EMPLOYMENT TRIBUNALS

Claimant: **Ms Ijeoma Onyebalu**

Respondent: **The Governing Body of Gascoigne Primary School**

Heard at: **East London Hearing Centre**

On: **1, 2, 3, 4, 8, 9, 10 August 2023**

Before: **Acting Regional Employment Judge Burgher**
Ms G Forrest
Mr L O'Callaghan

Appearances

For the Claimant: **In person**
For the Respondent: **Ms L Robinson (Counsel)**

JUDGMENT having been sent to the parties on 21 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Procedural background

1. The Claimant brought two claims which have been joined together. The first claim, case number 3205347/2021 was presented on 9 August 2021 with a 6-page narrative. This claim involved the Claimant's concern that she was required to work from home from 8 March 2021 which engaged the Claimant's fundamental disagreement with the Respondent schools COVID testing policy and it seeking to coerce her to take a COVID test. The claim stated:

> "I was subjected to unlawful indirect and/or direct discrimination, victimisation, harassment and bullying for notifying my employer that my health and safety would be endangered by my employer?s Schools Covid-19 Asymptomatic Policy and guidance. I also suffered from detriments in the workplace for raising issues in the workplace relating to asserting my statutory rights. My employer did not comply with their own policies, legislations, government guidance and etc therefore my grievances were heard and concluded outside their own normal time-limits for hearing grievances. They unlawfully raised a disciplinary in response to my grievance as well.

> … deliberate acts of harassment from other employees at Gascoigne Primary School, which created intimidatory, hostile, degrading, humiliating and an offensive environment. I was denied risk assessments, training opportunities, tools, equipment, data, resources and etc in order for me to carry out my job correctly, to teach my class and meet vital deadlines. This caused me anxiety and severe distress.

2. The second claim, case number 3200006/2022 was presented on 5 January 2022 with a 23-page narrative of complaints. The Claimant summarised her heads of claim as follows:

> The Claimant brings claims against the Respondents for:
> (a) Direct discrimination (Equality Act 2010 ss 13&39)
> (b) Discrimination arising from disability (Equality Act 2010 s15)
> (c) Indirect discrimination (Equality Act 2010 s19)
> (d) Failures to comply with duty (Equality Act 2010 s 21)
> (e) Failures to comply with public sector equality duty (Equality Act 2010 s149)
> (f) Failures to comply with public sector duty regarding socio economic inequalities Equality Act 2010 s 1)
> (g) Failure to comply with a duty to make reasonable adjustments (Schedule 2 & Schedule 8 Equality Act 2010)
> (h) Harassment (Equality Act 2010 s26)
> (i) Victimisation (Equality Act 2010 s27 &39)
> (j) Prohibited Conduct: Ancillary (Part 8 Equality Act 2010)
> (k) Infringement of the Claimant's personal data rights and her rights as a data subject under Article 15 of the UK GDPR, under 20 of the UK GDPR, and under Data Protection Act 2018 (ss 170 & 173)
> (l) Being in breach of, and acting incompatibly with Article 3, Article 6 (1), Article 8, Article 14, and Article17 of the Human Rights Act (1998) which is unlawful
> (m) Being in breach of fraud by representation, fraud by failing to disclose information and fraud by abuse of position (Fraud Act 2006 s1).

3. Preliminary Hearing 1 took place before EJ Fowell on 14 February 2022 (144) and the judge decided to list a Preliminary Hearing in public to consider the issue of disability. At the same time the judge listed a 10-day hearing to consider all issues (including disability). The judge stated as follows:

> 5. There will also be a further open preliminary hearing by video on 7 June 2022 at 10.00 am to decide whether Ms Onyebalu was disabled at the material time. Directions are given below to ensure that the parties are ready for that hearing and that the Tribunal has enough time on the day to resolve it.
>
> 6. If Ms Onyebalu is held not to have been disabled then many of the allegations in this claim (3205347/2021) will be dismissed. (A complaint of victimisation has been made, which would not be affected, and there is mention of asserting a statutory right and of health and safety matters, which are still unclear). Further case management orders may then be given at that hearing, if time allows, and a ten-day hearing is unlikely to be needed.

4. Preliminary hearing 2 took place in public on 7 June 2022. EJ Elgot sent judgment to the parties on 14 June 2022 (156)

> 1. The Claimant was not at the material time relevant to these claims a disabled person within the definition of section 6 Equality Act 2010.
>
> 2. Accordingly her claims of disability discrimination (including harassment) against all of the Respondents in both of these consolidated cases DO NOT SUCCEED and are

DISMISSED.

3. Her claims of victimisation under section 27 Equality Act 2010 remain to be heard. There is a ten day hearing listed for 26-28 July, 1-4 August and 8-10 August 2023 which will remain as listed until after a further case management preliminary hearing for 3 hours on 16 September 2022 at 10 am to deal with all outstanding matters. A notice of Hearing will be sent out in due course.

…

5. By 6 page letter dated 1 August 2022 the Claimant applied to reconsider EJ Elgot's judgment. It does not seem as though this was referred to EJ Elgot to consider. However, on 9 September 2022, the Claimant submitted a 14-page list of issues for consideration for the Preliminary Hearing listed to take place on 16 September 2022. The Claimant applied to amend her claim to relabel her dismissed discrimination and harassment complaints as unlawful victimisation complaints.

6. Preliminary hearing 3 took place on 16 September 2022 and EJ R S Drake addressed the remaining issues (176). EJ Drake did not amend the hearing timetable and repeated that the final 10-day hearing already listed to commence 26 July 2023 will be limited to liability only and thereafter any Remedies Hearing will be listed separately. Paragraph 4 of EJ Drake's decision dismissed the Claimant's application to amend. The judge stated:

4. The Claimant's application 9 September 2022 to amend her claim (to add the particulars she has pleaded of alleged direct disability and harassment as particulars of victimisation) is dismissed because they are not pleaded that widely as such and because the discrimination and harassment claims have been dismissed by EJ Elgot as of 7 June 2022. Further. in absence of pleading of them as victimisation, they cannot be relabelled as such and out of time.

…The Claimant has "nailed her colours" in expressing certain detailed particulars "to the particular masts" of direct discrimination and harassment claims, but not to the mast of victimisation. She is clearly from the terms and detail of her claims a perspicacious though self-represented party and thus must accept this as that is the way she has chosen to express her claims.

7. At paragraph 35 of the orders, when considering the scope of the Claimant's remaining claims the judge stated:

The Claimant raised in her two sets of pleadings complaints about a number of grievances she had raised, the manner in which they were conducted and the fact that none were upheld. She says that the raising of those grievances (about alleged infringement of her rights under EqA) amount to protected acts for the purposes of the definition in Section 27(2) and that she was subjected to detriment evidenced by

35.1 the way the grievances were dealt with;

35.2 what was to her the unsatisfactory outcomes thereof; and also

35.3 she was then subjected to disciplinary procedure which was of itself imperfectly conducted in breach of her rights.

I explained that she may not argue that the protected act was also the detriment flowing from it so that to this extent her arguments under 35.1 and 35.2 could not be logically sustained, but that 35.3 was free-standing. I determined the issues accordingly.

8. A list of issues was included in EJ Drake's order. On 30 September 2022 the Claimant wrote to apply to amend the list of issues specified. This amendment application was heard at a Preliminary Hearing 4 on 7 March 2023 before EJ F Allen (194). EJ F Allen allowed limited changes to the list of issues and concluded at paragraph 3:

> The amendments were discussed fully at the hearing and, for the reasons given at the hearing, the following amendments are made to the Case Management Orders dated 16 September 2022:
>
> (1) A claim for victimisation under Section 39(4)(d) is to be included in the complaints and issues.
>
> (2) The date at 38.2.1(e) is amended to 4 October 2021.
>
> (3) The word "procedure" is Paragraph 38.3 is amended to "procedures" and the colon is amended to a full stop. Paragraph 38.3 will now read "Did the Respondent subject the Claimant to disciplinary procedures and conduct it unfairly.

9. The final list of issues was then included in EJ F Allen's order. This is recorded as Annex A to this judgment and forms the basis of this Tribunal's consideration. As far as length of hearing EJ F Allen continued the 10-day listing to commence of 26 July 2023.

10. By letter dated 18 July 2023, having reviewed the issues, correspondence and judicial availability, Acting Regional Employment Judge Burgher informed the parties that the hearing in person would be reduced to 7 days including Tribunal deliberation, given that there was no disability discrimination claim.

