process that the respondent followed was outside the range or band of reasonable responses.

101. The claimant was off on sick leave from the beginning of the Autumn term 2020. Thereafter he remained on sick leave certified by his GP until after his dismissal.

102. The claimant was referred to occupational health. Ms Ward provided a report on 16 September 2020. Ms Ward's report was perfunctory. As an occupational health assessment this was poor. Ms Carmichael-John should have sought medical advice from the claimant's GP or sought a more thorough occupational health report (possibly from a doctor) given that the claimant's job was clearly on the line.

103. Nevertheless the disciplinary process carried on, we assess because the respondents had made up their mind that the claimant was guilty and they wanted to bring him to a disciplinary hearing as quickly as possible. The claimant is not referred back to occupational health. The actions in proceeding with the disciplinary procedures was reckless There was a rush to dismiss. We determine that this was outside range of reasonable responses.

104. On 30 September 2020 claimant was instructed to attend an investigatory meeting, which was scheduled for 6 October 2020 [HB752]. As early as 2 October 2020 the claimant said that he was not attending a meeting to discuss his sick leave because, he said, he was not well enough.

105. On 7 October 2020 the claimant obtained general advice from a clinician [HB759].

106. The Head Teacher had essentially established the facts on 28 July 2020. She had made a judgment that the claimant had misrepresented his absence, and this was before she heard from the claimant. The Head Teacher had determined that the claimant's actions were unacceptable before instigating a disciplinary investigation from her deputy. Despite the muddle of the final sentence, it is clear the investigation served little purpose. The Head Teacher who directed the investigation had established the facts to her liking.

107. Ms Carmichael-John interviewed 3 witnesses. The statements were not sent to the claimant in advance of the hearing [see HB768]. An investigation report was sent by

post on the 6 November 2020 and then the letter with the same enclosures were sent again to the claimant by email on Monday. The claimant said that he did not receive the postal material, but having heard the totality of the evidence, we do not regard the claimant as a truthful witness, and we are reluctant to believe much of what he said without corroboration.

108. The investigation report is extraordinary. The report was short, inaccurate and hopelessly biased. The language is condemnatory of the claimant. Ms Carmichael-John's investigation was not undertaken with an open mind. She built a case against the claimant and discounted anything that might not suit the claimant's dismissal. Such a bias investigation was a breach of the ACAS Code of Practice. Such an investigation report might not have mattered too much if there were robust disciplining officers. But here the disciplinary chair and the other school governor were distinctly not robust. AB was unimpressive as a witness and appeared totally out of her depth throughout the process. AB did not have any training in her role. She did not have an enquiring or challenging approach. In fact, she did nothing other than accept this flawed report.

109. Ms Carmichael-John did not follow the school's procedure in providing the disciplinary report insufficient time [see HB447-448]. This was particularly relevant where there is evidence that the claim was suffering from work-related stress.

110. AB said that the hearing of 13 November 2020 did not go ahead because the claimant raised a grievance. In fact, this is wrong. The disciplinary hearing did go ahead because, upon instruction from MS, the dismissing officers heard evidence from the 3 witnesses, which they took into account

111. The respondents' case was that they adjusted the disciplinary hearing to allow for the grievance to be determined. On first glance this appears to accord with ACAS' guidance. However, that was an attempt to mislead us. AB determined the claimant's grievance [HB920-922]. AB recognised that the matters were closely intertwined. Again this process was determined without hearing directly from the claimant and this was also indicative of the respondents rushing into haste to determine that matter so that AB could proceed with the dismissal.

112. The grievance is largely outside the scope of the unfair dismissal analysis, but we were not at all satisfied with the role of MS. We did not understand why the disciplining/dismissal chair needed to be the investigating officer in the grievance. That was not explained so we believe the respondents could and should have got someone else to investigate the claimant's grievance. Possibly another school governor or someone from the fourth respondent. What is clear to us is that AB was not the "critical friend" that she said she was. Again, what emerges is a desire to move the process quickly toward what we see as a preordained conclusion.

113. We could not understand why MS threatened the claimant with disciplinary action for false allegations at such an early stage [HB823]. MS admitted at the hearing this was inappropriate. It did not accord with the policy [HB519-520]. The whole flavour is of a closed mind and dismissive attitude towards the claimant.

