# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs Philippa Gordon - Gould**

**Respondent:** **Unity Schools Partnership**

**Heard at:** Bury St Edmunds
(in person)

**On:** 27 March – 31 March & 3 – 5 April 2023
**In Chambers:** 13 – 15 November & 20 November 2023

**Before:** Employment Judge Laidler
**Members** Mr R Allen
Ms S Williams

**Appearances**

For the claimant: In person

For the respondent: Ms A Beech, Counsel

# RESERVED JUDGMENT

1. **The claimant did not make protected disclosures within the meaning of section 43B Employment Rights Act 1996 ('ERA') and the claims of detriment & dismissal fail and are dismissed.**

2. **Had the claimant established that she had made protected disclosures she was not treated detrimentally and unfairly dismissed for having done so.**

# REASONS

## Procedural history

1. The claimant issued proceedings on 15 May 2020. She had been employed by the respondent as a special educational needs coordinator from 1 September 2019 to 20 March 2020. She indicated she was bringing a claim of age discrimination and "whistleblowing".

2. The claims were resisted by the respondent. There was a preliminary hearing before Employment Judge Moore on 20 October 2020. At that hearing the claims were clarified and it agreed that the full merits hearing would be listed to take place over six days at the Watford Employment Tribunal with the parties to provide dates to avoid.

3. The claims against Emma Wilson-Downes were dismissed on withdrawal by the claimant as was the claim of age discrimination. The claimant wished to have leave to amend and was ordered to submit an amended particulars of claim and her reasons supporting her application by 24 November 2020.

4. The full merits hearing was listed to take place in the Watford Employment Tribunal 16 to 23 August 2021.

5. The application to amend was heard by Employment Judge Warren on 28 June 2021. He granted the application to amend as set out in the claimant's document of 24 November 2020. The final hearing was vacated and a further preliminary hearing listed for 17 August 2021 to conduct further case management.

6. That hearing took place before Employment Judge Alliot and the full merits hearing was relisted to the 21 to 28 March 2022. Orders were made for the respondent to send the tribunal by 12 October 2021 the finalised agreed list of issues and an order was made for specific disclosure by the respondent by 12 October 2021. Further directions were made.

7. The full merits hearing came before Employment Judge Spencer on 21 March 2022. As he recorded in a summary sent to the parties on 29 March 2022 although listed for six days the judge was only available for five days. It was apparent to him at the outset of the Hearing this was insufficient time to complete the case in its entirety and that it was not in accordance with the overriding objective for it to be started. He relisted it to commence on 27 March 2023 with a time estimate of eight days.

8. This tribunal was not able to sit on 29 March 2023. It therefore was left with only seven days available to it. The bundle of documents was over 700 pages. The tribunal heard from the claimant and from Emma Wilson – Downes, Megan Burt and Rosemary Prince on behalf of the respondent. It was able to hear all of the evidence and closing submissions. It adjourned to an in chambers discussion listed for 31 May to 1 June 2023. As the parties were advised by the Regional Employment Judge the judge sustained an injury in May 2023 as a result of which she was not able to work. On returning to work the in chambers discussion was listed on the first available dates that the tribunal could do. These reasons have been forwarded to the parties as soon as possible thereafter.

## The Issues

9. The finalised list of issues appeared in the bundle at page 64 to 73 and is attached to these reasons by way of an appendix. The disclosures were referenced to paragraph 5 of the claimant amended particulars of claim 24 November 2020. They were listed in schedule 1 to the agreed list of issues. The claimant relied upon 20 disclosures.

10. In addition was the letter of 5 February 2020 to the Chair of the Governors, Sue Leon referenced at paragraph 6 of the amended particulars The respondent accepts that it disclosed information but nothing further.

11. At paragraph 11 of the Amended Particulars of Claim were listed the following detriments:

    11.1 Being made subject to formal disciplinary proceedings during my probationary period of employment.

    11.2 Having my probationary period of employment extended by three months

    11.3 Being required to complete a series of tasks before the end of the extended probationary period which was unreasonable given the scope and number of them.

12. By the time the list of issues was finalised Schedule 2 listed 36 alleged detriments covering 5 specific probation or line management meetings.

13. The claimant then referred at the outset of this hearing to a document she had prepared entitled “summary list of detriments for clarification”. Although this initially appeared to replicate matters in the list of issues, there were new matters included: –

    13.1 24 January 2020 – a meeting took place between claimant and respondent proposing constructive dismissal- “without prejudice”.

    13.1 3 April 2020 dismissal appeal hearing

    13.2 The claimant also added in relation to detriments that she had ‘some suspicion, although as yet no proof, but I am suffering ongoing detriment

as a result of having been blacklisted on the teachers service which holds records of failed probationary periods…' In relation to that counsel also drew the tribunal's attention to paragraph 125 of the claimant's updated witness statement which seemed to suggest a further detriment with regard to references written about her employment.

14. It was argued on behalf of the respondent that all of these were new matters and that there had been no application to amend. They went beyond the list of issues which had been agreed and there had been no previous indication that list was wrong.

15. As there was extensive documentation and the tribunal was going to adjourn to read for the first day these points were reserved until they had carried out that reading. On resuming on the second day the tribunal gave the following decision.

16. The claimant could not rely upon a without prejudice meeting said to have taken place on 24 January 2020. She could not rely on the dismissal of the appeal as that was never pleaded as a protected disclosure detriment. With regard to paragraph 3 of the document now produced if the claimant had wanted to assert that there had been post-dismissal detriment she should have applied for leave to amend or should have issued fresh proceedings. None of those matters could therefore be relied upon. If however the list that the claimant now produced is a more accurate list of the detriments subject to the matters that cannot be relied upon it can be relied on in preference to schedule 2 to the list of issues.

17. The tribunal had to remind the parties on numerous occasions throughout the hearing of the evidence that it was not determining whether the respondent complied with all of its SEND obligations but whether the claimant made protected disclosures and was disciplined for doing so. The question of whether the respondent had complied with its SEND obligations was outside the tribunal's remit and not within its expertise. Whilst that still remains the case by the time that the tribunal was to hear submissions the SEND Code of Practice had been referred to by both parties on a number of occasions and was referenced in closing submissions. The tribunal therefore considered that it should at least see a copy of the Code to assist it in its understanding but not to make any decision on whether there had been compliance with it. Both parties were in agreement and a link was sent to the tribunal so it could be accessed. The full title of the Code is Special Educational Needs and Disability Code of Practice : 0 to 25 years published by the Departments of Health and Education, dated January 2015 (which the tribunal was assured was still the relevant document).

18. The tribunal heard from the claimant and the following on behalf of the respondent:

Emma Wilson – Downes, Headteacher
Megan Burt – Assistant Headteacher and claimant's line manager
Rosemary Prince – Director of Secondary Education for the respondent.

19. From the evidence heard tribunal finds the following facts. The following abbreviations have been used as they were in the hearing :

SEND – Special Educational Needs
SENDCO – Special Educational Needs Co-ordinator
EHCPs – Education, Health and Care Plan.
EHCANs – Education Health and Care Assessment of Needs
HTN – Higher Tariff Needs
FXA – Felixstowe Academy
TA – Teaching Assistant
LSA – Learning Support Assistant
HLTA – Higher Level Teaching Assistant.

**The facts**

20. The SEND Code of Practice is statutory guidance that applies to various listed organisations including schools. It sets out the expectations and obligations on schools in respect of SEND with particular reference to the applicability of the Equality Act 2010 to many of the SEND pupils. It contains an entire section dealing with schools at section 6. In particular it provides:

> 6.2 Every school is required to identify and address the SEN of the pupils that they support. Mainstream schools, which in this chapter includes maintained schools and academies that are not special schools, maintained nursery schools, 16 to 19 academies, alternative provision academies and Pupil Referral Units (PRUs), must:
>
> • use their best endeavours to make sure that a child with SEN gets the support they need – this means doing everything they can to meet children and young people's SEN
>
> • ensure that children and young people with SEN engage in the activities of the school alongside pupils who do not have SEN
>
> • designate a teacher to be responsible for co-ordinating SEN provision – the SEN co-ordinator, or SENCO (this does not apply to 16 to 19 academies)
>
> • inform parents when they are making special educational provision for a child …

21. From the evidence heard the tribunal understands that those pupils with SEN or a disability may have an Education, Health and Care Plan (EHCP) setting out the education, health and social care support that is to be provided. This plan is drawn up by the local authority following assessment of the pupil and after consulting with relevant agencies, the school and parents. It is a legal document and must be followed. The contents and requirements set out in it will vary depending on the needs of the individual but may for example cover help with writing or a particular type of intervention (for example maths, literacy or emotional health).

22. Emma Wilson - Downes gave evidence, which the tribunal accepts, that it is unusual in such a plan that one-to-one support is mandated for a student attending a mainstream secondary school although some pupils do have that in place. Where such one-to-one support is not mandated other support can be provided. The tribunal accepts that the wording of the EHCP usually allows for flexibility and creativity in the way that support is provided. For example support from the general classroom teachers is often possible as it does not always require a SEN specialist.

23. Emma Wilson - Downes also explained to the tribunal, which it accepts, that there are three funding streams in education :

    23.1 Base – applicable to every child.

    23.2 Notional SEND funding – a paper exercise (without the school applying) based on the number of SEND children at the school based on information in the census. This is up to £6000 and applies to those on EHCP that do not necessarily reach the HTNF threshold.

    23.3 Higher Tariff Needs Funding (HTNF) – an application to the Local Authority based on evidence the school submits but this does not have to be just for SEND pupils. It could be to assist with other behavioural or support needs. The bands depend on the needs of the child.

24. The claimant produced a document at page 110 headed 'Special Educational Need (SEND) data covering 2018 – 2020. This showed that when the claimant started there were 20 pupils with EHCPs and 137 requiring SEND support.

25. For October 2020 the figure for those requiring SEND support had increased to 201. The headteacher explained that when this was investigated it transpired that those pupils who had difficulty moving into senior school had been added to the SEN register and when the figures were adjusted to give a more appropriate indication it was much more in line with the 2019 figures. She explained how it is a huge change to move to secondary school but it would be expected that pupils would have settled by the October half term. If they were still finding things difficult after that then it would be appropriate to conduct an assessment to see if there were SEN or other areas of need. The head was concerned about the over identification of SEN needs when it may just be a transition issue.

26. The claimant put to the headteacher in cross examination that because of limitations on funding there was a vested interest on the part of the school and the respondent to keep the SEND numbers to a minimum. The headteacher completely disagreed with this proposition. She explained and the tribunal accepts that the number of children on the SEND register dictates the notional funding for the following year. Where the pupils needs are greater then an assessment assists in obtaining HTNF. Irrespective of funding teachers in the classroom need to know about children with SEND or other needs to be able to

teach and assist the children make progress. Not knowing those needs can be a huge issue.

27. It was also put to the headteacher by the claimant that the school has to show how the notional funding has been used prior to making an application for HTNF and again the headteacher disagreed stating that the school does not have to show how the funding is used and costings are not asked for. It is based on the needs of the pupil. The EHCP and HTNF are not reliant on each other.

