Case No:- 3309665/2022;
3315467/2022.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Fadipe	v	Active Learning Trust

Heard at: Cambridge

On: 15, 16, 17 and 18 April 2024
In Chambers Discussions: 18 April 2024
Judgment Given: 22 April 2024

Before: Employment Judge Tynan

Members: Mrs W Smith and Mr S Holford

Appearances:
For the Claimant: In person
For the Respondent: Mr S Peacock, Solicitor

JUDGMENT having been sent to the parties on 24 May 2024 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Respondent operates a number of schools and colleges, including the Neal Wade Academy in March, Cambridgeshire ("the Academy"). The Claimant was employed at the Academy, initially as an English teacher. Her interest in, indeed her passion for, the English language was evident throughout the hearing. She is understandably proud of having overcome an abusive childhood to become a teacher and equally takes pride in the contribution she has made to the educational experience of the pupils she has taught during her teaching career.

2. The Claimant's continuous employment with the Respondent began on 4 September 2018 and ended on 31 August 2023 following her resignation on three months' notice. She asserts that she was constructively dismissed and pursues various complaints against the Respondent that she was discriminated against as a person with a disability.

3. The Respondent concedes that throughout her employment with it the Claimant was disabled by reason of the mental health conditions of obsessive compulsive disorder ("OCD") and post traumatic stress disorder ("PTSD"). Knowledge in relation to PTSD is only conceded with effect from 14 June 2022; however, nothing turns on this since the acts complained of span the period from 25 August 2022 until 31 August 2023 when the Claimant's employment ended.

The Hearing

4. Although there were various 'bumps in the road' in the course of the hearing, including the occasional need for the Tribunal to provide the Claimant with a firm steer, we are not concerned to pass judgment on the Claimant or her former colleagues in terms of their teaching skills or professional or personal attributes. However, given that the Claimant has directed critical comments at the Respondent witnesses, calling into question their, and indeed others' honesty and integrity, we think it important that we observe that this case, as with many of the cases that come before the Tribunals, involves differences of perception and recollection. It is not one of those relatively rare cases in which a witness has lied or misled or sought to mislead the Tribunal, let alone one of those exceptional cases in which a party's witnesses have colluded in order to maintain untruths. It is regrettable that the Claimant has seen fit to question others' honesty and integrity; her allegation and assertions in that regard have not been objectively well-founded and have only served to undermine her own credibility.

5. We are satisfied that, as the Claimant did, the Respondent's witnesses each endeavoured to provide a truthful and accurate account of events, even if the parties' respective accounts differ and conflict in certain respects.

6. There were three bundles of documents. For convenience we shall refer to the Respondent's bundle as the 'Hearing Bundle' and to the Claimant's two bundles respectively as the 'First and Second Supplementary Bundles'. The page references in these Reasons correspond to those Bundles.

7. The Claimant gave evidence and on behalf of the Respondent we heard evidence from:-

    7.1. Elaine Hammond, the Respondent's Director of People.

    7.2. Graham Horn, the Academy's Principal.

    A significant element of the claim concerns comments allegedly made by Ms Hammond and Mr Horn, which were overhead by the Claimant on 25 August 2022.

    7.3. Elaine Graham, Director of Operations at the Academy.

    7.4. Stephen Bradbury, Director of IT at the Academy – for clarity, his role is a teaching one and at the relevant time included responsibility for Media as well as IT. With effect from September

2020, Mr Bradbury became the Claimant's line manager. Whilst she evidently does not hold him in high regard, and took the opportunity during the hearing to criticise him in somewhat trenchant terms, she has not pursued any legal complaints against the Respondent with reference to any alleged acts or omissions of his.

7.5. Craig D'Cunha, Executive Head Teacher at Chantry Academy, another Academy within the Trust.

Mr D'Cunha decided the Claimant's grievance (at the first stage) in respect of the comments allegedly overheard by the Claimant on 25 August 2022.

8. There was also a witness statement from Jim Rowland, Head of School at the Academy. The Respondent decided in the course of the hearing not to call Mr Rowland to give evidence. We have read his statement but attach limited weight to it given his non-attendance at Tribunal.

The Law

Unfair Dismissal

9. Section 94 of the Employment Rights Act 1996 ("ERA") provides,

> 94. The right
>
> (1) An employee has the right not to be unfairly dismissed by their employer.