114. The email at page 833 came out later. The email demonstrated that AB was not someone who could properly control her opinions, or treat the claimant fairly or

professionally in the grievance process. Surprisingly, neither MS nor anyone else in the process considered replacing her as the disciplinary officer and that spoke volumes.

115. In addition, AB as the chair of the disciplinary hearing allowed a decision to be made that relied upon evidence that the claimant had not seen and did not know about. This was indicative of an unfair process and no reasonable employer in similar circumstances would have proceeded in such a manner. Faced with the non-attending party any reasonable employer would establish what information he had been sent and would have given him the opportunity to comment upon it. We are not sure whether it was fatally unfair in these circumstances, because the evidence of these witnesses was largely predicable, i.e. there were no surprises and because nothing turned upon the witness statements. But it demonstrated the respondents' approach. The dismissing officers had made up their mind and MS, the human resources adviser was determined to steam roller this through.

116. We were concerned about the Head Teacher's involvement in the disciplinary procedure. she had her fingerprints all over this process. She made the determinations of 28 July 2020. She questioned the process and asked for those involved to account for their actions. We do not know what happened behind the scenes, but we do not accept the evidence of Ms Carmichael-John and AB in contrast to the Head Teacher's correspondence at pages 822 and 823 of the hearing bundle, where the Head Teacher was inappropriately involved. The lack of a clear and credible explanation lead to our determination that both were not reliable witnesses.

117. We heard in evidence that the respondent had deliberately destroyed notes in respect of the grievance. That is particularly suspicious for the Tribunal, particularly when the original interview notes [of HB844-869] for the grievance were "corrupted". This underpins serious concerns about the veracity of these notes and the contents of interview evidence which taint all aspect of the employer's dealings with the claimant.

118. The respondent rescheduled disciplinary hearing to 4 December 2022. The claimant was still off sick, and the respondent gave no consideration to reconvening disciplinary hearing after or on the expiry of the claimant's sick note on 4 January 2021 [HB1216]. No consideration was given to seeking further information or advice on the claimant's health condition. There was no engagement with the claimant's GP.

119. The meeting on 4 December 2020 was to make a decision on the disciplinary matter. The dismissing officers refused to consider the claimant's additional evidence. This was particularly rich when Ms Carmichael-John did not follow the correct disclosure for her investigation report. AB's explanation at paragraph 29 of her witness statement appears to be at odds with meeting notes and the explanation appears bizarre. We do not understand the reason AB and the other dismissing officer determined not to give claimant any latitude at all.

120. It is not clear that the claimant was dismissed in the hearing notes. There was no consideration of mitigating factors. In evidence AB insisted that mitigation was considered but this was not in the respondent's record of the meeting, and it was not

in the dismissal letter. There is a reference to "mitigation" in the dismissal letter [at HB917] but that is not consideration of proper mitigation. AB refused to consider the claimant's landlord's letter on spurious grounds as, we determine, it did not fit in with their predetermined conclusions. The disciplinary panel should have considered it in the circumstances; it was unjustifiable not to do so and again outside the range of reasonable responses. This should have been weighed with evidence of others.

121. The claimant's appeal was not a rehearing. The respondent reviewed a substantially flawed process, but they did hear the claimant. The appeal outcome largely ignored the claimant's grounds of appeal. Ms Green did not come to an independent conclusion, the appeal merely rubber stamped a bad decision. Such was the level of engagement that the appeal panel of 3, 2 had the cameras off for large parts of the hearing. No evidence of connectivity problems so we reject Ms Dannreuter's submission on that point. Ade Banjoko asked 1 question when prompted which was not particularly salient. Mehul Sheth asked about the holiday booking arrangements and about an airline refund, so he appear to be at least somewhat engaged for part of the hearing.

122. At the appeal hearing the claimant produced a bank statement to purportedly corroborate that he was in the UK rather than going on holiday. This document was not really considered by the appeal hearing. The claimant was cross-examined on this document by Ms Dannreuther at the Tribunal hearing. At first, he sought to justify some discrepancies but then he admitted that he created a fraudulent document. This document was manufactured with the intent to deceive. The claimant is not merely unreliable, we make the determination that he is dishonest.