28. The tribunal accepts the headteacher's evidence in these respects. She has the experience of applying for funding and how it is assessed

29. Evidence was also heard from Megan Burt, which the tribunal accepts, that Child A needed 1-1 assistance at all times but was the only pupil with that in his plan. The other 6 children would have needed a person with them additional to the classroom teacher due to the complexity of their needs, including Downs Syndrome. Another 17 did not have it mandated in their plan and in her opinion would not have benefited from 1 – 1 support.

30. The tribunal also accepts the evidence of Emma Wilson – Downes given at paragraphs 18 & 19 of her witness statement concerning Ofsted. The school had been in special measures for some time but had come out of that at the inspection December 2021. This was a full inspection and the inspector was a SENDCO. The various full and monitoring inspections undertaken in the last few years, including when the claimant was at the school, did not highlight any issues with EHCPs or breach of legal obligations for SEND provision.

**Key Personnel**

*Emma Wilson - Downes*

31. Emma Wilson - Downes commenced her role as Headteacher at Felixstowe school on 30 September 2019. Prior to this she was the Assistant Headteacher at Thomas Gainsborough school a role she had held since 2016 where she had responsibility for SEND, behaviour and the schools access classes for vulnerable students. She was the deputy designated safeguarding lead and the line manager of the SENDCO. The tribunal accepts the evidence given in her witness statement that her experience included complex matter management, strategic planning for the development of SEND provision, undertaking learning walks as part of quality assurance, working on staffing models, difficult parental meetings, alternative provision funding applications and recruitment.

32. At FXA the headteacher had two Deputy Headteachers, Joanne Mark and Steve Elliot, that she line managed who would manage the rest of the staff including middle leaders. The tribunal accepts the evidence of Emma Wilson - Downes that it would not be usual in a school the size of FXA to have the Head directly manage the SENDCO or a middle leader and neither would she have had the capacity to do so. On arrival she reorganised the senior leadership team (SLT) roles so Steve Eliot, the claimant's first line manager took over responsibility for behaviour and Megan Burt (who had a keen interest in SEND)

took over the claimant's line management with the support of Joanne Mark, Deputy Headteacher, who had line managed the previous SENDCO.

*Megan Burt*

33. Megan Burt has been employed by the respondent since 2015. She is a PE teacher and Assistant Headteacher at Felixstowe school. Her entire experience has been at the school and she has progressed to be a member of the senior leadership team. She has a keen interest in SEND matters. She would often attend SEND networking events held by the respondent for continuing professional development purposes. Although she had no interest in being a SENDCO while the claimant was at the school when the claimant left she took over the management of the SEND department as nominated SENDCO. She began the course to obtain a National Award in Special Educational Needs Coordination in September 2020 and qualified in August 2021.

34. The tribunal accepts the evidence of Emma Wilson - Downes that Megan Burt did not have to have a day to day knowledge of the individual children to line manage the claimant but that she was well supported by Jo Mark who had run the department when the previous SENDCO was absent for a long period of time. Her role was to make sure there were discussions around staffing and deployment and the Head was satisfied that she had experience in that and the management of resources.

*Other staffing*

35. The claimant set out at paragraph 18 of her witness statement the staff she had available to her. One of the key disputes in this case is the differing views held by the claimant and respondent as to the deployment of those personnel.

36. The claimant listed Sharon Roper and Andrew McKenna as sharing 'the role of working part – time as my personal assistants and part – time on safeguarding'. That they were employed as the claimant's PAs was disputed by Megan Burt who had seen no evidence that they were. She accepted that Sharon Roper dealt with SEND administration split with safeguarding administration. Andrew McKenna, was 19 at the time and on an apprenticeship through KICK Start. Whilst Megan Burt accepted they might be involved in helping and diary taking she did not consider it appropriate for them to be communicating with parents which she believed they were often called upon to do and the tribunal accepts that evidence.

*The claimant*

37. When the claimant joined the respondent in 2019she had 13 years classroom teaching experience. She had four years previous qualifying experience to work

with students with Specific Learning Difficulties (SpLD dip 2007) She obtained the National Award for Special Educational Needs Coordination in April 2018**.** The tribunal accepts the evidence of Emma Wilson - Downes that the claimant's previous experience was at a secondary school less than half the size of FXA and prior to that in a primary school.

38. By letter of 7 October 2019 the claimant was offered a permanent appointment as SENCO at Felixstowe Academy from 1 September 2019. The contract of employment was seen at page 120 of the bundle. This made it clear that the employment was subject to a six month probationary period due to end on 1 March 2020. It stated: –

> By that date a decision will be made concerning your future employment. This decision could be:
>
> - That your fixed term employment is confirmed, or
> - That a further period of probation is required before a decision is made, or
> - that the employment be terminated.

39. The claimant accepted in cross examination that she was under no illusion that the respondent would be actively monitoring her probationary period.

40. The claimant was also provided with the Teaching Staff Handbook. This again confirmed the probationary period. It also provided at clause 28 that the claimant was required at all times to comply with their 'rules, policies and procedures' which could be obtained from human resources and on the intranet. The claimant confirmed that she had access to those policies including a code of conduct.

41. The respondent's policies included a whistleblowing policy and procedure seen in the bundle at page 82. This set out at paragraph 5 the procedure for making a disclosure. As a general rule the disclosure should be made to the Headteacher or the Chair of Governors. Where however a whistleblower believes that they cannot approach either of those the concern is to be raised with the Trust's Director of HR. It was expressly stated that would be appropriate 'if the disclosure concerns the conduct of the Headteacher or the Governing Body, or if a disclosure has already been made to them and no discernible or timely action has been taken to address the situation'. The policy goes on to describe how a disclosure can be made and that the whistleblower should 'make it clear that s/he is making a disclosure with the terms of this procedure'. There is no dispute that the claimant did not invoke this policy.

*PID 1 - 4 – 6 September 2019 claimant's alleged protected disclosure at a meeting with Anthony Williams, Headteacher.*

42. It was the claimant's evidence (paragraph 13 of her witness statement) that between 4 - 6 September 2019 immediately after she had started her role she spelt out to Anthony Williams, the then headteacher, that provision for the number of children with EHCPs and those needing full-time one-to-one support still awaiting for their plans to be completed was insufficient and not compliant with the SEND Code of Practice. It is her evidence that he recognised the problem and agreed to the need for more TA's and for her to go ahead with recruiting a minimum of three. The tribunal did not hear from Mr Williams. The respondent acknowledges that the claimant did speak to him as alleged it denies that what she said amounted to a protected disclosure. Emma Wilson – Downes was adamant, and the tribunal accepts her evidence, that she did not know about any such alleged disclosure. She was working across two schools from September but only took up her appointment full time at Felixstowe School on 28 October 2019.

*PID 2 - 9 – 13 September 2019 alleged protected disclosure at a meeting with Steve Elliot, line manager.*

43. It is the claimant's case that due to her concerns about the shortage of appropriate staff she met with Steve Elliot her initial line manager at some point in the second week of term. In her witness statement at paragraph 20 she states that "I told him about the lack of staff to be legally compliant and agreed that recruitment of staff was necessary". The heading to that paragraph suggests that there were two disclosures one in the week of 9 September and one in the week of 19 September. In cross examination the claimant appeared to accept it was only one disclosure on the 19 September.

44. The claimant had a line management meeting with Steve Elliot on 19 September 2019 and copies of the notes are seen at page 177 of the bundle. There are references in those notes to staffing issues. For example in the first section headed 'discussion area' there is reference to a new staff interview having taken place and one candidate being 'OK'. There is also reference to staffing been a major issue with "someone is ill every day – how do we cover needs when this occurs?' There does not seem to be anything in the notes which would suggest that there was any discussion about serious failings or a breach of any legal obligation. It is of note that when the claimant cross examined Emma Wilson - Downes on this alleged disclosure whilst obviously she could not comment as it was not made to her the claimant then asked her whether it was 'likely' that she had a conversation with Steve Elliot about staffing issues in the department. Emma Wilson - Downes accepted that the notes of the line management meeting show that the claimant did raise such.

*PID 3 - Claimants alleged protected disclosure at a meeting with Jo Mark (Deputy head teacher) - 23 to 27 September 2019*

45. The claimant's evidence at paragraph 24 of her witness statement was that as she knew from earlier conversations with Jo Mark that she had some past knowledge of the SEND department and the teaching assistants she decided

"to discuss my ongoing concerns with her. I told her my first priority was to recruit more new staff as agreed by JW" and Jo Mark agreed that the continuing recruitment of staff was essential. The claimant in her witness statement said that 'JM would have made the head teacher …aware of this overriding concern'. In cross examination she said she did not need to ask Jo Mark to inform the head as Mr Williams had already agreed with her that she needed to recruit more staff.

46. On 24 September 2019 Anthony Williams resigned and left as Head Teacher.

*PID 4 – Claimant's alleged protected disclosure at a meeting with Wayne Lloyd and Head Teacher at Thomas Gainsborough school 25 September 2019*

47. When Anthony Williams left as executive head of the respondent, Wayne Lloyd who was the headteacher of Thomas Gainsborough school (also part of the same Academy) took interim responsibility for the school. Emma Wilson Downes was officially appointed as the replacement headteacher after the half term break

48. The claimant states that when Wayne Lloyd realised that she wanted to explain her case for not having enough TA's he replied "you [SENDCos] never have enough TA's". The claimant states that she had the impression he was already prepared for her request and was not prepared to take any necessary action. The respondent does not accept that this conversation took place.

49. Even on the claimant's own case this was just a discussion and not a disclosure of information within the meaning of section 43B.

*Child E*

50. In October 2019 the claimant travelled to a training conference in Liverpool and received an email from Rachel Baty on 3 October 2019 (page 209) with regard to Child E to confirm the outcome of a meeting they had both attended that day with Child E's parents.

51. The claimant had been called to a meeting with the mother of child E and Rachel Baty to discuss her child's reintegration back into the school following a fixed term exclusion which had been imposed earlier in the week. The claimant states that had not been imposed by her. In her witness statement (paragraph 29) the claimant describes how she considered the child's mother expressed anger at her during the meeting as she saw her as responsible for not having ensured that sufficiently appropriate measures had been taken by staff to prevent the child behaving in the way that triggered an exclusion. The claimant states that the parent took out her frustrations on her and was "unguarded in her verbal attacks which she levelled directly at me".

52. When the claimant replied to Rachel Baty's email she inadvertently also sent her reply to the parents. She explained that she was working late in the evening

at the conference trying to catch up with work emails and doing this on her iPhone. In her reply she explained her position with regard to Child E and stated that concerning the exclusion "inevitably, parents of Child E's venom was directed at me as a result".

53. Steve Elliot emailed the claimant asking if she had intended to send that email to the parents. The claimant replied: –

> "Absolutely not. Unbelievable that the original one to me was also copied to parents of Child E. I have been working on this using my iPhone while travelling so sadly did not have obvious sight of all recipients and assumed it was sent in-house"

54. Steve Elliott replied that the original email was not copied into the parents but it was sent to the parents as the main recipient and everyone else was copied in.

55. On 6 October the claimant sent an email of apology to the parents of Child E. She tried to assure them that the school would continue to strive to work with them to support Child E in the best way they could. It is notable that the claimant apologised for including them in her reply email but did not apologise for her language and tone.