10. Section 95 ERA 1996 provides,

> 95. Circumstances in which an employee is dismissed.
>
> (1) For the purposes of this Part an employee is dismissed by his employer if …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

11. The Claimant claims that she resigned by reason of the Respondent's conduct. The last in time matter identified by her in that regard is either a letter she received from Mr D'Cunha's letter dated 21 December 2022 or, if later, the Respondent's alleged failure to take appropriate action against Ms Hammond and Mr Horn in respect of their alleged comments on 25 August 2022.

12. It is an implied term of all employment contracts that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them - Malik v Bank of Credit and Commerce International SA [1997] UKHL 23. The Claimant relies upon the matters

referred to in paragraphs 22(a) – (d) of her Further and Better Particulars of Complaint document as breaches of the 'Malik' implied term of trust and confidence.

13. A claimant must have relied upon the conduct complained of in resigning their employment. Furthermore, it is not every breach of contract that will justify an employee resigning their employment without notice. The breach or the matters collectively complained of must be sufficiently fundamental that it or they go to the heart of the continued employment relationship.

14. The starting point in this regard are the observations of Lord Denning MR, in Western Excavations (ECC) Ltd v Sharp [1977] EWCA Civ 165, including that an employee "must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". However, his often cited comments have been developed in subsequent authorities, notably Bashir v Brillo Manufacturing Co [1979] IRLR 295, W. E. Cox Toner (International) Ltd. v Crook [1981] ICR 823, Bournemouth University Higher Education Corporation v Buckland [2010] EWCA Civ 121; [2010] ICR 908; and Chindove v William Morrisons Supermarkets Plc, UKEAT/0201/13. The principles have recently been reviewed by the EAT in Brooks v Brooks Leisure Employment Services Ltd [2023] EAT 137 and in Leaney v Loughborough University [2023] EAT 155.

15. In Leaney, the EAT considered the circumstances in which an employee may affirm the contract. HHJ Auberbach said:

> "19 … the relevant general principles may be summarised as follows. The point is that, where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation. Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party's conduct as having brought the contract to an end (unless or until there is thereafter further relevant conduct on the part of the offending party, a point discussed in Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978; [2019] ICR 1).
>
> 20. The innocent party may indicate by some express communication that they have decided to affirm, but affirmation may also be implied (that is, inferred) from conduct. Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period.

He also noted the following passage from Chindove:

> "26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the

time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test."

Disability Discrimination

16. The Claimant's discrimination complaints are pursued under §.13, 15 and 26 of the Equality Act 2010 ("EqA").

17. Section 13(1) of EqA 2010 provides,

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

18. Section 15 of EqA 2010 provides,

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

19. Section 26 of EqA provides,

> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic; and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

20. In order to succeed in any of her s.13, and indeed s.26, complaints the Claimant must do more than simply establish that she has a protected characteristic and, in the case of s.13, that she was treated unfavourably or, in the case of s.26, that she was subjected to unwanted conduct: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said in the context of s.13 that a Claimant must establish something "more" than unfavourable treatment and a protected characteristic, even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.

21. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference the Tribunal must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. In the case of s.13, this is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of less favourable treatment on the relevant protected ground. In this case the Claimant does not contrast her treatment with how the Respondent allegedly treated other non-disabled employees. Instead, she contrasts her treatment with how the Respondent would have treated a hypothetical comparator, namely a non-disabled English teacher.

22. Other material that is capable of supporting the requisite inference of discrimination would be a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory conduct, might in some cases suffice. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

23. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation for the differential treatment or unwanted conduct becomes relevant.

24. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence; it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> …dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Findings of Fact and Conclusions

25. The Claimant has brought two Tribunal claims against the Respondent, though by the time they came before Employment Judge Tynan in June 2023 for case management (following an earlier hearing before EJ George in February 2023), she was no longer pursuing any of the matters raised in the first claim. The Claimant was legally represented at the her hearing; her solicitor intimated that a third claim was to be brought, the Claimant having given notice resigning her employment by then. In the event, a claim of unfair constructive dismissal was introduced by way of an amendment to the existing claims. Notwithstanding her decision in that regard, taken with the benefit of legal advice, she has continued to make extensive reference to those withdrawn complaints in pursuing her other claims at the final hearing. Indeed, we observe that they seem to have at least equal significance in the Claimant's mind to the issues identified within the agreed List of Issues.