123. So, the investigation was biased and profoundly unfair. There is a significant breach of the ACAS procedure. The respondents did not undertake the investigation fairly or reasonably. It was important to keep an open mind and look for the evidence which supports the employee's case as well as evidence against this and the investigation should have confined itself to establish the facts of the case. The dismissing officers could not have come to an honest belief in the claimant's guilt based upon such a flawed investigation. The respondent fail the *Burchell* test at all 3 levels.

124. However, that leaves us with allegations of serious wrongdoing and a dishonest claimant. In respect of a *Polkey deduction*, there was no minor defect in the respondent's application of its dismissal procedures, its defects were fundamental and profound. Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still been dismissed even if the correct procedure had been followed: see *Davidson v Industrial & Marine Engineering Services Ltd EATS/0071/2003*. If the disciplinary investigation had some merit to it, then we may have accepted the applicable of a *Polkey* deduction. However, the circumstance of this case was that the respondent wanted rid of this employee and irrespective of his health or the other evidence or mitigation the respondents were determined to get rid of him. There were at least 2 human resources representatives involved so we cannot conclude that the defaults we inadvertent or insignificant. No reasonable employer would have adopted this approach. Consequently, we make no *Polkey* deduction.

125. In his witness statement claimant said the requirement for him to attend work for the last week of term was unfair and outside his contractual obligation. The claimant said he needed notice which was a silly argument as the Head Teacher did not need to give him notice to do his job in school. It was a reasonable request to be in school for the last week of term. He lied to the Head Teacher about going to Georgia. He tried to bounce her into a decision, but she instructed him to be in school for the last week. We determine that he was never going to attend work for that last week. The claimant had a pre-booked holiday (as evidenced by his boarding card) to Croatia. We determine he lied about his covid sickness absence as this was never corroborated with any test results or sick note or other evidence and, having heard this evidence, we now view him as a dishonest person both because of the lies he told at the time and, more shockingly, in respect of the deliberate creation of misleading evidence. We have not heard from his girlfriend nor his landlord, so we do not believe that he remained in the UK in July 2020.

126. Whilst the claimant disregarded the Head Teacher's instructions to attend school at the end of school. Others attended and so far as we see the school coped with his absence. In evidence, AB said that his dismissal was not inevitable, she said that if he had been contrite and honest then the result would have been different, but the claimant showed no insight and there was no recognition that he had done anything wrong. The claimant was guilty of blameworthy conduct. His absence was serious but not necessarily overwhelming. It is his lies that have disturbed us most. We are resolved to make a substantial deduction on the basis of his blameworthy conduct. The claimants misconduct clearly contributed to his dismissal.

127. Any reduction of compensation is an arbitrary assessment. We thought strongly about making a 100% deduction but that would have been disproportionate bearing in mind our criticisms of the respondent's behaviour. We were resolved to reduce both the claimant's basic award and compensatory award by 70%, i.e. he will get 30% of the compensation we assess that he is due for the unfair dismissal and this is on the basis that we expect this figure to be fairly modest.

<u>The whistleblowing claims</u>

128. In respect of the protected disclosures:

- 5.1.1.1 was accepted at the outset by the respondent as amounting to a protected disclosure.

- Under 5.1.1.2 Ofsted is not a prescribed person or organisation under s43F ERA so this cannot be a protected disclosure. In any event the first the respondents knew of this was on 11 November 2020 at the same time of the claimant's grievance. We believe that this was a cynical exercise by the claimant to throw mud at the respondent following him being caught out for his unauthorised absence. There was no evidence to suggest that the respondents were particularly concerned about the alleged consequences of the chickenpox outbreak or the work reference so as to link this with any detriment, so we discount this for further consideration.

- We do not accept 5.1.1.3 was a protected disclosure. In this instance we prefer the evidence of Ms Carmichael-John who denied that this part of the conversation

on 19 November 2019 happened. We accept that the claimant said he had been assaulted (protected disclosure 5.1.1.1) but we do not accept that he said Child A needs were too severe for him to be accommodated at this special school. There is no contemporaneous note or some other reference in correspondence to such a discussion, so we do not accept that it happened.