11. On 1 August 2023, the first day of the hearing, the Tribunal timetable was discussed and outlined with the parties. The Tribunal was required to manage the hearing fairly and justly, in accordance with the overriding objective and it was explained to the parties that the matter would need to be determined in the time allotted as it was not in the interests of the Tribunal or the parties for there to be further delay if the case went part heard. It was confirmed that the hearing would be 7 days and that the evidence would need to be completed by the morning of the day 5 to allow the Tribunal time to decide and deliver judgment. The Claimant indicated that she had up to 20 questions for each Respondent witness and estimated that 2 hours per witness would be sufficient for cross examination. No objection was raised to the Tribunal timetable set at this time.

12. The procedural background referred to above is referred to in detail because the Claimant left the hearing at 12:15 on the fourth day of the hearing (4 August 2023). At this stage the Claimant had reiterated her increasing dissatisfaction. At the start of the fourth day, having reflected overnight the Claimant expressed concerns and objected to the Tribunal directions about the length of time that she would be allowed to cross examine the Respondent's remaining witnesses. The Claimant also raised concerns about the Tribunal's directions preventing her from asking irrelevant questions of witnesses and stopping her from asking repetitive questions and making lengthy statements to witnesses.

13. The Claimant spent nearly 5 hours questioning the Respondent's first witness, Ms Francis. Given that the Claimant is a litigant in person she was given considerable

latitude with this witness to set out the context of her case through questions and statements, whilst being intermittently encouraged to ask relevant questions relating to the issues. However, during and following Ms Francis's cross examination the Claimant was reminded of the hearing timetable and was informed that she ran the risk of running out of time if she maintained her approach of asking unfocused irrelevant questions. It was clear that the Claimant was seeking to address numerous allegations that were no longer before the Tribunal in the questions she was asking of witnesses. Consequently, the Tribunal indicated that it would not permit further irrelevant questions and would expect the Claimant to complete her questioning of all the Respondent's witnesses within the time indicated.

14. The Tribunal sat later on the third day, rising at 16:45 and was prepared to sit later on day 4 to ensure the evidence was heard.

15. At the start of the session, at 10.20 on day 4 the Claimant fundamentally disagreed with the direction to limit the hearing to 7 days, she stated that it was perverse. She stated that as a litigant in person with anxiety she expected to use the full 10 days previously indicated for the evidence to be considered and for the Tribunal to make its decision after that.

16. Following an adjournment at 11:47 the Tribunal reconvened at 12:05pm The Claimant reiterated her request to allow her a full 10 days for her cross examination of witnesses. The Tribunal confirmed, as it had previously confirmed at 10:20 earlier in the morning that the hearing was limited to 7 days including deliberation time. The Claimant maintained that this was perverse, the proceedings were prejudged, contrary to numerous legal and judicial maxims, including a maxim of 'hasty justice' that she would be appealing and that God would be the ultimate judge. The Claimant left the hearing at 12:15.

17. The Tribunal proceeded to hear the Respondent's remaining witnesses namely Ms Preston, Ms Buchner and Mr Lan George in the Claimant's absence. The hearing was adjourned to resume for oral submissions to take place on 8 August 2023, as originally timetabled. The Claimant was informed in writing of this on 4 August 2023 and both parties were informed that they would be entitled to submit written submissions if they wish in addition to the 1 hour oral submissions timetabled. Any written submissions were required to be emailed to the Tribunal copied to the other side by 9.30am on 8 August 2023. The Claimant did not attend on 8 August 2023 or provide any written submissions. The Claimant did not attend to receive the oral judgment on 10 August 2023.

Evidence

18. The Claimant gave evidence on her own behalf.

19. The Respondent called:

19.1 Dina Francis, HR Advisor for the school
19.2 Rehana Miah, Assistant Head Teacher
19.3 Rahat Ismail, Chair of Governors
19.4 Joanne Preston, Headteacher

19.5 Donald Lan George, HR Manager London Borough of Barking and Dagenham
19.6 Anre Buchner - Deputy Headteacher
19.7 The Respondent invited the Tribunal to read the evidence of Kevin Medcalf – Governor from an external school who chaired the Claimant's first disciplinary process. He was not available to be cross examined and as such the Tribunal placed no weight on his evidence where it did not correspond with contemporaneous documentation.

20. All witnesses were subject to cross examination and questions from the Tribunal save for Ms Preston, Mr Lan George and Ms Anre Buchner, as the Claimant had left the hearing before they gave evidence. However, the Tribunal asked these witnesses questions in relation to the issues that arose from the Claimant's case.

21. The Tribunal was also referred to relevant pages in an agreed bundle consisting of 2027 pages.

Facts

22. The Tribunal has found the following facts from the evidence.

COVID and Government Guidance

23. On 30 January 2020, the WHO Emergency Committee agreed that the COVID outbreak met the criteria for a Public Health Emergency of International Concern. Nevertheless, the published guidance as at 19 March 2020 was that COVID-19 is no longer considered to be a High Consequence Infectious Disease (HCID) in the UK (209). Despite this statement the Government imposed a first national lockdown on 23 March 2020.

24. As far as COVID testing was concerned the government guidance on testing made clear that antibody testing and blood tests were voluntary (220). The issue of blood tests was not relevant to this case. There was guidance issued about lateral flow testing (LFT) (230) and there was no government guidance stating that LFT was mandatory. For LFT the guidance stated that (248)

> Lateral flow testing may be used in either symptomatic or asymptomatic populations who are at risk of COVID-19 infection. It is used to ease service demand on labs and to produce results rapidly (within 15 to 20 minutes), for timely reporting and for early detection, isolation and contact tracing of data subjects who might be infected by COVID-19.
>
> …
>
> Negative results do not rule out possible infection and should be considered in the context of a patient's recent exposures, history and the presence of clinical signs and symptoms consistent with COVID-19, and confirmed with a PCR test, if necessary, for patient management. The way your data is used and managed is the same as the PCR test outlined in the overarching privacy notice.

25. The "Schools COVID operational guidance" issued in February 2021 by the Department for Education (DFE) stated that for prevention it must be ensured that face coverings are used in recommended circumstances (1781); and that asymptomatic testing should be promoted and engaged (1782).

26. The guidance states that children in primary schools do not need to wear a face covering (1786) and:

> "Face visors or shields should not be worn as an alternative to face coverings. They may protect against droplet spread in specific circumstances but are unlikely to be effective in reducing aerosol transmission when used without an additional face covering. They should only be used after carrying out a risk assessment for the specific situation and should always be cleaned appropriately.
>
> Exemptions
>
> Some individuals are exempt from wearing face coverings. This applies to those
>
> who:
>
> • cannot put on, wear or remove a face covering because of a physical impairment or disability, illness or mental health difficulties
>
> • speak to or provide help to someone who relies on lip reading, clear sound or facial expression to communicate
>
> The same exemptions will apply in education and childcare settings and you should be sensitive to those needs, noting that some people are less able to wear face coverings and that the reasons for this may not be visible to others."

27. Asymptomatic testing was addressed in this guidance (1803). It was recommended that rapid testing using Lateral Flow Devices (LFDs) would support the return to face-to-face education by helping to identify people who are infectious but do not have any COVID-19 symptoms. It was stated that the lateral flow devices used have received regulatory approval from the MHRA for self-use. Home test kits will be available for all staff on return and that testing remains voluntary but strongly encouraged.

28. Specifically, for primary schools the DFE guidance was as follows (1805):

> "Primary schools
>
> Staff in primary schools will continue to test with LFDs twice a week at home, as per existing guidance on testing for staff in primary schools and nurseries.
>
> Primary age pupils will not be tested with LFDs. Public Health England have advised there are currently limited public health benefits attached to testing primary pupils with lateral flow devices. Primary age pupils may find the LFD testing process unpleasant and are unable to self-swab. We will review this approach in the light of any emerging evidence.
>
> All primary school pupils are expected to return to school on 8 March."

29. In respect of the school workforce the DFE guidance made it clear that school leaders are best placed to determine the workforce that is required in school, taking into account the updated advice set out in the guidance for those staff who are Clinically Extremely Vulnerable (1810).

<u>COVID and London Borough of Barking and Dagenham</u>

30. The Respondent's local authority issued separate, specific guidance to its schools and issued an asymptomatic testing policy. The following are relevant:

"Primary schools, junior schools, maintained nursery schools and schools-based nurseries must continue to put in place a range of protective measures to minimise the risk of infection (549)

Is participation compulsory?