56. The parents replied the next day stating that:

> Unfortunately the issue is not only that you included me in your email but the sheer lack of respect or common courtesy that you have for others.
>
> You have badmouthed me throughout the email therefore the only reason you are apologising is that you were caught to have done so and not that you actually said those horrendous things in the first place.
>
> It is the most unprofessional email I have had the displeasure of reading for a very long time and I am utterly appalled at the behaviour of someone who is supposed to be in the lead in a leadership position.

*Investigatory meeting – 11 October 2019*

57. By letter of 7 October 2019 the claimant was invited by Jo Mark to an investigatory meeting to discuss the allegation of misconduct in that she had "shared unprofessional comments in an email, and you were negligent in the use of staff email, leading to parents receiving the unprofessional comments". The claimant was advised of her right to be accompanied and that there were three possible outcomes, namely no further action, informal action or referring the case for consideration at a formal disciplinary hearing. It is the claimant's case that this was both heavy-handed and unnecessary and could have been dealt with in a more informal and proportionate way of putting her response into context.

58. The meeting was conducted by Jo Mark, described in the minutes as Vice Principal, School Development and the claimant was accompanied by a trade union representative. The minutes included copies of all the relevant emails. The claimant defended her position explaining how stretched and tired she had

been that day. She did at one point 'absolutely accept I am in the wrong and didn't respond appropriately but I was reading it on an iPhone and it did not appear as a letter. You would always start a communication with a parent with dear…'

59. In response however to Jo Mark asking her why she had not apologised to the parent for the language she had used she replied that:

> 'I could have said that but the email was not intended for [parent] and she was asking me to apologise for something which was not meant to offend her…she was venomous. I have described her behaviour, and why would I apologise for something that was not intended for her?'

60. The outcome was that the claimant was sent on 14 October 2019 a 'letter of expectation.' This confirmed that no formal disciplinary action would be taken however the letter of expectation would run from the date of the letter for a period of 12 months for future disciplinary purposes. The letter made it clear that: –

> you must not use any language which could cause offence including making unprofessional personal statements.
>
> You must ensure you always check recipient details before sending and forwarding emails
>
> You must discuss the response to parental concerns or complaints with your line manager.

61. The letter of expectation was given to the claimant at a meeting held with Jo Mark. The minutes of that meeting note that the claimant "commented this was fair and she pointed out that there were exceptional circumstances and she hoped JMR could see that. Outside normal working hours with a phone etc. She said she knew she was wrong and will make a point of being more vigilant." The meeting noted at the end that the claimant "appreciated the way this has been done, even though it is a disciplinary process. She commented it had been done in a positive way. PGO apologised and said that she did not want to bring the Academy into disrepute".

62. Despite that response at the end of the meeting the claimant told this tribunal that she felt the letter of expectation was "totally disproportionate" and put her under the spotlight for serious investigation for any slight misdemeanour. She disputed the notes of the meeting and did not accept the proposition put to her that she got off lightly. She stated she had little choice but to accept the outcome as otherwise she would be seen as not being professional. She was trying to be honest and rebuild the relationship which had gone awry at an early stage. She wanted to show she had a positive relationship with the senior management team and the parent. When questioned on why she had said it was "fair" she said in cross-examination that she hoped it would not go any further and would not be used against me. She now recognises that one word was taken entirely out of context and used again and again to prove that she

was someone who was not professional with parents and in fact that could not be further from the case.

*PID 5 - Alleged protected disclosure to Jo Mark verbally week commencing 7 October 2019*

63. The claimant alleges at paragraph 42 of her witness statement that she spoke to Jo Mark in her office and said "no matter how I try to reorganise the timetable, we cannot possibly meet the needs of our SEND children with our present level of staffing". She states that Jo Mark did not deny the problem. Even on the claimant's own evidence this was just a routine discussion with a senior colleague about staffing.

*Megan Burt as claimant's new line manager*

64. Megan Burt took over as the claimant's line manager in October 2019 and was also an Assistant Headteacher. Her line manager was Joanne Mark who was Deputy Headteacher. Ms Mark had considerable experience as she had previously line managed the SEND department. The tribunal saw various line management notes of the line management meetings that were conducted with the claimant in its bundle. For example they met on 8 October 2019 (page 203). One of the matters raised as a discussion area was "concerns around absence and sickness that this affects the consistency". It is noted that the total number of LSA's was 15. The claimant must have raised that she was "short of time" as it is noted she was finding it challenging to complete core tasks such as observation of TA's and assessment of students. It was recorded that Megan Burt was to look at the possibility of changing tutor group and timetable. Later it has been added that this was not possible "due to time allotted for the role being adequate. Informed that fair time is allocated along with TLR to achieve responsibilities".

65. The claimant was very clear in her cross examination of both Emma Wilson – Downes and Megan Burt that she considered that it was inappropriate for her to be line managed by Megan Burt who was not a SENDCO and who she perceived did not have the relevant experience to act as her line manager. Having heard the evidence the tribunal is satisfied that it was a reasonable management decision for Megan Burt to line manage the claimant. She had been moved into a senior leadership position, had her own interest in SEND and with the support of Jo Mark (who had line managed the SENDCO previously) was considered by the Head to be an appropriate line manager of the claimant. She did not need to know the individual details of each child that the claimant had responsibility for to be able to assist with timetabling and the allocation of resources.

*PID 6 - Alleged protected disclosure by email to Wayne Lloyd 10 October 2019*

66. The alleged email relied upon is in the bundle at page 206. It was a copy of text but not the actual email itself. The claimant explained in cross-examination that she was unable to obtain the email post dismissal and "I had a copy of this and put it into a word document and that is why there is no date". The claimant went on to explain it was from her personal records of what she had done, she could not remember how she had sent it and it might have been from her personal email account. When pressed on the matter she said that she copied it into a word document and added the heading to save it. It was sent from her personal email and that is how she had the record. The actual email was not produced.

67. The claimant explained the background in her witness statement at paragraph 43. She was concerned about the level of TA absence. She also wished to have a meeting with Emma Wilson - Downes to raise concerns that had been expressed by TAs about the new zero tolerance policy for behaviour management of SEND. A chain of emails was seen in the bundle starting with the claimant on 8 October 2019 asking if she could meet with Ms Wilson - Downes to discuss issues the TAs had raised (page 199). Difficulties are seen with regard to them managing to meet with the last email agreeing 11:15 on 11th. It is not clear if they did meet.

68. The text of the alleged email at page 206 asked Mr Lloyd if the claimant could have a further discussion with him regarding her role and planning for a coordinated SEND strategy. She wanted to be clear about the school's legal position in relation to inclusion and how this should be interpreted. She concluded that she was concerned that "having a layer of management between herself and the SLT can frustrate my direct involvement with this process and slows down the process of effective interaction and change". The tribunal cannot see that the claimant was there raising the breach of any legal obligation but was asking for a discussion.

*PID 7 - Alleged protected disclosure in a meeting with Emma Wilson - Downes 28 October to 1 November 2019.*

69. The claimant gave evidence that the situation with a short shortage of TAs became even more critical towards the end of the autumn term 2019 when one went on long-term sick leave. During the first week after half term the claimant arranged an appointment with Emma Wilson - Downes to talk to her about staffing issues. She deals with the alleged disclosure at paragraph 51 of her witness statement. She asserts that Emma Wilson - Downes said it was just a matter of adjusting the timetable appropriately. She alleges that she did not enquire about the students for whom the school had a legal obligation either at a one-to-one level, small group or whole class level. Neither did she enquire about those additional high needs students for whom the school received HTN funding in order to secure one-to-one support nor did she enquire about other SEND children. The claimant ends the paragraph by stating that she felt the headteacher had 'effectively vetoed any staff recruitment to help the situation in the hope of denying the problem". That is a workplace discussion. The claimant is not there disclosing information which would suggest the breach of a legal obligation.

70. The tribunal accepts the evidence of Emma Wilson - Downes that on or about 5 November she had a discussion with the claimant encouraging her to work with Megan Burt to re-timetable the SEND department to cover the needs of the SEND pupils.

71. There was an OFSTED visit 30 October 2019. The claimant met with the inspector with Emma Wilson – Downes.

*Child A*

72. On 11 November 2019 (page 238) the claimant emailed Emma Wilson - Downes in connection with a meeting she had had with a Hayley Mason lead coordinator family services and Child A's parents about how they were meeting the child's needs as set out in a recently updated EHCP following a tribunal hearing in October. She explained that Hayley would like a meeting to discuss the school's future plans for supporting Child A and other similar pupils and asked whether that could be arranged as soon as possible. Hayley also wanted the claimant to prepare for another meeting the following week to go through the new EHCP stipulations for that child and clarify exactly what the school was able to put in place and what they were unable to put in place.

73. Emma Wilson - Downes asked for a copy of the EHCP and this was forwarded to her by the claimant. She then declined the claimant's email invitation to attend an annual review for the child scheduled for 29 November. The claimant then queried the fact that she needed to go back to the local authority to indicate if there were aspects of the EHCP that the school genuinely felt they were unable to provide for or had evidence to show were not in the child's best interests.

74. The head replied that she had made her comments on the EHCP and would question whether a continued one-to-one provision was the best thing for the child and if support in class by an TA not necessarily on a one-to-one basis might be better to enable him to build independence. The claimant responded that she had raised this before the child's tribunal hearing but that the EHCP had stipulated a number of one-to-one sessions as well as in class need for direct support in a number of areas throughout the week. The claimant did not feel the child was likely to respond well to that and it may also affect the learning of the other children. Ms Wilson - Downes urged the claimant to discuss the matter with Hayley Mason and also recommended that the claimant might find it helpful to speak to an individual doing a similar role at the head teacher's former school.

75. On 12 November 2019 the claimant had a line management meeting with Megan Bert page 256

76. In the same email chain as discussing Child A Emma Wilson - Downes declined the claimant's invitation to attend Child E's annual review stating it was not necessary for the head to attend.

*PID 8 - Alleged protected disclosure in a meeting with Megan Bert 18 to 22 November 2019*

77. In the agreed list of issues this alleged disclosure is stated to be:

> 'As on many other occasions, I explained to her that we did not have sufficient staff available to be legally compliant with our obligations to children with EHCPs. I explained that: "The lack of willingness of [the headteacher] to make funds available to the SEND department was preventing me from providing safe cover for SEND children when staff were absent"

78. The claimant states however in paragraph 58 of her witness statement when dealing with this alleged disclosure that she complained verbally to MB about how difficult it was to meet with the headteacher and about her 'growing concerns'. Much of the paragraph is concerned with the claimant's attempts to speak to Emma Wilson - Downes. The tribunal does not find that information was disclosed

*PID 9 - Alleged disclosure on 23 November 2019 to the headteacher.*

79. The claimant amended the date of this allegation to the 22 November 2019. In her paragraph 60 she states that it was made verbally in the admin office when she and an HLTA found they were even more short staffed than usual. The claimant asserts that the headteacher continued to 'assert that she could not provide any supply cover for when a TA was sick'. This was a staffing discussion not the disclosure of information.