- 5.1.1.4 did amount to a protected disclosure because the claimant's grievance clearly referred to allegation of sexual harassment. The allegation conveyed information under s34B(1)(b) ERA and was made to the employer under s43C ERA. We accept that matters concerning sexual harassment in a special school engages the public interest.

129. The detriments that are alleged to arise from making the protected disclosures are set out at 6.1 of the list of issues. In respect of the "live" issues we say as follows.

130. In respect of issue 6.1.1, the relevant protected disclosure can only be the claimant raising his assault and abuse by child A on 19 November 2019. The context of disclosure is important. The claimant worked in a special school dealing with a large proportion of children on the autistic spectrum range with associated conditions and children with other special needs. Many of these children had difficulties in regulating their emotions and frustrations in expressing themselves. Verbal abuse and assault was according to the respondents an occupational hazard and a fairly regular occurrence. The claimant accepted this in part, however, he saw it more as an occasional occurrence. There is not sufficient information to reconcile how frequently staff were assaulted and abused, but we regarded this as, regrettably, something familiar to all concerned. There is no indication that the Head Teacher or Ms Carmichael-John or anyone else took against the claimant for reporting this incident, i.e. making the protected disclosure, in the 8 months prior to the first whistleblowing detriment allegation.

131. The detriment of subjecting the claimant to disciplinary action, including on 28 July 2020 informing him of the start of an investigation, had patiently nothing to do with the reporting a regular and predictable incident part-way through the first term and had everything to do with the claimant skiving off work and subsequently lying about it at the end of the third term, the school year-end.

132. Because of the effluxion of time and because of the unrelated nature of the 2 matters, we do not accept that a protected disclosure for an entirely unrelated matter materially influenced the Head Teacher in her threat of suspending the claimant. The Head Teacher was keen that the disciplinary case against the claimant progressed. She wanted the claimant dealt with promptly in the disciplinary context. Whilst this was inappropriate in itself it was based on the claimant's disciplinary transgression and his absence from work.it was not materially influenced by his protected disclosure of some 10 months or so earlier. The Head Teacher was annoyed by the claimant's absence in the final week of term the reason he gave for this absence. She did not believe him, and the respondents embarked upon a disciplinary investigation. The Head Teacher's fingerprints were all over this process. She wanted to engage with the claimant and his refusal to contact her frustrated her to the extent that she threatened him with suspension if he did not contact her. This may well have been inappropriate because suspension should not be used as a sanction, and it is difficult to see the need to remove someone from the payroll in

such circumstances. Disciplinary action or advising the claimant in respect of possible disciplinary action appears to us to more appropriate option. Nevertheless, again this had nothing to do with what can be construed as a whistleblowing disclosure almost 10 months before.

133. Allegation 6.1.3 was limited during the course of the hearing to Ms Carmichael-John's recommendation that the claimant be called to an investigation meeting [HB752]. Again, for the reasons stated above this had nothing to do with the whistle-blowing disclosure and everything to do with the claimant's unauthorised absence from work.

134. Allegation 6.1.4 was withdrawn on day-5 of the hearing.

135. In respect of allegation 6.1.5, AB and MS decided to investigate the claimant's grievance and it was reasonable to interview witnesses in the claimant's absence. As part of the grievance investigations, there was no sharing of witness statements with the claimant, which is not contended as a detriment. The grievance officers chose not to call these witnesses to the grievance hearing so the notes that were taken were kept secret from the claimant. The grievance officers chose not to call these witnesses to any hearing, yet they still wanted to rely upon the evidence. This is unfair – but, we determine, this was not done for any reasons to do with the protected disclosures. At this point the claimant had made 2 protected disclosures - the verbal report of the abuse and assault by the pupil 1-year previous, which we determined was not of significant occurrence, and the grievance itself of around 2-weeks earlier. It sounds a particularly strange way to frame an allegation that says because of the grievance the respondents decided to hold a meeting in the claimant's absence. That does not make sense. However, in any event, the claimant was subjected to a detriment, which we have identified, and the causal link for the detriment was nothing to do with any whistleblowing reasons. It was everything to do with AB and MS resolving not to treat the claimant fairly. That was because they believed claimant was guilty of a disciplinary offence and they were not going to bother to give him a fair hearing in respect of a grievance that they predetermined was merely a distraction or an obstacle to the main event – the claimant's gross misconduct behaviour in skiving off work and lying about it.