The Department for Education expects all primary schools, junior schools, school-based nurseries and maintained nurseries will want to participate and offer at-home test kits to staff. It is voluntary for staff to participate.

Once staff understand the testing process and read a privacy notice, if they choose to participate they are committing to self-administer the test and provide their results. Schools should ensure that staff provide their results (positive, negative or void) to NHS Test and Trace via the self-report gov.uk page. Results should also be shared with the school / nursery to support local contact tracing.

Staff who decline to participate can still attend school or nursery. People who decline to participate in this testing programme should follow the usual national guidelines on self-isolation and anyone should get tested if they show symptoms. (550)"

COVID and the Respondent school

31. The Respondent school is a primary school in Barking teaching over 1000 Schoolchildren based over two sites. The school employees 180 teaching staff of which 46% are black and Asian or minority ethnic and 42% of management staff or BAME (1735). The school had a senior leadership team of 8 at the relevant time and during COVID they were exceptionally busy dealing with the uncertain and worrying times of addressing the risks and trying to ensure the safety of staff, pupils and parents whilst running the school.

32. In doing so, the Respondent implemented the Local Authority guidance having regard to the continuous, sometimes daily, extensive risk assessments which was dynamic. The Respondent evidenced detailed risk assessments as follows:

32.1 29.05.20
32.2 Claimant's individual risk assessment on 15.06.20
32.3 16.07.20
32.4 18.09.20
32.5 16.09.20
32.6 23.02.21
32.7 26.02.21
32.8 01.03.21
32.9 19.08.21
32.10 22.09.21

33. The School's risk assessment

Primary schools

In primary schools, it is recommended that face masks should be worn by staff and face coverings should be worn by visitors in situations where social distancing between adults is not possible (for example, when moving around in corridors and communal areas). Children in primary school do not need to wear a face covering.

Face Coverings: Updated Advice

> ‘Face Coverings in Education' guidance from the DfE
>
> In primary schools where social distancing is not possible in indoor areas outside of classrooms between members of staff or visitors (for example, in staffrooms), **head teachers will have the discretion to decide whether to ask staff or visitors to wear, or agree to them** wearing face coverings in these circumstances. But children in primary school do not need to wear a face covering.
>
> https://www.gov.uk/government/publications/face-coverings-in-education/face-coverings-in-education
>
> Primary school staff will continue to take 2 rapid COVID-19 tests each week at home

34. The Respondent expected all primary school children to return to school on 8 March 2021 following national lockdown. It was concerned that it had a high proportion of BAME and Clinically Vulnerable/Shielding groups from staff and local population and as such its relevant risk assessments identified that, amongst other things:

34.1 all Primary school staff should continue to take 2 rapid COVID-19 tests each week at home.

34.2 Facemask, eye protection and face shield should be used.

35. The required expectations were notified to staff in December 2020 and consequently confirmed in an Asymptomatic testing policy which was subsequently signed off by teaching trade unions and adopted by the governing body on 11 February 2021 (1771). The policy stated:

> Testing of staff (1772)
>
> Testing is on a voluntary basis, but all staff are expected to take the test to comply with their obligations under the Health and Safety at Work Act 1974, as detailed above.
>
> The only exceptions are staff who have had a positive Covid-19 test in the last 90 days. In these cases, staff should not take the test as the outcome is likely to be positive owing to dead virus remaining in the lungs for some time.
>
> If staff have any concerns about taking the test or the testing process, they should raise this with their headteacher or manager immediately.
>
> Refusal to take a test (1773)
>
> Given the challenging context that we are facing, the success of the testing programme depends on everyone pulling together. All staff are expected to take the test and they have a duty to take care of their own health and safety and that of others who may be affected by their actions.
>
> Employees who do not wish to take the test will be required to explain their reason(s) in writing. The headteacher or manager will then meet with the individual to discuss their concerns; the individual may be accompanied by a work colleague or trade union representative.
>
> We will listen to what employees say and their reason(s). Each case will be considered on its merits and the headteacher or manager will take advice from Human Resources, Occupational or Public Health as appropriate, before deciding on the proportionate course of action. The headteacher or managers decision is final.

> Where an employee refuses to take a test and does not give a reasonable reason why, they may be required to work from home, assigned to alternative duties, or redeployed to avoid the risk of them infecting others if they have Covid-19 and are asymptomatic.
>
> Unless the employee can demonstrate reasonable grounds, if they continue to refuse to take a test then this may be considered a disciplinary matter. For instance, this could be where an employee unreasonably refuses to be tested in breach of the Policy and it is necessary for them to have a test in order to do their job. Failing to comply with their health and safety duties including "Pandemic" legislation may also be considered a disciplinary matter.

36. The Tribunal is not surprised that Government policy was followed by Barking and Dagenham Council, and that Council policy was followed by the school. The Headteacher, Ms Preston confirmed that there this is a network of Borough Primary School Headteachers (called PACE), and that she is certain all schools followed the same policies concerning face covering and LFT.

37. In view of the above policies and documentation, we have no difficulty in finding that the Respondent school was seeking to formulate and implement best practice to adapt for the best interests of its staff, pupils and parents so all primary school children could safely return to school on 8 March 2021.

<u>COVID – Claimant's perspective</u>

38. The Claimant commenced employment on 19 October 2015 as a higher-level teaching assistant. On 20 June 2017 she was promoted to teacher. She was a teacher teaching year 5 children.

39. Prior to COVID, there was no evidence of any serious relationship issues between the Claimant and her colleagues.

40. During the Claimant's specific COVID risk assessment, the Claimant identified as high risk under BAME.

41. All the Respondent's staff were invited to notify of any underlying health issues. However, save for subsequent reference to 'hidden disability' the Claimant was curiously consistent in refusing to provide any details, whether in confidence or otherwise, of her health condition to her employer and refused to consent to suggested occupational health assessments.

42. Between June 2020 and 8 March 2021 the Claimant was attending school working with others without testing, wearing a mask or face covering or providing the Respondent with a specific reason for her face mask exemption. However, the Claimant had purchased and wore a sunflower lanyard as a way of demonstrating that she had a hidden disability.

43. The Claimant referred to Government guidance that some individuals are exempt from face coverings.

> This applies to those who cannot put on, wear, or remove a face covering because of a physical impairment or disability, illness, or mental health difficulties…the same exemptions will apply in education and childcare settings, and you should be sensitive to those needs, noting that some

> people are less able to wear face coverings and that the reasons for this may not be visible to others".
>
> Exemptions: Where face coverings are recommended there are some circumstances where people may not be able to wear a face covering. This include (but is not limited to) people who cannot put on, wear, or remove a face covering because of a physical or mental illness or impairment of disability…where putting on, wearing, or removing a face covering will cause people severe distress" and it confirmed that for "COVID-19 asymptomatic testing in school...testing remains voluntary

44. The Claimant emphasised, and we accept, that there was no reference to exemptions for face masks in the Respondent's risk assessments at all.

45. In her evidence, and throughout her communications with the Respondent, the Claimant relied on Government Guidance dated 14 July 2020 (482)

> "some people may feel more comfortable showing something that says they do not have to wear a face covering. This could be in the form of an exemption card, badge or even a home-made sign… Those who have an age, health or disability reason not to wear a face covering should not be routinely asked to provide any written evidence of this".

46. On 19 September 2020, the Claimant wrote to Ms Preston stating (537).

> "I am exempt under the Government Legislation Exemptions from wearing a face covering of any type. There are many exemptions from wearing a face mask, which include hidden disabilities including - but not limited to;
>
> (i) because of any physical or mental illness or impairment, or disability (within the meaning of section 6 of the Equality Act 2010(1)), or
> (ii) without severe distress;
> https://www.legislation.gov.uk/uksi/2020/791/regulation/4/made
>
> In accordance of Section 6 of the 2010 Equality act; I am protected against unlawful discrimination by my employer because of my disability/medical exemption. Under the act, you have a duty of care to make reasonable adjustments for any individual who is at a substantial disadvantage due to their (hidden) disability.
>
> I am legally under no obligation to divulge my private medical issues or provide proof in anyway of my exemption, as per the Data Protection Act 2018."

47. Further, on 21 September 2020 the Claimant responded to Ms Preston's query about any medical condition she should be aware of and stated:

> "It is a personal choice and is not necessary in law to disclose information on about one's face covering exemption. They also state that those who have an age, health or disability reason for not wearing a face covering should not be routinely be asked to give any written evidence."