80. In cross examination the claimant relied upon an email of the 26 November 2019 (page 290) as evidence of this disclosure. That had been understood to relate to a later disclosure on that date as set out below.

*PID 10 - Disclosure to Joanne Mark week beginning 23 November 2019 regarding staffing and compliance with EHCPs*

81. All that the claimant said at paragraph 62 of her witness statement about this alleged disclosure is that 'staff absences continued to be a constant concern so at the next opportunity I spoke to JM'. The tribunal would expect the claimant to do so but not every conversation amounts to a protected disclosure and there is absolutely no evidence that this was.

*PID 11 - Written disclosure Emma Wilson Downes 26 November 2019 (supply cover email) regarding compliance with EHCPs*

82. In this email the claimant stated:

I need to alert you to a serious problem facing the SEND department and impacting on the school as a whole. This week, is a typical example of the many difficulties we have been facing on a daily basis since the beginning of term with regard to staffing. Often I have had to withdraw HLTAs out of their normal and essential commitments of providing one-to-one support to specific pupils, in order to place them in the classroom to ensure support for our most vulnerable SEND. Essentially, this is an issue of robbing Peter to pay Paul and compromising the ability of our department to legally comply with our students EHCPs on a regular basis. We have had a minimum of 5 off sick each day; today there are 7 off and yesterday we had 6 off. Although, this level of absence looks alarmingly high and frequent, the reasons for each individual's absence are genuine and warranted.

As well as impacting on the EHCP students and others with significant SEND needs, this is having an impact on the learning of other children. For example, there were a couple of incidents last week when the essential needs of a Down's Syndrome child directly affected the learning of other students. Both myself and an HLTA on separate occasions were prevented from teaching their class for some considerable time due to the need to accompany this child to the toilet due to lack of TA support staff.

I understand that in due course, the structure of the department will change and may require different levels of TA staffing in certain areas but in the meantime, we are failing to be compliant with our legal obligations to students and upsetting many parents as a result. I would like to appeal to you to give this issue your consideration as a matter of high priority.

83. The respondent accepts that this amounted to 'information' but not that it was a protected disclosure.

84. The headteacher's position in evidence about this email was that she recognised that the claimant had to make adjustments to the timetable. What she took issue with however was that 1-1 support was not mandated for all SEND pupils. Small group provision would have been appropriate. The email does not show whether the students that the claimant had in mind had a requirement for 1-1 support in their EHCP and she found it highly unlikely that it would have done

*PID 12 - Written disclosure Emma Wilson Downes 26 November 2019 (timetable email) regarding send department timetabling*

85. At paragraph 64 of her witness statement the claimant explained that the disclosure was the email sent at 18:41 in which she refers to another email that evening from Andrew McKenna with an attached timetable they had colour coded 'to demonstrate as clearly as we could to EWD precisely which students required essential one to one support on their EHCPs and the staff that we had to support them'. The tribunal did not see his email or the timetable.

86. The respondent accepts that this was sent and that it amounted to information. If the whole email chain is read it can be seen that Jo Mark and Megan Burt were offering suggestions as to how the timetable could be managed, with Jo Mark responding within 8 minutes.

87. The frustration expressed by Emma Wilson - Downes in her email to Jo Mark at 20:24 encapsulates the difference in approach that there was between the claimant and the SLT with regard to the type of provision that was required for the children and how to achieve it. As the Head explained not all SEND children required 1 – 1 support all the time. Only one child required 1 – 1 support all the time and 6 others some of the time. The tribunal accepts that Emma Wilson – Downes view was that some of the children could be supported in small groups and with interventions lead by other staff and not just from the SEND team. This could be the form tutor or a pastoral member of staff. For her it was about the appropriate deployment of staff. She explained in evidence about the timetabling of a 'shadow class,' such that the child could be moved back into their regular class if staff were ill or required elsewhere. She is of the view that support could have been more efficiently delivered in small groups than 1 – 1.

88. In her email to the claimant on 26 November 2019 at 09:48 to the claimant (copied to Jo Mark) the headteacher had requested a list of students whose EHCP states that they must have 1-1 support. She wrote directly to the claimant on 28 November requesting this again and later Megan Burt stated that she would get it herself.

89. In cross examination the claimant stated that the preparation of the colour coded timetable and the delivery of it by Andrew was a protected disclosure made by him on the claimant's behalf. There is no such concept in the legislation.

*Interim Probation review – 29 November 2019*

90. At page 299 – 300 were notes of a meeting held by Megan Burt with the claimant. The following were areas to be developed and carried forward for discussion at the next review:

> **'**Communication with parents and staff
> Learning walk support
> Discussion of the CPD opportunities for all staff
> Regular updates on trackers
> Identify and requesting purchase of a new numeracy test
> Development of a rapid improvement plan for the SEN department
> More engaged parent communication and meeting opportunities
> Linking with heads of year and assistant headteachers involved in student support to ensure there is greater triangulation between all areas.'

In the Personal Requirements section the claimant's attendance and commitment to the role were acknowledged as excellent but that 'general conduct has been some cause for concern, particularly through the communication to parents and staff. The approach taken needs to be more professional'.

*PID 13 - Verbal disclosure to Megan Burt in 11 December 2019 meeting regarding Child A's EHCP*

91. On 18 November 2019 Hayley Mason wrote to Emma Wilson Downes to introduce herself as Lead Co-ordinator who manages the Family Services Coastal team for Suffolk County Council. She asked to meet with the head to discuss the EHCP for Child A. The head replied that although happy to meet with her it would be more appropriate to meet with Megan Burt, who as Assistant Headteacher line managed the SENDCO and had a good oversight of Child A's EHCP provision and was liaising with the parents.

92. On 19 November the claimant sent Emma Wilson - Downes Child A's EHCP which she had marked up in red for her to respond and requested that she let her know if each of his student tracker comments were valid.

93. An appointment must have been arranged for the claimant, the head and Megan Burt to meet that day as the head emailed the claimant at 18:39 to say they had waited for her at 4pm as arranged to go through the Plan. She confirmed she would look at the SEN tracker and Megan would speak to the claimant. She reminded the claimant that if parents wanted an appointment with a SLT member she point them towards Megan and not herself.

94. On 21 November the head again wrote to the claimant that she had expected to meet with her that evening and the claimant replied apologising explaining that she had double booked herself.

95. A meeting took place on 11 December with Hayley Mason, attended by the claimant, Child A's parents and Megan Burt.

96. The claimant's evidence (paragraph 67 of her witness statement) is that at this meeting she spoke openly about her concerns regarding staff levels and the school's inability to make any further provision to meet the additional requirements of Child A's tribunal amended EHCP. She stated that she knew this could not be done and feared the consequences for other students with higher levels of need if support was removed from them in order to demonstrate in front of the local authority and parents that the school could meet Child A's further requirements.

97. Megan Burt set out her recollections of the meeting in an email to Jo Mark, the following day, 12 December 2019. (Page 332) It was her recollection that the claimant had suggested there was evidence in a variety of areas that Child A did not need some of the things that were outlined. Hayley Mason of the local authority stated that as it was a legally binding document and as a school it was their duty to provide what was stated in the plan. The main areas of concern were around Child A having 2/3 members of staff who act as 1:1 within lessons. Megan Burt questioned whether or not this was currently in place following on a positive experience Child A had with a 1:1 on the previous Friday but the claimant felt they could not always provide a 1:1. She began to say that the Academy cannot support this because of the predicaments the department is in and due to the change of Trusts. At that point Megan Burt had intervened

and said she would speak to Emma Wilson - Downes directly to confirm that they were in a position to offer Child A 1:1 support as directed in EHCP. On her return to the meeting she confirmed that was the case and as a school they would ensure they had this in place for Child A. It was her recollection that the claimant continued to "speak loudly" and talk about how she could not facilitate the 1:1 support, despite Megan Burt asking her to stop as the point she was making was not appropriate for the meeting. She continued to speak louder and raise her voice. Megan Burt recalled that she again informed the claimant that the issues she was raising were not appropriate for the parent to hear, were not relevant to what they were discussing in the meeting and needed to be raised at a time with herself and Emma Wilson - Downes. The claimant however continued at which point Hayley Mason interjected and said that these were conversations that needed to be discussed with her line manager and the head of school.

98. Rachel Baty, Assistant Headteacher, had come into the meeting as she heard shouting coming from it. She saw the two parents leave the meeting and spoke to them. They explained to her that they had chosen to leave the meeting because staff were shouting at other staff and they felt this was unprofessional and they should not be witness to that kind of behaviour. Rachel Baty entered the meeting to find "Philippa shouting at Megan. I explained to Philippa that she should not speak like this to staff. She also then started shouting at me".

99. The parents of Child A also provided some background with regard to the meeting in a document dated 17 December 2019 (page 335). They set out how they had attended two previous meetings with the claimant during which they had been advised that the Academy was unable to deliver the support specified in Child A's EHCP due to "staffing and resources issues" and "issues arising from the implementation of the new Trust" including a recruitment freeze. They had also been advised by Hayley Mason that the claimant intended to present evidence at the meeting stating why she felt that Child A did not need and would not want full-time 1:1 TA support and other interventions detailed in the EHCP. They found this of concern and left them feeling that the claimant was "not committed to working in partnership with us as parents". They found the meeting to be "tense from the start" and felt that the claimant was repeatedly negative from the outset "insisting that she was unable to deliver the support specified in Child A's EHCP despite repeatedly being told by Hayley Mason that it must be implemented". They recalled the claimant stating on more than one occasion that delivering Child A's support would have a "negative impact on other children" and that there were children with EHCP's who were of greater need. The claimant was advised that such points were not suitable to be discussed at this meeting. They felt that the claimant did not consider Child A's needs of equal priority to those of others. They felt that the meeting became very strained after Megan Burt had consulted with the head and the claimant refused to accept the decision that full-time 1:1 would be implemented and that Ms Burt would work with her to overcome any staffing issues. They recalled that "she became almost hysterical stating that "no one understands how difficult her role is". They felt that she spoke very disrespectfully to Ms Burt at certain points throughout the meeting. They offered to leave the meeting to

enable further discussion to take place between the staff and Hayley Mason and to avoid any embarrassment.

100. The claimant relies upon what she said to Megan Burt at this meeting as a protected disclosure. In the list of issues it is put that she was raising that they did not have adequate staffing to meet the requirements of Child A's plan as well as to continue the support of other children's plans. The respondent accepts that the claimant raised such with Ms Burt and that this amounted to information but denies that it was a protected disclosure.

101. Later on the 30 January 2020 the claimant raised with Malcolm Reeve (SEND Auditor for the respondent) whether the school could appeal the SEND tribunal decision concerning this child and was advised by him that there were no grounds to challenge a tribunal finding and that it would place the school 'at odds with the family which is inadvisable' (pages 473 – 5).

102. By letter of 12 December 2019 the claimant was invited to a meeting on 19 December to investigate allegations of misconduct against her. The letter recorded that the concerns were that she had behaved unprofessionally including unprofessional communication during a meeting with parents and that this was in breach of the letter of expectation issued on 14 October 2019. She was advised that the meeting formed part of the Academy's formal disciplinary procedure and that she had the right to be accompanied at the meeting.