136. Allegation 6.1.6 was difficult to work out and we spent a lot of time at the preliminary hearing before commencing the evidence trying to understand the precise nature of this allegation and what "secure questioning" was supposed to mean. Clearly, the respondents undertook a noticeably poor investigation. The claimant seems to say that this was predictable, with which we do not concur. He said that the investigation should have gone to a third party, but this was based on little more than his hostility to the respondents and a desire to be awkward on his part. The Tribunal is very firmly of the view that third-party investigations are only warranted in exceptional circumstances, as in this instance it was up to the respondent to get its processes right. There was no compelling reason that the respondent should have got an external investigator to interview witnesses and make a record and this was not a difficult task. That should clearly have been something the investigating officer could and should have done but, more significantly, it is for a decision maker to make sure that a substantially fair process has been followed. That did not happen in this instance, but it was nothing to do with the claimant's whistle-blowing disclosure and more to do with AB's indifference in treating the claimant fairly because she had

already made up her mind as to both his guilt in the disciplinary matter and the irrelevance of this grievance.

137. Allegation 6.1.7 was then mirrored in the claimant's grievance. This allegation had nothing to do with the claimant's whistleblowing disclosure and everything to do with AB clearing the decks to proceed dismissed claimant as quickly as possible.

138. Allegation 6.1.8 was withdrawn on day-3.

139. The detriment in respect of allegation 6.1.9 was in respect of the breach process by AB and MS in delay in providing the information relied upon by the respondents until 2 days before the disciplinary hearing, due to be held on 13 November 2020. The procedure said that this information to have been provided no later than 5-days before. The claimant said he only read the post and there was an incomplete report at appendix 2 missing. It is our view that this had nothing to do with the claimant's historic complaint about child A because that matter bore no relevance to matters as they unfolded. This also nothing to do the claimant's grievance because information was provided on the same day as the grievance so it's a nonsense to suggest that these 2 matters had anything to do with anything other than the investigation officer's and the disciplinary officer is poor behaviour. AB and MS were not bothered to treat the claimant fairly as both respondents were convinced of the claimant guilt prior to the hearing and is nothing to do with the contended protected disclosures.

140. For substantially the same reasoning as described above, we find allegation 6.1.11 in respect of the respondents ploughing on with the disciplinary hearing despite the claimant's ill health was nothing to do with his whistle-blowing disclosures. The respondent could and should have rescheduled disciplinary hearing for early January 2021 when the claimant sicknote had expired. It was not logical that they did not wait because the respondent had waited for MS to draft a grievance outcome, which had not been sent until even later. We were puzzled by the rush and determined that it was everything to do with the respondent's pre-judging the case and desire to get the claim out of the door at all costs as soon as possible.

141. Finally, in respect of the claimant's dismissal, issue 6.1.12. Dismissal is clearly a detriment; however, the claimant's dismissal is not correctly categorised as a detriment under s48 ERA. The claimant was an employee so his dismissal should be assessed as a claim of automatic unfair dismissal under s103A ERA. The causation for the dismissal is a higher threshold than that for a detriment case, the principal reason (or one of the principal reasons) must be the protected disclosure. As we make clear above, the claimant was dismissed because he skived off work and, when challenged, he lied about it. This was properly a gross misconduct offence. He was unfairly dismissed because the respondent's did not follow a fair process in dismissing him. This had absolutely nothing to do with any protected disclosure, such contentions are preposterous; as are the whistle-blowing detriments claimed above.

Disability discrimination

142. We will deal with the claimant's disability discrimination claims briefly because these allegations also have no merit.