48. The Tribunal note that the guidance did not preclude an employer from asking for written evidence of reason for exemption and finds that it would not have been unreasonable for written evidence to have been required given the uncertainty and concerns at the time.

49. The Claimant stated that she was unable to wear any face covering and that she had a face covering exemption (482). The Claimant did not provide any written evidence about any medical condition at all and continued to work throughout 2020

and early 2021 in her 'bubble year group' without testing or wearing a mask.

50. The Claimant did not provide detail of the hidden disability that she referred to and subsequently steadfastly refused the Respondent's invitations to refer her to occupational health for advice. It was not until October 2021 that the Claimant actually sought specific medical assessment where she was diagnosed with Mixed Anxiety and Depression Disorder.

51. Whilst there were no exemptions applicable to testing, the Claimant emphasised that Government guidance stated that testing was voluntary.

Implementation of policy

52. On 15 December 2020 the Respondent's staff were informed that more prescriptive protective steps were going to be necessary in future and that there would be a requirement to take a LFT COVID test twice a week (966).

53. The Claimant made her objections to testing clear to Ms Preston in a letter of 6 January 2021 (546). The thrust of this letter was that she disagreed with the safety of testing, the accuracy of tests and the possibility of false positives which would impact on the mental health on her and her family if she had to self-isolate for 10 – 14 days. None of the objections in this letter identify hidden disability as a potential reason for not taking the test and we find that the Claimant's later diagnosis of Mixed Anxiety and Depression Disorder would not have been relevant to taking a test.

54. The specific guidance from the government was to get children back into schools from 8 March 2021. On 15 January 2021 the Claimant's then line manager, Mr James Fox, spoke to her asking her if she had reconsidered her decision not to participate in asymptomatic testing and the Claimant stated that her position had not changed (612).

55. On 29 January 2021, all staff at the Respondent school were provided with a copy of the asymptomatic testing policy which was subsequently ratified by the teaching trade unions and by the schools governing body on 11 February 2021 (564).

56. On 23 February 2021 Ms Preston sent an email to all staff stating (968)

> "Staff Testing
> We now know that staff and children will return on Monday 8th March; it will be more important than before to make sure you take your twice weekly test. You can collect a Lateral Flow Home Testing Kit from the office which will give you enough tests to last for about three weeks; the results are displayed within 30 minutes of taking the test. If your result is positive, please inform me immediately. The Covid-19 Asymptomatic Testing Policy was adopted by our Governing Body on 11th February, I have attached it for your information."

57. Mr Fox discussed matters again with the Claimant on 23 February 2021 to see if her position had changed. He wrote to the Claimant on 24 February 2021 recording (612):

> "During our meeting yesterday, I informed you that I was aware of correspondence that you had sent to Ms Preston within which you stated that you do not consent to wearing a face covering. You stated that this was due to the fact that you are exempt. I noted that there are

> many reasons why someone may be exempt, but you had not disclosed such a reason to the school. I suggested that wearing a face shield (rather than a face covering) presents an alternative means (albeit less effective) by which the wearer may reduce their risk of transmitting the virus. I highlighted the fact that exemptions apply to face coverings, rather than face shields.
>
> You stated that you do not wish to wear a face shield.
>
> You stated that you did not consent to wearing a face covering.
>
> As indicated in my last email to you on this subject, I would strongly urge you to reconsider this decision, in the interests of keeping everyone (including yourself) safe whilst in school."

58. Matters were escalated to Ms Preston on 24 February 2021, and she wrote to the Claimant on 25 February 2021 (617).

> "Regarding you receiving children from other classes within your bubble, this was amidst an outbreak and we need to ensure we are working together to continue the education of pupils at such challenging times. We would not send children home to isolate if they have no need to, neither do we send children home if their teacher is not on site. It is our aim to ensure children have as much face to face teaching wherever possible even if this is delivered by another teacher within their bubble. Clarity around what learning they should access – although they may be at different stages within the learning for the week, they will still be accessing the Year 5 curriculum so could be included into your lessons to support the smooth running of the day in light of the extremely challenging situation at the time. To avoid cross-contamination, they could be given new equipment which can be collected from the office. I will include this into the Risk Assessment so this is clear should there be another outbreak.
>
> During exceptional times, all colleagues should pull together and place our children and their education at the forefront."

59. The Claimant's position did not change. The Claimant sent Ms Preston a 7-page letter on 26 February 2021 setting out her objections to testing and wearing face masks (671).

> "In accordance of Section 6 of the 2010 Equality Act; I am protected against unlawful discrimination by my employer because of my disability/medical exemption. Under the act, you have a duty of care to make reasonable adjustments for any individual who is at a substantial disadvantage due to their (hidden) disability.
>
> I am legally under no obligation to divulge my private medical issues or provide proof in anyway of my exemption, as per the Data Protection Act 2018.
>
> The above was already stated in my correspondence sent to Ms Preston on 19th September 2020. This is the second time I am stating this information please can you confirm whether you or the school are not satisfied with this."

60. During her internal grievances and her oral evidence, when asked how the school could be confident that she did not have COVID if she did not test, the Claimant stated that she knew her body, if she felt sick, had a fever, cough or temperature or lost her sense of taste she would self-isolate. This answer demonstrated to the Tribunal the Claimant's total failure to understand the reason, or worse, total disregard for the necessity for asymptomatic testing at the time.

61. On 26 February 2021, Ms Preston wrote to the Claimant (664) issuing a 'Reasonable Management Instruction' requiring the Claimant to take LFT Covid Test

and wear a mask. In respect of testing Ms Preston stated (664)

> "Asymptomatic testing, (of those not experiencing any symptoms), is being introduced as part of a national programme of testing, which is being rolled out by the Government in the effort to reduce the transmission of Covid-19 in schools.
>
> I do not consider the [the Reasons provided by the Claimant] to be acceptable reasons to refuse a test which ultimately will ensure the safety for yourself, colleagues (including those who are Clinically Extremely Vulnerable when they return to the work place), vulnerable pupils and the community."

62. In respect of disability Ms Preston stated (666)

> "I can confirm that the School does adhere to this guidance and is willing to make reasonable adjustments by applying such exemptions for disabled employees. That said, it is also a well-established legal principle that an employer is exempt from the duty to make reasonable adjustments if it does not know and cannot reasonably be expected to have known that the disabled person has a disability which is likely to place them at a substantial disadvantage compared with persons who are not disabled. You have failed to provide any information to either confirm the nature of your disability or how it places you at a disadvantage compared with persons who are not disabled. Accordingly, the school is not under any legal duty to make reasonable adjustments by exempting you from the requirement to wear a face covering. Should you wish to provide further information about your potential disability and how it places you at a disadvantage then this will be properly considered. In the absence of such information, your refusal to wear a face covering in a refusal to following a reasonable management instruction and a breach of the School's Code of Conduct.
>
> I have attached the Asymptomatic Policy formally adopted by our Governing Body on 11th February 2021.
>
> Should you fail to follow the reasonable management request, unfortunately the school will need consider potential formal disciplinary action under Health and Safety Guidance."

63. On 1 March 2021 the Claimant wrote to Ms Preston reiterating her refusal to test or wear a mask (745).

64. On 3 March 2021 Ms Preston replied to the Claimant informing her not to return to the school site from 8 March 2021 (748). She wrote:

> "I am acknowledging receipt of your letter dated 01.03.21; I am in the process of composing a response and will email to you when completed.
>
> I have been advised to inform you not to return to working on-site from Monday 8th March, but to continue working from home. The school will buy in an HLTA to remain with your class whilst you provide them with remote education. The school will be unable to accommodate this long term so will review on a weekly basis.
>
> If you need to discuss arrangements further, please speak with Mr Fox (Deputy Headteacher)."

65. On 9 March 2021 the Claimant then wrote a grievance to the Co-Chairs of Governors complaining about this decision (749). The Claimant relies on this letter as her first protected act.

66. There were two members of the schools 180 staff, including the Claimant, who refused to test. NE was the other member of staff who was subsequently issued with a warning in June 2021 and then agreed to take tests.

67. On 15 March 2021 (755), Ms Miah liaised with Ms Preston and HR to investigate the Claimant and NE refusal to comply with a management instruction to test.