103. Notes of the meeting was seen at page 342 of the bundle and were taken by Sharon Flint, Bursar of the Academy. The meeting was chaired by Jo Mark and the claimant was accompanied by a trade union representative. In cross-examination the claimant did not accept these minutes recorded everything that was discussed and asserted that they had been written to portray her in the worst light. She conceded that they partly reflected what was said at the meeting. The one matter that she said was not there was that when Megan Burt left the meeting to go and speak to Emma Wilson - Downes about recruitment of more staff she came back with the assurance that a member of staff would be made available. The claimant felt this was ambiguous as it was not clear if the person would be recruited. The claimant says she raised concerns as to whether that would be the case or not. She did not believe this was included in the notes and she could not recall in cross-examination whether she had pointed out the ambiguous nature of this or not.

104. The minutes record that the meeting considered the statement from parents of Child A, Megan Burt's email and that of Rachel Baty.

105. In the minutes the claimant acknowledged that what she had to say "may have sounded and appeared unprofessional" but to have any integrity she had to point this out. She had not been reassured prior to the meeting any staff would be made available and was not able to guarantee they could put support in place with the current staffing levels. She considered that to have been an "honest response".

106. What also comes across in the minutes is that the claimant had earlier had discussions with Hayley Mason as to whether the EHCP was appropriate for the school and Child A prior to the tribunal. She had even asked to appeal the decision as she considered it was not in the interest of Child A or the department. The claimant believed that Hayley Mason should have consulted with her prior to going to the tribunal hearing in view of the impact on other children. She considered that the EHCP was based on when Child A was in primary school and that she had evidence that the did not need the support that was being required in the plan.

107. The claimant refuted that she had raised her voice but did accept that she talked over others at times and was "clear". Whilst what she said might have been uncomfortable for some it had needed to be said in her view. The claimant did acknowledge that it was not appropriate to raise the matters at that meeting but as they were having an important discussion she needed to alert everyone to what they could do in the school bearing in mind that they could not supply 1:1 in the future. The claimant acknowledged that the atmosphere in the room was tense and "I'm sorry if I made people feel uncomfortable. Yes others voices were raised to, but I was the one making people feel uncomfortable". Whilst the claimant would not accept there had been shouting she did acknowledge there were raised voices and that hers was the dominant one as "it needed to cut through as I wasn't being listened to. It was about making sure we explained what could not be fulfilled".

108. Jo Mark prepared an investigation report seen in the bundle at page 321. She concluded that on the balance of probabilities the claimant did behave in an unprofessional manner communicating unprofessionally during a parental meeting and that could be in breach of the letter of expectation issued on 14 October 2019. She recommended that the matter be progressed to a formal disciplinary hearing.

109. By letter of 24 January 2020 the claimant was invited to a formal disciplinary hearing on 7 February 2020. She was informed that the hearing would be conducted by Emma Wilson - Downes and David Chambers HR business partner would be present. The allegation that would be considered was that the claimant was in breach of her letter of expectation issued on 14 October 2019 in that she acted unprofessionally during a meeting with parents.

110. The letter stated that the claimant's actions could be considered as misconduct in which case the outcome could be a formal warning. The claimant was advised of her right to be accompanied and provided with the investigation meeting notes and the statements of the parents, Megan Burt and Rachel Baty.

111. In cross examination the claimant was taken to examples of gross misconduct appearing in the respondent's policy at page 106. It was suggested to her that the respondents could have brought a charge of gross misconduct but did not do so.

112. The claimant prepared a document entitled "my defence statement" dated 30 January 2020 for the disciplinary hearing (page 458). The claimant did not

suggest in that document that she considered herself to have been whistleblowing. In cross-examination she stated she had not raised whistleblowing as to have done so would have been highly inflammatory but she did consider she was being targeted. Again that is not suggested in the defence statement and the claimant acknowledged in cross examination that it was not said explicitly as it seemed clear why she had been brought to a disciplinary hearing. The tribunal notes that in defending herself this would have been a perfect opportunity for the claimant to explain that she considered she had been 'whistleblowing' and that was the reason why she had spoken as she had but she did not do so.

113. The tribunal was not taken to minutes of the 7 February meeting but did see a diary/blog kept by the claimant which demonstrated that the claimant was able to state her case and call a witness she thought should have been interviewed.

114. By letter of 10 February 2020 Emma Wilson - Downes confirmed to the claimant that the outcome of the disciplinary proceedings was that she be given a first written warning. Having taken the claimant's explanations into account they had concluded that this was justifiable in accordance with the trust disciplinary procedure. The warning would remain active on her file for a period of three months from the date of the hearing after which it would lapse. They expected immediate improvement and should the claimant commit a further act of misconduct that could result in further disciplinary action being taken. The claimant was advised of her right to appeal.

115. It was put to the claimant in cross-examination that in accordance with the respondent's policy (page 100 clause 13.2) the claimant received the lightest penalty. It was the claimant's case that to do otherwise would have highlighted that she was being sanctioned for whistleblowing. It was clearly as a consequence of her whistleblowing. If they had given her a higher sanction she stated the main motive would have been a lot stronger for her to take legal action against them. She maintained the view that her actions had been highly appropriate. The claimant explained that she had not appealed the written warning as she did not consider it in her best interest to do so. She still remained adamant it was not justified in the slightest.

*PID 14 - Verbal disclosure to Joanne Mark 19 December 2019 regarding resourcing and EHCP requirements*

116. It is the claimant's case that she also made a protected disclosure to Jo Mark and others at the investigating meeting on 19 December 2019 when she stated emphatically that it was a question of professional integrity that she needed to expose the fact that she would have insufficient staff to meet the legal requirements as set out in Child A's EHCP. In the amended particulars the claimant put in quotation marks "my problem is enormous as I have no assurance of additional staffing. I put in resources where I could [but] risked a vulnerable child [in doing so] and it is important to protect them. She [my line manager] doesn't have the understanding of the department or the [legal requirements] of EHCP's." The way the claimant explained this in her witness statement (paragraph 71) was that she defended her actions by explaining it

was a matter of professional integrity that she had spoken out at the meeting. The claimant does not state there that she made it clear to Jo Mark that she was making a protected disclosure.

117. The respondent accepted that the claimant spoke as pleaded and that this amounted to information.

*PID 15 - Written disclosure to Megan Burt 21 January 2020 regarding SEND staffing*

118. This actually relates to an email sent by the claimant to Megan and others on the 23 January 2020 relating to Child B (p374). In the email at 14:03 the claimant stated: –

> "Hi Megan, I just wanted to let you know that we had another minor incident with Child B today. She did not have a TA in English… So we arranged for me to call Miss A should the need arise. She wanted to go urgently in the middle of the lesson so took herself off to the loo immediately after I had alerted Miss A and she responded that she was on her way. Instead of going to the nearest loo, Child B went to one at the far end of the corridor so initially we didn't know where she had gone. When Miss A found her, she said that the first loo had a crack [in the seat?] so she had gone looking for a different one.
>
> I have spoken to Parents of Child B about it and explained what happened. In future I think we will make sure we ask D for cover should we be in this situation again."

119. What was relied upon by the claimant in her pleadings as the disclosure was made in the email on 25 January 2020 at 18:33 when the claimant said:

> 'For me this also underscores the level of difficulty the department has in supporting the SEND needs appropriately within the constraints of the present level of staffing with respect to the level of SEND need in the school.'

120. Whilst the respondent accepts that the claimant wrote in these terms it denies that this contained any information such as to amount to a protected disclosure. However there was consideration in evidence of the whole email chain including the claimant's email of the 25 January 2020 in which she stated the above. The respondent in closing submissions accepted that if the whole email is relied upon as a disclosure, although that was not what was pleaded, it does not dispute that information is contained within the email chain as a whole.

121. The claimant describes the background to this in her witness statement at paragraph 79. She states she had to decide between removing essential cover for Child B (who needed personal care when going to the toilet) or removing one of two TA's from a large very disruptive French class of 30 which included a high number of students with SEND. The claimant had a small class of three but did not have a TA and made a plan that she would summon the TA from another class if Child B did ask to go to the toilet. There was a delay during which Child B ran to the designated toilet which she found to have a broken

seat. The TA could not find her there as Child B went to find another toilet and the claimant states returned safely to the claimant's classroom (which is not what the claimant said in her email of the 25 January to Megan Burt). The claimant phoned Child B's parents to explain what had happened and wrote the email seen above to advise Megan Burt of her decision to leave the TA in another class for the 40 minutes lesson with a small risk that she might have to summon her away for a few minutes.

122. In cross examination Megan Burt took issue with the claimant's decision to have two TAs in one classroom when they were struggling. If only one had been in the classroom then the other could have been with Child B. It was in her view poor management of the team. She referred to a second incident with Child B a week or two later.

123. A letter from the parents of Child B to Emma Wilson - Downes was seen at page 415 dated 26 January 2020. They stated how extremely disappointed and appalled they were at how they had been treated from September 2019 having previously had a good relationship with the Academy. They found the claimant to be "unprofessional, her rudeness was disgusting, she has no regard for safeguarding and only seems interested in looking after the year 7 students and has no consideration for any of the older students".

124. They went on to state that the claimant appeared to have no regard for Child B's safety or the child's needs or what an EHCP means. They did not even know whether the child's plan was being followed and put into practice. They stated this was the second time they had issues with safeguarding. Previously they had received regular updates and knew projects Child B was working on and were able to do things alongside at home to help. This year they had LSA's telling them what she had been doing in class but they had no idea whether she was on track with coursework. They asked to hear back from the head teacher within seven days with a "reasonable and fair resolution for us and Child B." They felt that it was "disgusting in this day and age that you were able to lose a student in your care on school grounds, one of which has issues with being locked in, hygiene and loud noises so if an alarm had gone off, you know full well what her reaction would be and it wouldn't have been acceptable at all on any level". They considered the care given by the claimant was "similar to that received back in the 1950s and we feel that she is being discriminated by her. Not only for having Downs but the lack of rapport and support to us as her parents"

125. Attached to the parents letter at page 416 was a more detailed overview from the parents of their dealings with the claimant, which the tribunal was taken to when the claimant was cross examined. It makes reference to them having a prearranged meeting with the claimant for 5 September 2019 but being told that the claimant did not remember organising it and "sent Mrs R out to say that they were really busy with the new intake." They then did meet with the claimant but state that they were told by her they would only have 10 minutes. They explained how they had raised their concerns for Child B and were disappointed that the claimant terminated the meeting after the 10 minutes as a result of

which they told her "I felt we were being kicked out. For our first meeting we felt we were treated unprofessionally and unfairly"

126. The document also refers to another meeting being held with Steve Elliott, the claimant, another LSA and the parents of Child B. They expressed their concern at not being happy at not knowing who the LSA would be on a regular basis and asked if they could meet her. They felt they had gone from having a good relationship with the LSAs and SENDCO to no communication whatsoever. When they mentioned thinking of contacting OFSTED they stated that the claimant "flew off the handle accusing my husband of threatening her and started shouting. Her line manager Mr Elliott said [he] had not threatened her but was voicing his opinion". They said that the claimant had her head in her computer when they were trying to talk to her. The claimant they said had stated that "some year 7 students had equal needs to our daughter Child B and their needs came before her. I clarified with her that she was saying that year 7 students came before our daughter and she said yes!"