26. Whilst it is, of course, every Claimant's right to put forward evidence in respect of background matters, particularly in order to provide context, it is unusual for details pertaining to withdrawn claims to be advanced with perhaps the level of detail they have in this case. We are alive to the possibility that this may be connected in some way to the Claimant's disability, even though she has not suggested this herself. Whatever the reason, in coming to this judgment, we have remained focused on the agreed List of Issues, as supplemented by the further issues in relation to her unfair dismissal complaint, summarised in the Further and Better Particulars of Complaint document submitted by the Claimant's former

solicitors on 21 November 2023 (respectively, pages 87 – 90 and 96 – 100 of the Hearing Bundle).

27. Because disability is conceded, we were not referred in detail to the various materials in the Bundles regarding the Claimant's health. Nevertheless, we took some time to familiarise ourselves with those materials so as to ensure that we made appropriate adjustments and allowances in the case. The Claimant has been assessed as having significant OCD symptoms, severe anxiety, moderate depression and severe distress. We ensured regular breaks in the proceedings (and reminded the Claimant that she could leave the hearing room at any time if she was feeling overwhelmed, which she did at one point in the hearing). We accommodated the Claimant's need to regularly check and order her papers given her propensity for intrusive, obsessive thoughts. We remained alert to the pressures she was potentially under, and made allowance for this in terms of how she expressed herself from time to time, as well as in terms of her likely impaired ability to concentrate and focus. Her susceptibility to stress and to feelings of distress was all too evident in the course of her affecting closing submissions.

28. Mr Peacock has summarised the Respondent's evidence regarding the background to this dispute at paragraphs 5 – 25 of his written submissions. Although the Respondent and, in turn Mr Peacock, have endeavoured to set the scene in a fair and balanced way, Mr Peacock has inevitably focused upon the immediate background, which has its origins in a flexible working request submitted by the Claimant on 26 May 2022. We do not lose sight of the fact in this case that the parties' working relationship dated back some years.

29. In summarising the immediate background, Mr Peacock refers to a meeting between the Claimant and Mr Horn on 12 July 2022 which seemingly concluded on the basis that the Claimant expressed herself to be happy with a proposed 70% timetable as well as grateful that it had been facilitated. Mr Peacock identifies that later the same day the Claimant expressed unhappiness because she perceived the timetable to be "filled up with a multitude of KS3 IT lessons". Although her concerns may have extended beyond that one issue, Mr Horn, who was copied into the email, asked Mr Rowland to facilitate a further meeting with the Claimant (page 277). Accordingly, even if he felt that they had enjoyed a positive and constructive discussion earlier that day (and by inference that the Claimant's concerns had been addressed to her satisfaction), he clearly understood, on being copied into the email to Mr Bradbury, that the Claimant either still had residual concerns or that new concerns had arisen in her mind.

30. Be that as it may, what is relevant we think is that Mr Horn evidently remained committed to finding a solution for the Claimant. His email to Mr Rowland does not evidence frustration or annoyance with the Claimant, or any inclination to subject her to any form of detrimental treatment for having or raising concerns. With the benefit of hindsight he might have trodden a little more gently when it emerged a day or two later that the Claimant was not signing in and out of school as required. However, we do not consider that Mr Rowland's subsequent letter of 14 July 2022 (page

280 of the Hearing Bundle) was a reaction to the Claimant's concerns, or otherwise indicative of a discriminatory or retaliatory mindset. Of course, if the Claimant believed that Mr Rowland's letter, issued at Mr Horn's request, was an act of discrimination or a repudiatory breach of contract, no legal claims have been pursued by her in that regard.