68. The Respondent's Disciplinary Policy (Section 4 – Investigations) (page 1700).

> "Investigations
>
> If the investigation provides evidence that may be regarded as misconduct or gross misconduct, the Investigating Officer should recommend to the Head Teacher or Chair of Governors (or whichever Governor has been appointed to make the decision) whether there is a need for a disciplinary hearing both processes could run concurrently."

69. The Tribunal notes that the enquiry extended to NE, the other employee who had refused to test. In view of the detailed correspondence and limited dispute no investigation meeting was held with the Claimant. NE did not have an investigation meeting either.

70. We find that neither Ms Preston nor Ms Miah knew about the Claimant's grievance of 9 March 2021 sent to the Co Chair of Governors at this time.

71. An informal grievance meeting was held on 17 March 2021 and there was a response to the Claimant's grievance letter on 23 March 2021 (766) rejecting the Claimant's informal grievance. Insofar as is relevant it was concluded:

> "The use of face masks plays a key part in minimising transmission when social distancing cannot be observed. As discussed, the School are not expecting masks/visors to be worn for prolonged periods of time, however only when social distancing cannot be adhered too. I am aware the School have previously responded to this query in the letter dated 26.02.2021.
>
> I do not consider your reasons for refusing to test to be acceptable. As you are aware the reason for the policy is to ensure the safety of your colleagues, pupils, and the community which is a key priority for the School to avoid outbreaks and transmission of the virus and your refusal does not enable us to achieve this.
>
> I cannot stress enough that Asymptomatic testing is an integral way to help contain the Covid-19 virus, help protect families and staff, especially those working in schools and front-line services, and to limit the spread of infection in the wider community, which the Council fully supports."

72. On 25 March 2021 Ms Preston wrote to the Claimant (770) informing her that as per the Asymptomatic Testing Policy the matter would proceed to a formal disciplinary. Ms Preston did not know about the grievance of the 9 March 2021 at this stage.

73. The Claimant responded to Ms Preston on 26 March 2021 objecting to the disciplinary given that she had an outstanding grievance (771).

74. The Claimant presented a formal grievance on 31 March 2021 which she relies on as her second protected act (780).

75. There was a grievance meeting held on 27 April 2021 and the Tribunal spent some time reviewing the notes of that meeting heard by a panel of 3 Governors Nikita Gupta, Zoubiya Ahmed and Tanaz Noor. During the meeting the following notes are relevant:

Ms Onyebalu – Autonomy of my body – its voluntary, the NHS, the government also state this – voluntary means a choice – I need to understand why the school is having a heavy-handed and disproportionate approach to me.

In the risk assessment, the school states it's following government guidance. Government guidance does say face covering exemptions exist. Individuals do not need to explain this.

Face coverings exist as a choice and I can either consent to it or I don't consent. It is an offer. (1021)

Question:

Ms Gupta – Consider the risk to school or other teachers and children. We need to think about asymptomatic testing, kids can spread it even if they don't have the disease

During unprecedented times where everyone is scared and on edge you can understand where there is discomfort, the children can transmit to their parents etc.

Answer:

Ms Onyebalu adds that's a hypothetical statement we don't know how this virus is spreading we can't link it back to the source. If someone catches cold, we don't know where they caught that cold from or whether it was from their immune system being compromised etc

Ms Onyebalu – The burden of proof is in the school – to quantify that risk working in a school where children have illnesses all the time.

Before this pandemic, children came to school with colds, flu…which are a part of life. During winter months, children develop more coughs and colds as it's the season. There is no social distancing in the class. The children are all in the same environment, breathing in the same air.

(1022)

Would you be open to wearing masks in corridors (to give that comfort to everyone else)?

Question:

Ms Onyebalu - So many layers to this question – I am not working to make others comfortable. I am working for the children, their educational attainment etc . It appears that you are saying I should wear a mask just to comply with everyone else, to make them happy. I am there to fulfil the legal obligations of my contract.

76. The Tribunal observe that this would have been the natural opportunity to mention the affect on her health and any possible panic attacks but does not do so. She remains consistent in her disagreement with the policies the school seeks to introduce. The meeting notes continue

1023

Ms Onyebalu states; Me not wearing a mask or getting tested doesn't cause harm, injury or just to anyone, especially since a RA has not been completed the risk or the benefits of wearing a mask has not been established.

I need a risk assessment, which I said in my informal grievance. I need those risks identified.

By law the school has the obligation to give me one, which I have been denied several times.

77. In this meeting with the Tribunal find that the Claimant was not prepared to compromise or engage with anything other than her own views. She disregarded anyone else but herself and gave the impression of entitlement, disregarding her work

colleagues, children and parents. As an aside the Tribunal find that the Claimant was destructively pedantic and blinkered in focusing on matters aimed at supporting her idiosyncratic views, and was singular in dismissing views and aims of others that did not accord with her own agenda.

78. On 5 May 2021 the Claimant received an invitation to attend a disciplinary hearing scheduled for 28 May 2021 (page 920 -924) and the investigation report was also attached (page 836 -913). The Claimant raised a concern that Ms Preston had sent this letter on behalf of the disciplinary panel whilst also being a witness to the allegations (970).

79. On the same date that the Claimant received the outcome of her formal grievance. the outcome was that her grievance was not upheld on 10 May 2021 (932). The Claimant appealed the outcome of the formal grievance on 10 May 2021. The Claimant relies on this as the third protected act (page 938-969).

80. On 11 May 2021, the Claimant then submitted an informal grievance to Elaine Allegretti, Director of People and Resilience, against the Co-Chair of Governors Rahat Ismail (page 978- 980). The Claimant relies on this as the fourth protected act.

81. On 14 May 2021 Ms Rebecca Stainsby, Deputy Headteacher raised concerns relating to the Claimant. She wrote:

> "Jo, I have been working on an online bullying case with pupils in Laranja. As part of this, Richard and I have looked at a pupil's school chromebook which child and parent said had evidence on but needed repairing. In the course of investigating this, we have seen these two messages (the first on Seesaw and the second a screenshot on the pupil's chromebook) which I am forwarding to you for information as it does seem inappropriate to share some of this information with pupils in the class."

82. On 17 May 2021, Ms Ahmed Co-Chair of Governors who attended Formal Grievance panel, sent an email expressing concerns about the Claimant and her approach in the grievance meeting. The letter outlined had serious concerns about the Claimant (991):

> - ability to be a positive role model for the children she teaches
> - degree of acceptable professional regard for the wellbeing and safety of children in her care and that of the wider school community
> - ability to comply, uphold and positively advocate school policies in a manner that is professional, responsible and in line with the expectations set out in her contract of employment.
>
> In my personal and professional opinion (as a school leader myself), having listened to her views and opinions, I would not be comfortable for her to be entrusted the care of my own child nor those children in the school in which I lead.
>
> With this in mind, we all felt it necessary to raise these concerns formally which we must state in no way impacted the formal grievance process, (which was conducted independently and impartially). However we all felt strongly enough that it is necessary to voice formal concerns separately based on the alarming views and opinions that Ijeoma shared with us in the meeting.

83. From what the Tribunal have read and recorded at the grievance notes of 27

April 2021 we consider that these volunteer governor views were entirely understandable. The concerns raised were because of the Claimant's dismissive and entitled approach to the policies and others demonstrated in the meeting with them.

84. On 28 May 2021 the Claimant's disciplinary hearing was held. A panel of governors external to the school were selected. Kevin Medcalf chaired the panel, started the meeting with the Respondent presenting its case. When the Claimant presented her case, she raised the issue that the grievance process should have concluded before the disciplinary proceedings were conducted, as at this stage the Claimant had an outstanding grievance and the appeal that had not been heard. Mr Medcalf adjourned the meeting for a short period and decided to postpone the disciplinary proceedings until the grievance process had been completed. (pa1031-1035).

85. On 7 June 2021 the Claimant was sent the outcome of the postponed disciplinary hearing, confirming that the disciplinary hearing would reconvene once the grievance process had been completed (page 1039-1040).

86. On 28 June 2021, the Claimant's grievance appeal was heard and the appeal was dismissed by letter dated 5 July 2021, the Claimant's grievance was not upheld (page 1082-1084).

87. On 29 June 2021, the Claimant then received notification from the school of new disciplinary allegations in respect of the matters raised on 14 and 17 May 2021 respectively page 1074-1075), and she was informed that the allegations were to be investigated (page 1079-1080). The Claimant contended that Ms Miah should not have been nominated as the investigator for this because of conflict of interest. In any event these allegations were not progressed as the first set of allegations needed to be considered.