143. Judge George determined that the claimant was a disabled person by reason of his depression and anxiety [HB355-366]. Judge George noted that the claimant contended that he had 6 free sessions of counselling provided by his employer, commencing in 2017 well before these events. There is no evidence that the respondent knew of this but if they did it was not registered with any concern or follow-up. The claimant thereafter undertook some remote counselling with someone based in Georgia because, he said, he could not afford to pay for a UK-based therapist, and he did not pursue this through his GP or some other NHS referral. The first mention of a mental health condition was in his GP sick notes from September 2020 which certified the claimant as being unfit for work because of stress. The claimant registered with a new surgery on 17 September 2020 and in the new patient questionnaire he did not disclose any depression or other mental illness. The claimant contended that the peak of his depression was in January 2020, but there is no absences from work during this period and the claimant said that this was because he was obtaining support from his Georgian therapist online. Judge George noted the apparent inconsistencies and gaps in the medical evidence but contended that she did not need to take a view on the claimant's credibility because it was not positively asserted on behalf the respondent that the claimant was not telling the truth. Judge George was concerned that the claimant chose not to tell his GP that he had a history of depression in September 2020 but nevertheless, due to the low threshold for establishing that he was disabled under the EqA, Judge George accepted the disability contended in part, but not in respect of post-traumatic stress disorder.

144. Judge George expressly did not determine that the respondents had actual or constructive knowledge of the claimant's disability; that was our task.

145. The claimant contended that he signed up for 6 free work-commissioned therapy sessions and attended these between October and December 2017. He originally told Judge George that this was 2018 so he was inconsistent in that important aspect of his evidence. Furthermore, having heard the claimant's evidence we do not find that he is a reliable or honest witness, so when his account is not corroborated by contemporaneous documents, we are unwilling to accept his version of events. The respondent witnesses did not know about these therapy sessions, and we do not believe the claimant when he said that he told the Head Teacher about his problems with depression and anxiety because this was denied and there is not one strand of evidence that might be taken as corroborative or consistent with this in circumstances where we expected to see some indication of such disclosure.

146. The absence of any corroboration works positively in the respondent's favour because, if the claimant has disclosed a history of mental health problems before his gross misconduct, then we are persuaded that the respondent would have investigated this.

147. The GP notes do not provide an indication of a disability and as far as the respondents knew the claimant's work-related stress arose in September 2020, so this did not have the longevity of a disability under s6 EqA. MS did refer the claimant to occupational health, and this did not throw up any suggestion that he was a disabled person. Therefore, if occupational health did not pick up on this, it is difficult to criticise the respondents for not doing so.

148. We are satisfied that the respondent genuinely didn't know that the claimant was disabled and could not have reasonably be expected to know this because they did not appreciate the extent of the claimant's claims of stress and anxiety subsequently found by Judge George. All of the claimant's claims of direct disability discrimination fail because the respondents did not know that the claimant was a disabled person, nor could they be expected to know about the claimant's health condition. The claimant went to Croatia on holiday when he should have been at work. That was obvious to his employer, and it was obvious to the Tribunal. We were unhappy with the respondents' behaviour during this process, but that was nothing to do the claimant's work-related stress or his disability.

149. In respect of the discrimination arising from the claimant's disability claim. We state above that the claimant was dismissed because of his gross misconduct. In respect of issue 10.1.2 the claimant claims fail at the first hurdle. Interviewing witness at the disciplinary hearing was relevant to disciplinary process. This is not unfavourable treatment.

150. So far as the reasonable adjustment complaint were concerned, the respondents need to know the claimant was a disabled person for the duty to make reasonable adjustments to arise. We have determined the respondents did not know that the claimant had the disability contended and that it could not reasonably have been expected to know this.

Sexual harassment

151. Of the 18 allegations of sexual harassment, we find 7 proven.

152. We considered these allegations carefully. The Head Teacher was clear in her evidence that she denied making the speedo's comment. "Speedos" is a common term, so we reject that it is unusual vocabulary. We reject we the Head Teacher's account in part.

153. The Head Teacher had blurred boundaries over making loans of money to the claimant and this blurring of professional boundaries was important in making such a determination.

154. We do not accept the respondents' contention that such comments were no big deal. We accept the evidence that the claimant made no contemporaneous complaint about in the intervening years and that these matters were not raised until his grievance. This indicates to us that that he was not significantly troubled by such occurrences. It also indicates that he raise this issue as retaliation towards the Head Teacher because of his negative treatment.