31. The Claimant's legal complaints are founded in the events of 25 August 2022 and how the Respondent dealt with them. In the period leading up to those events, Mr Horn became aware that the Claimant had offered to colleagues that she would take the lead on a collective grievance. He believed any such grievance to be unfounded. On 15 July 2022 the Claimant informed Ms Hammond that she had "put in for a tribunal". Ms Hammond understood from this that the Claimant had contacted acas pursuant to the early conciliation scheme. It lent an impression that the Claimant was unwilling to explore resolution through discussion or even via the formal grievance processes available to her. Separately, the Claimant submitted more than one complaint in respect of various other matters, including a formal grievance in respect of four named individuals, including Horn and a six point, somewhat personal grievance against Mr Bradbury. In the course of cross examining the Claimant, and again in his closing submissions, Mr Peacock referred to the Claimant as having raised "myriad" issues in the weeks or months leading up to the events of 25 August 2022. The Claimant objects to that description, citing the Greek and Latin etymology of "myriad" as a unit of ten thousand. We understand, and notwithstanding her OCD we think she too understood, that it was intended by Mr Peacock to convey that a not immaterial number of issues had been raised by the Claimant within a relatively short period of time, resulting in complaints and grievances, as well as a Tribunal claim, in circumstances where Mr Horn and others believed that they had in fact addressed the fundamental issue of concern to the Claimant, namely her flexible working request.

32. The other significant context in terms of the events of 25 August 2022 is that pupils' GCSE results were released and published that day. The results that year in IT and Media were particularly poor. Mr Peacock describes them, not unreasonably, as disastrous. Overall, we understand the student pass rate to have been about six per cent. On the Claimant's analysis, the pupils taught by her achieved a twelve per cent pass rate. On any view that still represents a particularly poor outcome, even allowing for the fact the Claimant apparently had no training or relevant experience in the subject areas. Pupils were understandably angry and upset, as were parents.

33. With the benefit of hindsight it may not have been the optimum day for Mr Horn and Ms Hammond to plan to meet with the Claimant to discuss her outstanding concerns. However, it was one of a relatively limited number of days during the school summer holidays when Mr Horn and Ms Hammond would have been available at school to meet with the Claimant. The poor exam results would not necessarily have been anticipated by them. The fact that a meeting was arranged on GCSE exam results day evidences to us that Mr Horn was prioritising the matter, and that he and Ms Hammond hoped to secure a satisfactory resolution for the Claimant ahead of and in time for the start of the autumn school term.

34. Ahead of the planned meeting, the Claimant was unaware that Mr Horn and Ms Hammond planned to address the Claimant's concerns by offering for her to return to teaching English at the Academy, in ordinary circumstances an outcome she would undoubtedly have been interested to pursue.

35. Mr Horn and Ms Hammond arranged to meet in advance of their scheduled meeting with the Claimant. Mr Horn arrived late to this 'pre-meeting', which took place in Mrs Graham's office. The Claimant's recording of the discussion confirms that Mrs Graham spoke only briefly; her comments are essentially inaudible. We find that Mrs Graham did not actively participate in the discussion, which reflects that Mr Horn was seeking to resolve a potentially difficult and rapidly escalating workplace issue with senior HR input from Ms Hammond.

36. The Claimant arrived ahead of time for the meeting with Mr Horn and Ms Hammond. She seated herself outside Mrs Graham's office. There is, and could be, no suggestion that she set out to entrap Mr Horn and Ms Hammond, or that she planned to listen in on their conversation. Their conversation was audible outside the room. As she listened, the Claimant took a notebook from her bag and began to note down certain comments, before proceeding to record the remainder of their conversation on her personal iPad. Although there is an issue between the parties as to whether covert recording is addressed in either the Academy's or the Trust's rules, policies and procedures, at an early point in her evidence the Claimant expressed her understanding that covert recording within the workplace is ordinarily inappropriate. Her evidence was that it was at the point at which the discussion had become "unlawful" that she was justified in documenting and recording it. She claims that a second recording of her subsequent brief interaction with Ms Hammond was entirely by chance and likely triggered when she placed her iPad into her bag.

37. The Claimant's handwritten notes of Mr Horn and Ms Hammond's conversation are at pages 250 and 251 of the First Supplementary Bundle. They are described in the Index as Handwritten Notes 1 and Handwritten Notes 2. In contrast to the notes at page 251, the notes at page 250 are not of a uniform style. Some of the documented comments are spaced out, whilst others are more bunched together, and at least two comments appear at the right hand margin of the page. It seems, to our eye, that the notes were made using more than one pen, since the tone and density of the ink seems to vary across the page. We cannot be entirely certain in the matter since we were only provided with a black and white copy of the notes; the original was not available for our inspection. Various comments have the appearance of having been inserted above, between or next to existing notes and comments. There are annotations in the margins to indicate the speakers. At least one margin note, "can that be used as evidence" may be a note by the Claimant to herself. Mr D'Cunha's name email address appear at the bottom of the notes at page 250, with no obvious indication that Mr Horn or Ms Hammond referred to him in the course of their conversation, let alone that they recited his email address.