88. On 13 July 2021 the Claimant received an invitation to attend the reconvened disciplinary hearing which was scheduled for 22 July 2021 (page 1091-1094). However, this did not take place, because the Claimant's representative was unable to attend and the disciplinary meeting was rescheduled to take place on 6 September 2021 the same panel were present, (page 1220-1231).

89. It was identified at the disciplinary hearing that due to an administrative error there had been an inconsistency with the allegations listed in the disciplinary invite letters that had been sent out and despite the clear wording of the investigation report that was provided to the Claimant. At the disciplinary meeting all parties agreed that the allegations to be considered were:

Allegation 1: Refusing to take part in regular Asymptomatic Testing

Allegation 2: Refusing to wear a face covering.

90. The Tribunal do not find that this inconsistency affected the fairness or process of the meeting. Both matters were fully and properly considered during the disciplinary hearing. A flavour of Claimant's position on the issues can be distilled from the notes of the meeting (1393):

> IO said, according to the Government, the status of Covid 19 (as of 19th March 2020) is no longer considered as a high consequence infectious disease in the UK. The school has provided no credible evidence to back their measures.

91. The Claimant mentioned hidden disability but does not mention how it affected LFT testing (1390). Only reference to hidden disability

92. On 13 September 2021, the Claimant was sent the outcome of the disciplinary hearing (page 1235-1238). The outcome was that the panel had decided to issue the Claimant with a final written warning for 18 months. The outcome letter did not inform the Claimant of a right to appeal.

93. The Claimant then Chief Executive Chris Naylor dated 15 September 2021 (page 1243-1247) and identified that she had not been provided a right of appeal.

94. On 15 September the Claimant was informed by Ms Anre Buchner, Deputy Headteacher that she would be investigating the second disciplinary issues which were first raised on 29 June 2021 above (page 1241-1242). Ms Miah was no longer investigation officer due to pressure of work and fair allocation of duties.

95. On 23 September 2021, Donald Lan George addressed the issue regarding the Claimant's appeal, he apologised and responded to the Claimant's letter of 15 September 2021 (page 1307-1308) on behalf of the Chief Executive and stated that an appeal would be arranged. There was a further mistake as attempts to arrange the appeal as a 'dismissal appeal' where made when, given the Claimant had not been dismissed, should have been a 'disciplinary appeal'.

96. Ms Buchner continued to try and progress with the second disciplinary investigation for the separate disciplinary issues without success (page 1333-1334,1365-1366,1402-1407, 1424-1428, 1433-1434, 1498-1500).

97. On 4 October 2021 the Claimant wrote a letter to Ms Naylor. The Claimant relies on this as her fifth protected act (1354). The Respondent accepts this as a protected act.

98. On 19 October 2021 the Claimant wrote to Ms Buchner (1433). The Claimant relies on this as her sixth protected act.

99. On 19 October 2021 the Claimant also wrote letter to Mr Lan George which she relies on as her seventh protected act. The Respondent accepts this as a protected act.

100. The Claimant submitted a further grievance, consisting of 6 pages, to Shah Rukh Memon, the Co-Chair of Governors on 5 November 2021 (page 1530-1545). This was headed "Contraventions of the Equality Act (2010), other UK legislations, natural justice and due process". Paragraph 4 of the letter stated:

> "For your reference, I am disabled. On 3 November 2021 James Fox, my line manager has acknowledged receipt of my disability diagnosis on 18th October 2021 which is depression and panic disorder. James is also in receipt of medical proof for reasonable adjustments

> dated 2 November 2021. You need my written consent if you need to share this medical information with others"

101. The Claimant relies on this as her eighth protected act. The Respondent accepts this amounted to a protected act.

102. The Claimant resigned by 7 page letter dated 18 November 2021 (page 1574-1580) by leaving her appeal against her first disciplinary outcome and the investigation in respect of the second set of disciplinary allegations incomplete.

103. The Claimant submitted a SARS request which indicated to the Respondent that she may have committed data protection breaches by retaining personal data. The Respondent informed the Information Commissioner, as it was required to do. On 3 December 2021 it informed that Claimant she must delete or destroy the relevant personal data she held. The Claimant responded to this letter on 6 December 2021 alleging that the request was malicious, vexatious and manifestly unreasonable.

104. The Claimant expressed concern that she was communicated with after her resignation by use of her private email address. The Respondent was communicating with the Claimant to clarify whether she was seeking to pursue her appeal against her final written warning. If her appeal was successful this could have improved any future reference the Respondent could have given. However, the Claimant did not proceed with her appeal. The Claimant indicated that she did not want her grievance to be investigated and she no longer wanted her disciplinary appeal to go ahead (1588, 1589-1590, 1599-1602, 1622).

Relevant Law

105. Section 27 of the Equality Act 2010 (EqA) states that:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
> (4) This section applies only where the person subjected to a detriment is an individual.
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

106. Therefore, when considering unlawful victimisation the Tribunal must assess:

106.1 the protected act being relied on;
106.2 any detriment suffered;
106.3 the reason for any detriment suffered.

107. When considering whether there is a protected act an express reference to the Equality Act is not required. Two categories of allegation falling short of an express allegation of breach of the EqA have been identified by the cases.

108. First, there is the case where the complainant alleges that things have been done which would be a breach of the Act but does not say that those things are contrary to the EqA Act. In Waters v Metropolitan Police Comr [1997] IRLR 589, [1997] ICR 1073, CA, Waite LJ said:

> 'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b).'

109. Second, is the case where the complainant does assert that there has been discrimination but does not say that the allegation is of discrimination in relation to one of the protected characteristics.

110. In the EAT case of Durrani v London Borough of Ealing UKEAT/0454/2012): Langstaff P said the following

> "22. I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies.
>
> 23. The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.…
>
> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally."

111. Once the existence of the protected act has been determined, the question to be asked is whether the Claimant has been subject to a detriment because of the protected act. The underlying issue is the "reason why" issue and not a "but for" test. See Greater Manchester Police v Bailey [2017] EWCA Civ 425.

112. When in examining the reason for any detrimental treatment the issue of the Respondent's state of mind is likely to be critical. See Nagarajan v London Regional Transport [1999] IRLR 572 regarding conscious/unconscious victimisation.

113. In Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 a reference was refused not because proceedings had been brought but because the proceedings were pending, this was found not to be victimisation.

114. When considering bad faith, the Tribunal considered the case of Saad v Southampton University Hospitals NHS Trust [2018] IRLR 1007, EAT. This case involved a claim for whistleblowing which failed because of a finding that the claimant had not made the disclosure in good faith; the Tribunal held that this necessarily meant that his victimisation claim had been made in bad faith. This was an error. HHJ Eady QC, as she then was, noted the warning given in the whistleblowing case by Auld LJ, Street v Derbyshire Unemployed Workers' Centre [2004] EWCA, that the term 'good faith' is 'found in many statutory and common-law contexts, and, because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another'. She held that when determining whether an employee has acted in bad faith for the purposes of EqA 2010 s 27(3), the primary question is whether **they have acted honestly in giving the evidence or information or in making the allegation**. This interpretation of good faith was re-iterated by HHJ Auerbach in Kalu v University Hospitals Sussex NHS Foundation Trust [2023] IRLR 129 where he went on to say that what was at issue was dishonesty in the sense that the claimant did not believe in the truth of the allegation they were making.

Conclusions

115. Having considered our findings of fact and the law set out above our conclusions on the issues are as follows.

Protected acts

116. The Tribunal considered the Claimant's alleged protected acts. The first alleged protected act was the Claimant's letter dated 9 March 2021 (749). The Tribunal carefully considered this letter. It starts by stating:

> My grievance has various grounds and has a wide range of issues such as the allocation of work, physical working environment, health and safety, working relationships and general treatment at work (i). It also concerns unlawful acts and dangers to health and safety(ii).

117. The only potential matter in this letter that could engage the EqA was paragraph 4 which said:

> "I notified [Ms Preston] that I was exempt from wearing a facemask on 26 February 2021. I confirmed that my mental health and physical health will be substantially impaired and adversely affected by putting on, wearing or removing a face covering. My mental and physical health would be at risk of harm as putting on, wearing or removing face covering causes severe stress to me.

118. The fifth paragraph of the letter states:

> The Act and The Management of Health and Safety at Work Regulations 1999 (the "Regulations") set out statutory obligations that employers owe to employees. The Act sets out general duties and the Regulations are more explicit in respect of what employers are required to do to manage health and safety under the Act. Under the

> Regulations employers are required to carry out an assessment of risk to employees' health."