127. On the 26 January 2020 (page 419) the claimant sought advice from her trade union representative and said she would 'like some advice about how to whistle blow in this case'.

*PID 16 - Written disclosure Emma Wilson Downes 31 January 2020 regarding the defence statement for a disciplinary hearing*

128. This alleged disclosure relates to the claimant's Defence Statement referred to above. In the amended Particulars the claimant stated that she relied on the following in the statement as a protected disclosure:

> 'I had the authority and indeed a professional and moral obligation to speak out. It was not only important for the SEN officer to hear of the potential impact on others in our school, given our existing resources, but also for the parents to be aware that the expectations of the EHCP for Child A to have a permanent one – to – one LSA, in my view, had at the time, already proven to be quite unfeasible'

129. In her witness statement at paragraph 98 the claimant's evidence was that she felt it was important to make clear her reasons for expressing her concerns so forcefully at the meeting on 11 December regarding Child A's provision. In cross examination she confirmed that she was trying to explain her actions. The respondent accepts that the claimant wrote as alleged in the document but that it was her explaining why she had to speak as she did and did not disclose information.

130. On 31 January 2020 the claimant was invited to a Probationary Review meeting on 13 February 2020 with Emma Wilson – Downes, Joanne Mark and David Chambers (HR business partner). The claimant was advised of her right to be accompanied and that they proposed to 'formally review your performance, capability and conduct to date following our recent discussions.' The claimant was also advised that the outcome could be continuation of her probation or termination of her employment

*PID 17 – Letter of 5 February 2020 to Chair of the Governors, Sue Leon*

131. The letter appeared at page 486. In the amended particulars of claim the claimant drew out seven matters in the letter that she relies upon as further protected disclosures. These were:

131.1 being unfairly subjected to disciplinary proceedings due to speaking out about SEND issues

131.2 Her unreasonable teaching and SEND workload and excessive hours and impact on her mental health.

131.3 How the headteacher had failed to provide adequate funding to the SEND department.

131.4 That there was insufficient funding to provide cover for absent staff members in the SEND department.

131.5 That the headteacher refused to engage with the claimant as SENDCO

131.6 That the headteacher acted too hastily in recommending exclusion of some SEND children.

131.7 That the headteacher was putting children at risk by moving the department.

132. In her witness statement at paragraph 105 the claimant stated that she hoped the letter would 'change hearts and minds about the need for more staff to improve the resourcing level of SEND in the school. It had become impossible for me to continue to do my job effectively and with any integrity'. The claimant did not suggest that she was whistleblowing or invoke the policy.

133. The respondent in closing submissions accepted that the claimant disclosed information in that letter but disputes that there were any protected disclosures made in the letter.

134. The claimant had a line management meeting with Megan Burt on 7 February 2020 (p 494). The minutes record that the following were discussed:

134.1 Learning walks
134.2 EHCP's – new and old
134.3 Folder on the Google drive
134.4 SEN and admissions
134.5 Touch typing
134.6 Adoption and LAC
134.7 HTN

*Probation Meeting 13 February 2020*

135. The minutes of the meeting appeared at p511 of the bundle. The meeting was chaired by Emma Wilson Downes, accompanied by Jo Mark Deputy Head Teacher and David Chambers HR partner from the trust. The notes were taken by Sharon Flint business manager. The claimant was accompanied by Ian Roberts, trade union representative. The claimant in her witness statement at paragraph 109 referenced the notes that she made which appeared in the bundle of pages 502 – 510. In her witness statement she is critical of the fact that her line manager Megan Burt was not at the meeting, that those present had no direct knowledge of her work as SENDCO and relied on notes from Megan Burt for information. Jo Mark was present who line managed Megan Burt and had experience of managing the previous SENDCO. The tribunal accepts that the reason Megan Burt was not present was because the claimant had challenged her age, experience and ability to line manage her so the probationary review meetings were moved up to her line manager.

136. The minutes prepared on behalf of the respondent recorded that at the outset Jo Mark led the meeting by reading from the eight week probation report dated 29 November 2019 and explained that the claimant would be asked for evidence of what she had done to improve on identified areas in the report. The meeting was lengthy and continued on 24 February 2020 after the half term break.

137. The decision was to extend the claimants probation by 6 weeks.

138. The outcome was given at the end of the meeting (P522). Jo Mark confirmed that they did not feel that the claimant was making enough progress and extended her probation by 6 weeks. Whilst recognising that the claimant was passionate about her role there were some areas to improve on. In order to support the clamant they had dropped her teaching time. The onus was on the claimant to book an agenda item for SLT to give updates.

139. With regard to communication there needed to be more effective communication directly to teachers rather than by email. There should be no more complaints around communication.

140. The claimant was encouraged to organise parental drop ins and coffee sessions. There could be a parent clinic with Megan Burt who could take on SLT issues,

141. Learning walks to be carried out with monitoring and analysis of the impact of interventions.

142. A rapid improvement plan needed to be developed.

143. CPD was to be provided for staff.

*PID 18 - Written disclosure Emma Wilson Downes 13 and 24 February 2020 regarding various comments made during probationary review meeting*

144. The claimant relies on two statements made by her recorded in the minutes of this meeting. The first was on the second page (page 512) where the claimant stated: –

> "I have been trying to do this job and have not been supported by the leadership team of this. It is not fair I am working 12 hours per day to meet needs and I am talking to parents and outside providers, but it is not my fault that we do not have resources. There is a lack of support and I am working hard to do this"

145. The next matter she relies upon is on page 3 of the minutes where she stated:

> "It is not my call how the department is resourced, and you need to be specific and where Emma was in meetings with George etc and knows there are particular parents with disproportionate demands and our inability to meet their needs. I was not being unprofessional but reality, to staff and parents. We cannot move forward".

146. The respondent in closing submissions accepts that the claimant broadly spoke as alleged. They deny however that the passages relied upon amount to information stating that both lack specificity. Neither could reasonably be said the respondent argues to tend to show any of the section 43B matters relied upon. Further they argue that the claimant did not believe at the time she was speaking in the public interest but was defending her performance.

147. On 6 March 2020 the claimant was handed a letter by Rachel Bay inviting her to a third investigatory meeting on 13 March 2020. The claimant accepts that she ripped up the letter and returned it to Emma Wilson - Downes "declaring this action to be abusive and that I would also need to refer it to the governors" (paragraph 117 claimant's witness statement). The claimant asserts that the letter did not say what the investigation was about but that she worked out it was the Child B incident of 23 January 2020 and she considered that this third attempt at an investigatory meeting was "blatant bullying". This meeting was not held.

148. As the claimant points out in her witness statement in early March 2020 the government instructed that all students and staff self-isolate for 14 days if they showed any COVID 19 symptoms. Like other schools the Academy ceased to operate normally between 6 and 20 March 2020 prior to the first national lockdown.

*PID 19 - Written disclosure to Emma Wilson Downes 20 March 2020 regarding department strain and parental expectation*

149. The claimant was invited to a probation review meeting on 20 March 2020 (page 562). In her witness statement at paragraph 119 the claimant raised that this was only 26 days after the first probationary review. She suggests this was an impossible timeframe. That was not something she or her trade union representative raised at the outset of the meeting.

150. Although referred to in the list of issues as a written disclosure it would appear that these were oral statements made at the review meeting. The minutes appeared at page 567 of the bundle. The claimant relies on her comment in the final paragraph of page 6 of the minutes "give me positive support and motivate me on the path I am on. If you want me to be effective. I want to be able to be honest, we all need to be honest…" When asked if she had obtained support that had been offered from the Thomas Gainsborough School the claimant replied that she had but "it is very important to understand we are different to them. They are selective … we are dealing with some heavy strains on our Department that do not exist there. I would like to take up support there more."

151. She also relies on her comment at the top of page 7 of the minutes "I am direct and life's too short. As you know there are parents who expect the earth, and we need to communicate honestly with parents on what we can provide. I am honest and straight with people [parents] and will say if it is not possible".

152. Again the respondent accepted in closing submissions that the claimant spoke as alleged but states again that neither passage relied upon amounts to information and both are unspecific. They also claim that the claimant could not reasonably have believed that either passage tended to show a breach of a section 40 3B matter and nor did she believe she was speaking in the public interest.

153. The tribunal notes that at that meeting the claimant made her feelings about Megan Burt, her line manager, clear. She stated that she would like not to have to explain everything to her and to not be undermined by her. The claimant wanted to give her jobs and stated 'I have a line manager who is telling me to do things she doesn't have an understanding of. I would like her to do things I want her to do, and I set the agenda…'

154. The outcome was given at the meeting that the claimant's employment would be terminated on the grounds of an unsatisfactory probation period. Given the decision it was confirmed that the claimant's last day would be the 20 March 2020 and she would not be expected to work from home during her notice period. She was advised of her right to appeal. A letter confirming this was sent dated the 23 March 2020 (page 585). This confirmed that the key points considered were:

    154.1 That the targets set at the previous reviews had not been achieved to a satisfactory standard
    154.2 Whilst recognising the claimants ideas and priorities they had not seen them put into action to provide a positive outcome for the students and at times 'you have prioritised your own ideas above the needs of the school as directed by the SLT'
    154.3 Despite the reduction in teaching time they had not seen sufficient progress
    154.4 Complaints from staff, students and parents were still being received. Whilst acknowledging that can occur the frequency of those in the probationary period was unsatisfactory.

154.5 Whilst the claimant had stated that staff were slowing her progress she had not taken sufficient steps to address that issue.

*PID 20 - Written disclosure to Rosemary Prince 3 April 2020 regarding "the main issues" document for appeal hearing*

*PID 21 - Written disclosure to Rosemary Prince 3 April 2020 regarding preparation for appeal hearing document for appeal hearing*

155. It is not necessary for the tribunal to deal with these subsequent alleged disclosures as they post date 20 March 2020 by which point all the alleged detriments and the decision to dismiss had taken place. The claimant does not rely on the outcome of the appeal as a detriment.

156. The appeal was heard by Rosemary Prince on 3 April 2020. The claimant was represented by her trade union. The appeal was not upheld.

## RELEVANT LAW

157. **Employment Rights Act 1996**

***43B Disclosures qualifying for protection***.

(1) In this Part a "qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

***47B Protected disclosures.***

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

***103A Protected disclosure.***

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

## Relevant case law

158. Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 held that in order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act. The ordinary meaning of giving "information" is conveying facts. For example, communicating information about the state of a hospital would be stating that: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". However, an allegation about the same subject-matter would be "you are not complying with the health and safety requirements".

159. The concept of 'information' however may include an allegation. In Kilraine v London Borough of Wandsworth [2018] IRLR 846 the court held that;

> In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained in Chesterton Global, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.
>
> Whether a particular disclosure satisfies the test in s 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in Cavendish Munro, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with Health and Safety requirements', the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime.

160. Sales LJ stated that:

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>
> Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.