155. There were significant questions about the claimant's reliability because he attempted to mislead the Tribunal on the index offence, and he falsified documents in his appeal. The claimant attempted to cast aspersions on the Head Teacher's sexual history. The Head Teacher's previous relationships, if any, were private matters and gossip or baseless accusations only further diminished the claimant's credibility.

156. Ms Judd O'Malley gave evidence of the Head Teacher's non-attendance at various staff meetings but we do not put much in store by this because this was based upon

her examination of the diary which could have been easily altered (by the Head or others) at any time.

157. That said, Mr Byrne was a credible and believable witness. He was the school caretaker. We believe he had a part to play in restraining a child so the respondents' attack on his credibility did not undermine his evidence in that regard. Although he was subsequently made redundant at the school, Mr Byrne said he had got another job reasonably swiftly. Whilst this did sour relations with the Head Teacher, we do not accept that Mr Byrne was so enraged with the Head Teacher that he would attend the Employment Tribunal to lie about what he witnessed. He pursued a person injury claim against the School but this does not credibly lead to a accusation of false testimony. We accept that Mr Byrne attended all-staff meeting on many Wednesdays. Where is evidence contrasts with that of the respondents' witnesses, we prefer the independent evidence of Mr Byrne. In particular, we accept Mr Byrne's evidence that he and some other staff teased the claimant about the Head Teacher's remarks and innuendos. This also appears to be consistent with WP (Class Teacher) referring to "banter" in the partial notes available for the grievance investigation [HB844-869]. Although these notes are unreliable because the original was destroyed and the file they were transcribed to supposedly corrupted, which is suspicious. Questions were put bluntly like, have you witnessed sexual harassment which is not appropriate in this type of case and some answers are missing or redacted.

158. On the Head Teacher's reply to the claimant's email on page 711 of the hearing bundle, the Head Teacher wrote to the claimant with a kiss, i.e. an "x". This does not indicate an unwanted sexual overture, but we remark upon this because the respondents' version of the email at page 714 has the x deleted. We were not taken elsewhere in the hearing bundle to where the Head Teacher used an "x" after her name in correspondence.

159. On balance we find that the sexual harassment contended at issues 12.1.1, 12.1.4, 12.1.6, 12.1.9, 12.1.11, 12.1.12, and 12.1.8. The consistent theme in these allegations is the Head Teacher remarking upon the claimants supposed fit body and his speedos. We reject the claimant other allegations, as these represent an exaggeration of what, in fact, occurred or he made them up to bolster his claims.

160. All of the claimant's allegations of sexual harassment are out time, pursuant to the Equality Act 2010. Notwithstanding the allocations found proven represent infrequent acts, there is some consistency with the allegations that we have accepted and they were all perpetrated by the same individual. Whilst this forms a continuous act or pattern of discriminatory conduct, the last act is still out time. Having given this determination and finding some allegations of sexual harassment proven, we determine that it would not be appropriate to deny the claimant a remedy in this regard. That said the claimant did not pursue these matters promptly because we determine that he did not regard the Head Teachers behaviour as either particularly serious or worrying, which will make any award modest. Whilst it is important to recognise and mark occurrences of sexual harassment, we do so in this particular case cognisant that compensation for these events fall on the more modest side of the scale.

<u>Victimisation</u>

161. The claimant did do the protected as identified issues for 2.1.1 and 13.1.2. The respondents first become aware of these protected acts on 11 November 2020 when the claimant submitted his grievance.

162. The claimant was not subjected to the detriment contended at 13.2.1 and 13.2.2 as alleged. This claim has no merit because it was patiently obvious to us that the protected acts had nothing to do with the detriments alleged. The claimant was subject to disciplinary action and then dismissal because he absented himself from work without the proper authorisation and in direct contradiction to the Head Teacher's instructions and that he repeatedly lied to his employer about the reason for his absence.

Employment Judge Tobin

Date: 11 April 2023

JUDGMENT, REASONS & BOOKLET

SENT TO THE PARTIES ON

11 April 2023

FOR THE TRIBUNAL OFFICE