119. We concluded that the focus of this letter is the Claimant raising concerns about the allocation of work, physical work environment, health and safety. We considered whether this letter to the Governors, read together with the Claimant's letter of 3 March 2021 letter to Ms Preston, where she outlined her reasons for not wishing to wear a face mask, engaged a contravention of the EqA. The Claimant's letter was raised as her justification to object to the schools policy of asymptomatic testing and possible damage to her health in breach of health and safety legislation and we do not consider that it amounts to a protected act for the purposes of section 27 EqA.

120. The second protected act that the Claimant relies on is the 31 March 2021 (780). In this letter the Claimant mentions three relevant central matters namely:

120.1 Her informal grievance of the 9 March
120.2 The EqAct; and
120.3 She states:

> "staff members who are exempt and who do not consent to testing to be protected against discrimination, harassment and differential treatment such as being challenged or pressured to wear a mask or take the test. If any have received differential treatment this should be acknowledged and remedied justly and fairly."

121. The Tribunal observes that the Claimant mentions the EqA in this letter and was considered whether all the circumstances in this letter of 31 March 2021 amounted to a protected act and again concluded that it does not. The Claimant's concern was about discrimination against those who do not consent to be tested or wear a mask which is not a protected characteristic to engage the EqA. The Claimant's concern in this letter cannot reasonably be extrapolated to relate to a protected characteristic such as disability. A fair reading of the grievance letter appeal does not engage protected characteristic, however. it does engage the Claimant's fundamental disagreement with the asymptomatic testing and face mask policy and schools intention to progress implementation of them. The Tribunal do not conclude that the Claimant's side references to her hidden disability and the EqA in this letter can be construed as an allegation that the Respondent is contravening the EqA due to a protected characteristic. At that stage the Claimant's hidden disability was unspecified and in any event was wholly irrelevant to the testing. The Tribunal's conclusion in this regard is supported by the content of the grievance meeting itself on 27 April 2021, at no stage did the Claimant mention disability or EqA concerns at all. She is keen to advance her view that the Schools policy is unwarranted.

122. Had it been necessary to consider, we would have concluded that the Claimant's assertions in respect of 31 March 2021 would have been made in bad faith. We required engagement issues of bad faith due to her clear comments on 27 April 2021 emphasising her fundamental disagreement with the School's asymptomatic testing policy and her complete a failure to provide or any reference to Equality Act or disability concerns. The Claimant had an agenda to seek to undermine the school's asymptomatic testing and face mask policy.

123. The third alleged protected act is the Claimant's grievance appeal letter on the

10 May 2021 (938-969). In this letter the Claimant says:

> This inquiry similar to the informal grievance outcome and formal grievance outcome have misinterpreted, omitted and dismissed evidence of discrimination, victimisation, coercion, bullying, harassment and differential treatment.
>
> Despite notifying the informal grievance panel and the formal grievance panel verbally and in writing, the following information (points 1-11) has been overlooked and/or dismissed again-
>
> 1. A risk assessment to be carried out for myself and any staff member who does not consent to testing and/or who has a facial covering exemption, in accordance with Regulation 3 of the Management of Health and Safety at Work Regulations (Principles of Prevention as per regulation should be applied, as well as Health and Safety arrangements as per regulation). As per regulation 10, the employer will make all information available to all employees and regulation ensures that the staff are aware of the risks, trained to carry out the tasks required of them and to report back to the Manager if any new risks are identified.
>
> 2. Staff members who are exempt and who do not consent to testing to be protected against discrimination, harassment and differential treatments such as being challenged or pressurised to wear a mask or take the test. If any have received differential treatment, this should be acknowledged and remedied justly and fairly.
>
> …
>
> 5. The Risk Assessment and the Asymptomatic policy to be updated to include information on individuals who do not consent to testing, after that it should be forwarded to staff members, parents and other members of the school's community with these corrections and clarifications.

124. The Claimant is clearly identifying there that her concern relates to people who do not consent of the people should receive protection and that the policies should be updated to reflect their interests. The Tribunal reasonable reading this letter leads to our conclusion that it does not engage the EqA, a refusal to consent to testing, which is the Claimant's concern, is not a protected characteristic.

125. The fourth alleged protected act is 11 May 2021. This is a short letter to Ms Allegretti, Director of People and Resilience (978 – 980). This letter made no reference at all to EqA or any protected characteristic and we do not conclude that it amounted to a protected act.

126. It therefore follows that the Claimant has not established that she made the first four protected acts that she relies on covering the period 9 March 2021 to 4 October 2021 and therefore no alleged acts of detriment for that period could have been because of a protected act.

127. The fifth alleged protected act is the Claimant's letter to Mr Chris Naylor on 4 October 2021 (1354), In this letter the Claimant states:

> The risk of harm and danger may amount to a contravention of LBBD's statutory duties under the following regulations and acts outlined below:-.
>
> A) Breach of Duty of Care- Equality Act 2010 Disability Discrimination
>
> (Applicable to all named employees and governors above)
>
> i) Failures to observe LBBD's School Asymptomatic Policy 2021

> ii) Failures to observe the right to full, informed consent.
>
> iii) Failures to observe Health and Safety Act 1974
>
> B) Breach of Duty of Care-Equality Act 2010-Harassment
>
> (Applicable to all named employees and governors above)
>
> I have been subjected to a systematic campaign of harassment as well as bullying due to LBBD omissions to undertake any preventative and protective measures to ensure a working environment free from harassment and bullying. There is also no written policy or training on Remote Working for LBBD Teachers/School staff working offsite as well as one for demotion and deployment and long-term working offsite. In particular, the persons named in list 1,2 and 3 have already been notified that I need training and support but they have intentionally and persistently ignore my needs.
>
> …
>
> Conclusion
>
> I require LBBD to observe the Equality Human Rights Commission guidelines and suspend Joanne Preston and James Fox because their unpredictable behaviour and unwanted conduct places a foreseeable risk of harm to both my mental and physical health.
>
> Notwithstanding, I contend that a failure to do so may make LBBD 'vicariously liable' for any subsequent omissions to act to prevent further detriments from being inflicted upon my person. I ask you to consider the magnitude of the risk of harm occurring and the gravity of harm which may occur should you refuse this request.
>
> It is my hope that I will not be made a workplace pariah and/or subjected to any detriment or detrimental treatment which would amount to a contravention of the aforementioned Acts or Regulations.

128. The Respondent concedes that this letter amounts to a protected act.

129. The sixth alleged protected is the Claimant's letter to Ms Buchner on 19 October 2021 (1433). This letter was written in response t Ms Buchner attempting to arrange an investigation meeting for the second set of allegations She writes:

> …
>
> 5. You are intentionally participating and engaged in workplace mobbing thus creating an oppressive and intimating environment for me. I can no longer ignore the palpable risk of harm to my physical and mental health and wellbeing.
>
> 6. LBBD is 'vicariously liable' for the conduct of its employees, in this case your unwanted and discriminatory conduct towards me.
>
> 7. As a result of the above, I have been diagnosed with a Mixed Anxiety and Depression Disorder, your unwanted conduct towards me, omissions and failures to act have exacerbated the frequency and intensity of this disorder

130. Whilst the Claimant mentions discriminatory treatment and the impact that this is having on her health we do not conclude that this letter engages any EqA contraventions to amount to a protected act. In short there is no indication of what, if any protected characteristic is being alleged as the basis for unwanted or discriminatory conduct.

131. The seventh alleged protected act is the Claimant's letter to Mr Lan George on 19 October 2021 (1452 – 1454). She writes:

> 17. My mental and physical health has been substantially and adversely affected. This has exacerbated the frequency and intensity of my anxiety and anxiety attacks.
>
> 18. I have had consultations with GPs, Counsellors and a Psychiatrist, who has diagnosed me with a Mixed Anxiety and Depression disorder on 18th October 2021. I will forward you the full medical report once he has completed it.
>
> 19. The above proves that I have been made a workplace pariah, victimised and discriminated against and continuously subjected to detriments and detrimental treatment which amount to violations of due process, equity, and natural justice, as well as breaches of LBBD policies Best practice, government guidance and contraventions of the aforementioned Acts and Regulations in my letter to Mr Naylor on 4 October 2021.