161. The court in Korashi v Abertawe Bro Moargannwg University Local Health Board [2012] IRLR 4 discussed the requirement of a 'reasonable belief' and stated that 'what is a "reasonable belief" in s.43B involves an objective standard

– that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser.'

162. The recent case of McDermott v Sellafield Ltd and others [2023] IRLR 639 accepted that an expression of opinion can convey information. Referring to the guidance in Kilraine (above) it stated that:

> Accordingly, whether there has been a disclosure of information depends on whether the communication has 'sufficient factual content and specificity' so as to be capable of showing one of the matters listed in sub-section (1) – that is, capable of tending to show relevant wrongdoing within s 43B(1). Just as some communications which may be described as communicating an allegation will pass that test, but some will not, so some communications which may be described as communicating an expression of opinion may pass that test, but others will not.

163. The issue of whether the disclosure has been made in the public interest was considered in Chesterton Global Ltd and another v Nurmohamed, Public Concern at work (Intervener) [2017] IRLR 837.CA. In addressing section 43B of ERA 1996 the Court held that:

> The tribunal has to ask: –
>
> a whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and
>
> b whether if so that belief was reasonable.
>
> Element b requires the tribunal to recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Whether the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.
>
> The question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people serving that interest. That is the ordinary meaning of "in the public interest". The criterion does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably believed so to be…"

164. In Fecitt & others v NHS Manchester [2012] IRLR 64 the court considered the particular wording in section 47B, the detriment provisions and found that

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…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. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so.

165. In Kong v Gulf International Bank (UK) Ltd [2022] IRLR 85 Simler LJ reviewed the case law in connection with dismissal for trade union activities, protected disclosures and victimisation, stating that they had a common feature, namely an enquiry into the employer's reasons for reacting to something that the individual has said or done. She considered that a constant approach emerged that each case turns ultimately on its own facts. She went on to stated that:

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I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in Page, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.

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Thus the 'separability principle' is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.

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Likewise, what was said in Martin, about being slow to allow purported distinctions between a protected complaint and ordinary unreasonable behaviour, is also not a rule of law. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. The phrases used in the authorities (in the context of trade union activities, victimisation and whistleblowing) capture

the flavour of the distinction, but were not intended to be treated as defining, and do not define, those cases where separability would or would not apply. They cannot properly be read in this way. In the wide spectrum of human conduct that might be relied on by decision-makers, each end of the spectrum is easy to identify as Phillips J observed in Lyon: gross misconduct or conduct that is 'wholly unreasonable, extraneous or malicious' at one end; and wholly innocent, blameless conduct at the other. Between those two ends of the spectrum difficult questions of fact arise, and the conduct and circumstances of the particular case will require close consideration. But the authorities provide no factual precedent or objective standard against which to assess the conduct relied on in a particular case.

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The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

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All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will 'cry out' for an explanation from the employer, as Elias LJ observed in Fecitt, and tribunals will need to examine such explanations with particular care.

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The legislation confers a high level of protection on whistle-blowers for sound reasons, and the distinction should not be allowed to undermine that important protection or deprive individuals of protection merely because their behaviour is challenging, unwelcome or resisted by colleagues. As Mr Laddie emphasised, whistleblowing by its nature, frequently involves an individual raising concerns about wrongdoing committed by individuals, frequently colleagues, commonly working in the same workplace. It is a natural human response to be defensive and resist criticism. Not only is it likely that the subject or content of a protected disclosure will be unwelcome, the manner in which it is made, repeated or explained, may also be unwelcome, leavng individuals feeling it necessary to restate their concerns, and increasing the prospect of being perceived as an irritant or thorn in the employer's side. Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur. The way in which the protected disclosure is made is also, in general, part of the disclosure itself, unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable.

166. As was made clear in Kuzel v Roche Products [2008] IRL 530 s103A falls within Part X of the ERA dealing with unfair dismissal. As such the burden is on the employer to show the reason for dismissal. It was stated that:

> When an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must produce some evidence supporting the positive case. That does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
>
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> The employment tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the employment tribunal that the reason was what he asserted it was, it is open to the employment tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or of logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must be that asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.'

## Submissions

167. Both parties handed up written submissions which it is not proposed to recite here. They also addressed the tribunal orally.

## CONCLUSIONS

### Protected disclosures

168. *PID 1 4 – 6 September 2019 claimant's alleged protected disclosure at a meeting with Anthony Williams, Head teacher.*

The respondent in closing submissions accepted that the claimant spoke to Mr Williams in the terms alleged. There was however insufficient information provided by the claimant for this to amount to a disclosure. As made clear in the case law there must be sufficient factual content and specificity so as to be capable of showing a relevant wrongdoing within s 43B(1) and there was not, even on the claimant's own case. The tribunal accepts the submission made on behalf of the respondent that is unlikely that the claimant would have had sufficient details in the first week of her employment. On her own evidence there is nothing to suggest that in this alleged disclosure she was showing that

the health and safety of any SEND pupil was being or was likely to be endangered and there is no reference to concealment.

169. *PID 2 - 9 – 13 September 2019 alleged protected disclosure at a meeting with Steve Elliot, line manager.*

From the claimants witness statement and oral evidence the tribunal is satisfied the claimant is actually relying on only one alleged disclosure at the line management meeting of the 19 September. All that the notes of that meeting show is that they were discussing staffing which is to be expected of a new member of staff with her line manager. Emma Wilson – Downes did not dispute that such a discussion probably took place. The raising of such a matter is not however a disclosure of information such as to make it a protected disclosure. There is not sufficient specificity for it to amount to 'information' within the meaning of section 43B. Again, on the claimant's own evidence there is nothing to suggest that in this alleged disclosure she was showing that the health and safety of any SEND pupil was being or was likely to be endangered and there is no reference to concealment.

170. *PID 3 - Claimants alleged protected disclosure at a meeting with Jo Mark (Deputy head teacher) - 23 to 27 September 2019*

The tribunal has concluded from the evidence that this was a usual discussion with a deputy head about staffing levels and not the disclosure of information with sufficient detail to fall within the meaning of section 43B. There is nothing to suggest a reasonable belief that what was said tended to show a section 43B matter. The claimant's own case is that Jo Mark agreed to the need to recruit more staff. That does not suggest the breach of any legal obligation.

171. *PID 4 - Claimants alleged protected disclosure at a meeting with Wayne Lloyd and Head Teacher at Thomas Gainsborough school 25 September 2019*

Even on the claimant's own case this was just a discussion and not a disclosure of information within the meaning of section 43B.

172. *PID 5 - Alleged protected disclosure to Jo Mark verbally week commencing 7 October 2019*

The claimant alleges at paragraph 42 of her witness statement that she spoke to Jo Mark in her office and said "no matter how I try to reorganise the timetable, we cannot possibly meet the needs of our SEND children with our present level of staffing". She states that Jo Mark did not deny the problem. Even on the

claimant's own evidence this was just a routine discussion with a senior colleague about staffing. It was not the disclosure of information with sufficient detail for it to amount to a protected disclosure. The alleged disclosure as pleaded does not go to show any of the section 43B matters.

173. *PID 6 - Alleged protected disclosure by email to Wayne Lloyd 10 October 2019*

The tribunal is not satisfied that this email was ever sent. It is satisfied that Emma Wilson – Downes knew nothing about it. If it was sent by the claimant from her personal email it would have been possible to produce a copy.

174. If it was sent it was asking for a discussion, not disclosing information. The claimant relies on the wording 'I also want to be clear about our legal position in relation to inclusion…' She may well have wanted that and to have a discussion but that is not the disclosure of information which the claimant reasonably believed went to show the breach of one of the matters listed in section 43B.

175. *PID 7 - Alleged protected disclosure in a meeting with Emma Wilson - Downes 28 October to 1 November 2019.*

This was a workplace discussion. The claimant was not there disclosing information which would suggest the breach of a legal obligation.

176. *PID 8 - Alleged protected disclosure in a meeting with Megan Burt 18 to 22 November 2019*

The claimant's evidence about this alleged disclosure was more concerned with the difficulties she had in speaking to Emma Wilson – Downes. The tribunal does not find that she was disclosing information in this discussion with Megan Burt.

177. *PID 9 - Alleged disclosure on 23 November 2019 to the headteacher.*

This was a staffing discussion not the disclosure of information.

178. *PID 10 - Disclosure to Joanne Mark week beginning 23 November 2019 regarding staffing and compliance with EHCPs*

The tribunal finds that this was another discussion about staffing. Not every conversation amounts to a protected disclosure and there is absolutely no evidence that this was.

179. *PID 11 - Written disclosure Emma Wilson Downes 26 November 2019 (supply cover email) regarding compliance with EHCPs*

The tribunal accepts that the claimant disclosed information in this email and the respondent also conceded that.

180. The claimant may well have believed that there was likely to be a failure to comply with the SEND Code. Having heard all the evidence including that of the Headteacher who had SEND experience the tribunal does not find that the claimant's belief was reasonable. The senior management were pointing out to her ways that they could be compliant by a different and in their view more appropriate use of the resources available to them. The tribunal has set out more general conclusions on reasonable belief and public interest below.

181. *PID 12 - Written disclosure Emma Wilson Downes 26 November 2019 (timetable email) regarding send department timetabling*

The claimant stated in evidence that Andrew McKenna when he sent the timetable they had worked on was making a protected disclosure on her behalf. There is no such concept within the Employment Rights Act provisions on protected disclosures, Section 43B referring to the 'worker making the disclosure'.

182. Whilst information may have been disclosed if the whole email chain is read the tribunal does not find that the claimant had a reasonable belief of one of the matters listed in section 43B. Jo Mark responded nearly instantly to the claimant's concerns with suggestions as to how appropriate support could be made available. As stated in the tribunal's findings the tribunal accepts the evidence of Emma Wilson – Downes and particularly that not all SEND children required 1 – 1 support all the time. Only one child required 1 – 1 support all the time and 6 others some of the time. The tribunal accepts that Emma Wilson – Downes view was that some of the children could be supported in small groups and with other interventions lead by other staff and not just from the SEND team. This could be the form tutor or a pastoral member of staff. For her it was about the appropriate deployment of staff. She explained in evidence about the timetabling of a 'shadow class,' such that the child could be moved back into their regular class if staff were ill or required elsewhere. She is of the view that support could have been more efficiently delivered in small groups than 1 – 1. Even if the claimant believed there was a breach of a legal obligation it was not a reasonable belief.

183. *PID 13 - Verbal disclosure to Megan Burt in 11 December 2019 meeting regarding Child A's EHCP*

The respondent accepts that the claimant spoke at this meeting as alleged and that this was information. It does not accept that it was a protected disclosure.

184. For the same reasons as in relation to the alleged disclosures above the tribunal has concluded that the claimant may have considered there was likely to be a breach of the SEND code but that was not a reasonable belief.

185. The claimant later raised with Malcolm Reeve the possibility of appealing the SEND tribunal decision concerning this child's EHCP and was advised by him that there were no grounds to do so and that it would be inadvisable. At the investigatory meeting the claimant made it clear that she had felt the need to preserve her integrity at the 11 December meeting. It was about that and not the public interest.

186. *PID 14 - Verbal disclosure to Joanne Mark 19 December 2019 regarding resourcing and EHCP requirements*

The respondent accepts that the claimant spoke as pleaded and that this amounted to information which the tribunal also accepts.

187. The tribunal does not however accept that the claimant had a reasonable belief in a breach of a section 43B matter as an explanation had been provided to her of how to reorganise her staff.

188. *PID 15 - Written disclosure to Megan Burt 21 January 2020 regarding SEND staffing*

The tribunal accepts, as does the respondent, that the claimant wrote to Megan Burt as alleged but on the 23 & 25 January 2020 and that taken as a whole it was disclosing information. It does not however find that there was a reasonable belief in a breach of any of the matters in section 43B. The claimant herself described this incident as 'minor' at the time when writing to Megan Burt. She could not therefore at the time have believed that the school was in breach of any legal obligation or that the child's health and safety were in danger. The claimant was giving her explanation as to what had occurred and not making a protected disclosure.

189. *PID 16 - Written disclosure Emma Wilson Downes 31 January 2020 regarding the defence statement for a disciplinary hearing*

This was, as described by the claimant, her 'defence statement' in which she explained her actions and why she needed to speak out but it is not a disclosure of information. It did not tend to show a breach of any section 43B matter and neither was it in the claimant's view in the public interest. It was defending her own position.

190. *PID 17 - Letter of 5 February 2020 to Chair of Governors, Sue Leon*

As accepted by the respondent the tribunal also finds that the claimant was disclosing information in that letter. The claimant may have considered the information demonstrated a breach of a legal obligation but the tribunal does not find that a reasonable belief.

191. *PID 18 - Written disclosure Emma Wilson Downes 13 and 24 February 2020 regarding various comments made during probationary review meeting*

The claimant relies on two specific extracts. The tribunal does not find that they disclosed sufficient detail to amount to 'information' within section 43B.

192. *PID 19 - Written disclosure to Emma Wilson Downes 20 March 2020 regarding department strain and parental expectation*

The tribunal does not find that there was sufficient detail disclosed for this to amount to the disclosure of information. It is not specific enough.

*Reasonable belief*

193. In addition to the conclusions above the tribunal has reached the following general conclusions on the issue of reasonable belief required under section 43B.

194. That information was demonstrating a failure to comply with a legal obligation is said to be the SEND Code of Practice. As set out at the beginning of the tribunal's findings the Code requires the school to 'use their best endeavours to make sure that a child with SEN gets the support they need – this means doing everything they can to meet children and young people's SEN'. The phrase 'best endeavours' is used. The tribunal accepts the submission of the respondent that this is not absolute.

195. The respondent does not have infinite resources and the funds they have must be managed. The senior management of the school were indicating to the claimant ways in which those resources could be managed but the claimant did not agree with them. She was entitled to that view but in the disclosure of information it was not a reasonably held belief that the respondent was in breach of its obligations under the Code.

196. The tribunal notes that Ofsted did not raise any issues with SEND provision in its report September 2021.

*Health and Safety*

197. In the list of issues the claimant also relies on the health and safety of any of the SEND children having been, being or likely to be endangered. The tribunal does not find that it was a reasonably held belief that the health and safety of any of the children were being endangered. The claimant was being encouraged by Megan Burt and Jo Mark with regard to the deployment of the staff that she had.

*Concealment*

198. In the list of issues the claimant also relied on sub section (f) of 43B(1) of 'information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed'. This allegation was not specifically put to the respondent's witnesses. The claimant's terminology in her evidence was being ignored and Emma Wilson – Downes not meeting with her.

199. There was a reasonable explanation from Emma Wilson – Downes that the claimant should go to her line manager Megan Burt or if necessary Jo Mark. The claimant may not have thought that Megan Burt was experienced enough to be her line manager but the respondent had placed her in a senior management position. When for example the claimant emailed Emma Wilson – Downes about Hayley Mason of the local authority wanting to meet with her she was told to direct the query to Megan Burt.

200. When the claimant was told it was not appropriate to discuss issues in front of Child A's parents and the representative of the local authority it was because she was arguing in front of them not because the respondent was trying to conceal anything.

**Detriments**

201. The claimant relies on all the investigatory meetings and probation review meetings as detriments 'on the ground that' she made protected disclosures. The tribunal has concluded that was not the case. Applying the language in Fecitt the protected disclosure must 'materially influence' the decision maker. In Fogg the tribunal was urged to consider what motivated the decision maker. The tribunal is satisfied that the respondent was not motivated by any alleged protected disclosures but by the claimant's actions. The following conclusions are given on the basis that the claimant had established that she had made protected disclosures which this tribunal is satisfied she had not.

202. The tribunal also accepts as correct the submissions made on behalf of the respondent at paragraph 83 onwards of counsels closing submissions with regard to causation.

203. Mrs Wilson – Downes was not working full time at the school until 28 October 2019. The first alleged disclosure was made to Mr Williams who left shortly after this conversation in early September 2019. He played no part in any investigatory or other meetings.

204. The next alleged disclosure was made to Steve Elliot and it has not been alleged that he played any part in the alleged detriments.

*Investigations*

205. The 14 October 2019 letter of expectation was sent to the claimant following the investigatory meeting on the 11 October. This came about because of the claimant's email to parents of Child E in which she referred to the parents 'venom'. At that point the claimant does not allege she had made any

disclosures directly to Emma Wilson – Downes and there is no evidence that the earlier alleged disclosures were passed onto her. The first alleged disclosure said to have been made directly to the headteacher was that of the 1 November 2019, after the event which led to this investigatory meeting.

206. The decision to investigate was an entirely reasonable one in all the circumstances. The parent had complained. The outcome of a letter of expectation was the lowest sanction short of taking no action at all.

207. The next alleged detriment is said to be the disciplinary investigation into the meeting of the 11 December 2019 following on the claimant's case 'whistleblowing incident on same day'. That would be alleged disclosure 13 to Megan Burt in the meeting. As has been more than clear in the evidence the claimant was investigated for the manner in which she behaved at that meeting not what she said. The allegations were that she acted unprofessionally, raised her voice, discussed issues she had been told were inappropriate to discuss at that meeting and was disrespectful to Megan Burt.

208. There was absolutely no evidence that the reason for that investigation was the making of protected disclosures. Although the claimant denied shouting she did not dispute she had spoken loudly to drown other out. Rachel Baty felt the need to go into the room due to the level of voices.

209. Not only did this behaviour occur in front of the parents who were made to feel their child's needs were not as important as others but in front of the local authority representative with whom the school had to continue to work.

210. The way in which the respondent dealt with the matter was fair and reasonable in the circumstances. The allegation was worded as misconduct not gross misconduct and the sanction given was a first written warning to remain on the claimant's file for 3 months and as such a relatively low level sanction.

211. The next matter relied upon is the 6 March 2020 when the claimant was advised of an investigation into Child B going to the toilet unaccompanied. This again followed a complaint by the parents and it was reasonable in all the circumstances for the school to investigate it. There is no evidence to support the suggestion that this was conducted on the ground that the claimant had made protected disclosures. The meeting did not in fact take place as the claimant ripped up the letter.

212. In addition to the parent's complaint other relevant factors in the decision to investigate were that the child had Down's Syndrome, needed continuous 1-1 support including with toileting and had a low tolerance to alarms. The child had actually gone missing for a while until found. It was the second such incident with the child.

213. The tribunal accepts that even an investigation as a stage in the disciplinary process can amount to a detriment but these were not conducted on the ground that the claimant had made protected disclosures.

*Extension of probationary period*

214. Again the tribunal accepts, as does the respondent, that the extension of the probationary period can amount to a detriment. The probation was extended

on 24 February 2020 by 6 weeks. It is not clear which specific disclosures the claimant relies upon is asserting she was treated detrimentally for making them. As has already been noted some of the alleged disclosures prior to this period were made to those not involved in the extension of the probationary period.

215. The respondent had cause to extend the probationary period and in so doing Mrs Wilson – Downes was not motivated by any protected disclosures. Despite the letter of expectation the claimant had continued to attract complaints from parents, students and colleagues and communication was raised as an issue at the first probation meeting on 29 November 2019.
216. Some actions set out at that first probation meeting for example not arranging CPD or rewriting her rapid improvement plan had not been completed.

217. Ongoing concerns had been raised at line management meetings.

218. The probationary review meeting was held in two parts overlapping the half term break and the claimant does not raise any issues as to the way in which the meeting was conducted or that adjournment. The minutes are clear that the claimant was made well aware of the issues of concern to the respondent and was given every opportunity to put her version of events.

*Additional tasks required of the claimant during her extended probation period – 24 February to 6 April 2020.*

219. The claimant accepted in cross examination that all of these tasks were required in her job description. As such they were routine elements of the claimants role and being required to do them cannot amount to a detriment. They are set out above in the tribunal's findings concerning that meeting. They were what the claimant as a SENDCO was required to do and to require that of her cannot be detrimental. It was certainly not being required due to any alleged protected disclosures but because they were required of the role

*Dismissal*

220. The sole or principal reason for the termination of the claimant's employment was not the making of alleged protected disclosures. The respondent found the claimant not to have fulfilled the expectations contained in her job description and they decided not to extend her probationary period further.

221. Although the claimant acknowledged at the final probationary meeting that having her teaching workload reduced had made a significant difference to her she had still failed to do more than one learning walk, was behind in certain identified areas, for example improving communication, arranging drop ins and attending SLT meetings.

222. The respondent received complaints from parents, children and staff during the extended probationary period.

223. As a result of the sending of the email to the parents of Child E the claimant was issued with a 'letter of expectation' dated 14 October 2019. The incident had occurred on the 3 October 2019 just over one month from when the claimant commenced employment on the 1 September. The letter (which was not a disciplinary sanction) made it clear in particular that the claimant must not use 'any language which cause offence including making unprofessional or personal statements'. Despite this, it was then necessary for the respondent to investigate the way in which the claimant conducted herself at the meeting with the local authority and Child A's parents on 11 December 2019.

224. That investigation was not about what the claimant said but the manner in which she was speaking and raising her voice (which she admitted) in front of the parents and the local authority representative.

225. Following that investigation the respondent then had to investigate Child B attending the toilet unaccompanied on 23 January 2020. They were bound to do so following a complaint by the parents. The investigation meeting did not in the end take place following the claimant ripping up the invite.

226. The respondent did not end the probationary period in an arbitrary manner. Firstly the probationary period was extended. This would have alerted the claimant to the fact that the respondent had concerns about her performance. The claimant was given a list of tasks to be completed during the extended probationary period. The tribunal has accepted they were routine aspects of the claimant's role and within her job description.

227. The claimant's probationary period was ended not because of any protected disclosure(s) but because she had not performed satisfactorily during the extended period.

228. There were no protected disclosures. In the event the tribunal had found that there were the claimant was not subjected to detriments 'on the ground that' she had made disclosures. Further, 'the reason, or if more than one the principal reason' for the claimant's dismissal was not the making of any disclosures.

229. It follows that all claims fail and are dismissed.

Employment Judge Laidler

Date : 18 December 2023

JUDGMENT SENT TO THE PARTIES ON

22 December 2023

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FOR THE TRIBUNAL OFFICE