132. The Respondent concedes that this letter amounted to a protected act.

133. The eighth alleged protected act is the Claimant's letter to the Co-Chair of Governors Shah Rukh Memom on 5 November 2021 (1530). This was a 16-page letter entitled "Contraventions of Equality Act 2010… " This letter makes extensive reference to legal authorities relevant to the EqA and the Claimant writes:

> 4. For your reference, I am disabled. On 3 November 2021 James Fox, my line manager has acknowledged receipt of my disability diagnosis on 18 October 2021 which is depression and panic disorder. James is also in receipt of medical proof for reasonable adjustments dated 2 November 2021. You need my written consent if you need to share this medical information with others

134. The Respondent concedes that his letter amounts to a protected act.

Detriments

135. In view of our conclusions only matters after 4 October 2021 could potentially be in scope of as acts of detriment. Notwithstanding this the Tribunal considered the Claimant's particulars of unfairness in respect of the entire disciplinary processes and decisions made. These can be categorised in the following headings:

135.1 Not holding an investigation meeting with the Claimant in March 2021, contrary to its policies;

In relation to not convening a disciplinary investigation, had we found that there was a protected act, we would not have found that the progression of any investigation and the way it was done was because of any alleged protected act. In particular employee NE was also investigated for failing to take a test, NE was not invited to a meeting and NE was not alleging any protected act. In any event, given the clarity of the Claimant's position specified in her correspondence we do not conclude that it was unreasonable or detrimental to not hold a separate investigation meeting for the Claimant to repeat her position. Therefore the Claimant would not have been able to succeed as a matter of causation on this point.

135.2 Not delaying the disciplinary process, until the outcome of the grievance and grievance appeal process in July 2021.

In relation to not delaying the disciplinary meeting in view of the grievance, it is clear that ACAS guidance does allow matters to be dealt with concurrently. The Claimant misinterpreted this point. Further, we conclude that the school needed to progress the disciplinary investigation, they were paying for an extra member of staff in the absence of the Claimant attending the school and needed to progress this matter to early resolution. The reason for doing that was not because of any alleged protected acts. In addition, we have found that at this stage neither Ms Preston nor Ms Miah knew about the Claimant's alleged protected act. When the matter did get to Mr Medcalf, the disciplinary was actually paused pending full determination of the grievance matters.

135.3 Ms Miah delaying sending the reports investigation reports to 5 May 2021.

The delay of Ms Miah sending investigation report Claimant amounted to eight working days after reaching the conclusions. In the context of the process, which was an exceptionally busy time for all concerned during COVID return to work, we would not have concluded that the delay was in any way motivated or caused by any alleged protected acts.

135.4 The disciplinary allegations in letters sent between May and September 2021, only had one allegation when the investigation stated that there were two.

Ms Miah's investigation report was clear in relation to setting out two allegations relating to face mask and testing. There was clearly a mistake in not transposing that into the disciplinary invite letters the face mask allegation. This mistake was repeated in subsequent invite letters. This obvious mistake which was remedied when raised at the meeting on 6 September 2021 and both allegations were then fully, fairly and properly considered. This was not because of any alleged protected acts.

135.5 Ms Preston sent the first disciplinary letter on behalf of the Governors on 5 May 2021 when she was a witness in the process as well.

Ms Preston forwarded the disciplinary invite letter by email on behalf of the disciplinary panel. This was an administrative issue, which whilst not best practice, ensured that the Claimant got the information sooner rather than later and therefore reduce any potential criticism about the delay in sending documents. Ms Preston was clear that she was forwarding the letter on behalf of the chair of Governors and the was not taking ownership or authority of that in any way. The forwarding of this email was not because of any alleged protected acts.

135.6 The fact of and delay in outlining the second set of disciplinary allegations against the Claimant on 29 June 2021.

We conclude that the concerns raised by others on the 14 and 17 May 2021 respectively needed to be properly dealt with. These concerns were not raised because of any protected disclosures. The second set of allegations were initially going to be investigated following 29 June 2021 but the investigation into the further disciplinary matters was then paused pending the outcome of the grievance and then pending the outcome of the first disciplinary matters. We do not conclude that that the delay and the investigation into the second set of disciplinary allegations was due to any alleged protected acts.

135.7 The alleged confusion over who the investigation officer was in respect of the second set of disciplinary allegations; and whether Ms Miah or Mr Medcalf was the disciplinary hearing officer.

Ms Miah was initially appointed to be the investigation officer in relation to the second set of disciplinary matters, and this was the initial intention because of the workload of respective members of staff at the time, not because of any alleged protected act. In September 2021 the responsibility for investigating the second set of disciplinary allegations was given to Ms Buchner.

Mr Medcalf was always the chair of the disciplinary panel alongside which was consider with other Governors from outside the school. The fact that Ms Miah was involved in the investigation did not change this.

135.8 Delaying convening disciplinary meetings between June and September 2021.

The disciplinary meetings were initially delayed to consider the grievance appeal and then to accommodate the availability of the Claimant's representative. The delays were not because of any alleged protected act.

135.9 The failure to inform the Claimant of a right of appeal in the disciplinary outcome letter dated 13 September 2021.

This was a mistake that Mr Lan George readily apologised for. He immediately sought to correct this and arrange an appeal which was not able to progress due to the Claimant's sickness and then subsequent resignation. We do not conclude that this mistake was because of any alleged protected act.

135.10 Wrongly stating that the Claimant could have a dismissal appeal hearing instead of just the disciplinary appeal hearing in October 2021;

This was clearly another mistake. The Claimant had not been dismissed. The wording was wrong and we do not conclude that this mistake was because of any alleged or actual protected act.

135.11 Specifying data protection concerns to the Claimant on 3 December 2021;

The Respondent's data protection concerns had to be addressed as a serious data breach, and the Claimant and the School had to communicate to ensure compliance with its data protection obligations. We do not conclude that this was because of any alleged or actual protected act

135.12 Communications with the Claimant in relation to the disciplinary appeal after her resignation

In relation to the progression of her disciplinary appeal by communicating with her to a personal email address after she resigned this was a fair way to proceed if Claimant needed a reference and would have potentially improve any reference that she could have. We do not conclude that this was because of any alleged or actual protected acts.

136. The Tribunal concludes that the Claimant disregarded anyone but herself during the difficult time that the School and society as a whole was facing. This is underlined by her comments that she was not at the School to make other people comfortable.

137. The Claimant was entitled to fundamentally disagree with the School's approach and in doing so it was inevitable that she would have to face the consequences of the School implementing its policies to manage the disagreement. This was not unlawful victimisation and the Claimant's assertions in this regard are wholly misplaced.

138. The Claimant adopted an obtuse and uncooperative standpoint and the Tribunal conclude that the School sought to manage her with incredible patience and diligence. The Respondent could not be criticised by deciding to take steps to seek to protect the health and well-being of its pupils, staff and parents.

139. The Claimant's claims fail and are therefore dismissed.

Annex A

Issues

The issues the Employment Tribunal will be asked to decide at the final hearing are as follows.

Issues

39. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Were the victimisation complaints made within the time limit in section 123

of the EqA? The Tribunal will decide:

1.1.1 Were the claims made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Victimisation (Equality Act 2010 section 27 & 39(4)(d))

2.1 Did the claimant do protected acts these are pleaded as follows:

(a) 9 March 2021
(b) 31 March 2021
(c) 10 May 2021
(d) 11 May 2021
(e) 4 October 2021
(f) 19 October 2021(1)
(g) 19 October 2021 (2)
(h) 5 November 2021

2.2 Did the respondent believe that the claimant had done or might do a/any protected act(s)?

2.3 Were any protected acts done in good or bad faith?

2.4 Did the respondent subject the claimant to disciplinary procedures and conduct it unfairly.

2.5 By doing so, did it subject the claimant to detriment?

2.6 If so, was it because the claimant did a/any protected act?

2.7 Was it because the respondent believed the claimant had done, or might do, a protected act?

3. Remedy for discrimination or victimisation

3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.2 What financial losses has the alleged victimisation caused the claimant?

3.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4 If not, for what period of loss should the claimant be compensated?

3.5 What injury to feelings has the victimisation caused the claimant and how much compensation should be awarded for that?

3.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

3.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.9 Did the respondent or the claimant unreasonably fail to comply with it by not engaging with the appeal process?

3.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

3.11 By what proportion, up to 25%?

3.12 Should interest be awarded? How much?

Regional Employment Judge Burgher
Dated: 4 October 2023