38. We find that the Claimant added to her contemporaneous notes once she had listened back to the recording, adding comments from the recording,

other comments she believed she could recall, and her own personal comments and observations on the matter. We conclude that she is most likely to have done this at home, possibly later that day. We find that the Claimant added the words at the very top of page 250 of the Hearing Bundle, namely: "She'll have all the policies" and "policy about policy", at a later point and that they are not a contemporaneous record of what she heard as she sat outside Mrs Graham's room on 25 August 2022. Instead, we find that the first contemporaneous record kept by the Claimant on 22 August 2022 was, "Why would I give her a chance?" and that the Claimant stopped taking notes after the point at which Ms Hammond had observed to Mr Horn that even if the school paid her off she could come back. At that point, we find that the Claimant stopped taking notes as she had begun to record the discussion.

39. We find that the notes at page 251 of the First Supplementary Bundle are not the Claimant's contemporaneous notes, but instead were created by her at a later point in time, most likely at the same time she annotated and added to the notes at page 250. With the exception of a single documented comment in the margin, which seems to be attributed to Mr Horn but which has not featured in these proceedings, the notes all relate to the recorded part of Mr Horn and Ms Hammond's conversation. However, the comments are documented in a way that does not reflect the structure of their conversation, something that is all too apparent when one contrasts the notes with the transcript at pages 600 and 601 of the Hearing Bundle. If the Claimant had been keeping a contemporaneous record, she would have documented Mr Horn and Ms Hammond's respective comments in the same order in which they appear in the transcript. Instead, when one contrasts the two documents, it is apparent that the notes at page 251 are a random selection of quotes taken from the recording. We conclude that the Claimant jotted them down as she listened back to the recording more than once. As regards the comment in the margin, "She'll be gone in two months", there is no obvious corresponding comment in the transcript; in any event it does not form part of the claim and is not referred to by the Claimant in her witness statement upon

<u>The claims arising from the comments allegedly made on 25 August 2022</u>

40. Our findings and conclusions in respect of Mr Horn and Ms Hammond's alleged comments on 22 August 2022 are as follows:

Mr Horn

<u>Issue A - "She'll have all the policies printed out".</u>

41. The Claimant's handwritten note at the top of page 250 of the First Supplementary Bundle is, "She'll have all the policies." We have already concluded that the Claimant added this alleged comment to her contemporaneous notes only after she had later listened back to the recording. We were able to listen to the recording both during the hearing and again in the course of our deliberations. The recording is not always clear. We find that when the Claimant initially listened back to the recording she misheard what Mr Horn had said. The transcript confirms

that Mr Horn said, "I'll have all the policies printed out" (see page 600 of the Hearing Bundle); instead, the Claimant noted incorrectly that he said, "She'll have all the policies printed out".

42. We find that Mr Horn was stating as a fact that he would arrange for any relevant policies to be printed off. We infer that he was conveying to Ms Hammond that the Respondent would need to be well prepared if it hoped to defend the Claimant's Tribunal claim. He was not referring to the Claimant's OCD or to her need to be organised, rather to his and the Respondent's need to organise themselves in the matter. In the context of his other comments, it can certainly be seen as an irritable expression of his determination that the Claimant should not get the better of the Academy in circumstances where he considered that her claim was unfounded, indeed "outrageous". Whilst the further context is that the Claimant had, of course, asserted within her Tribunal claim that her rights as a disabled person had been infringed, that does not in and of itself mean that Mr Horn's comments related to her disability. We remind ourselves that the Claimant has not pursued a s.27 victimisation claim in the matter. As we have noted already, there must be 'something more' if we are to infer that Mr Horn's comment related to disability. In our judgement, whilst his comment was in the context that the Claimant had raised various complaints and grievances, as well as a Tribunal claim, it did not relate to the fact that she was disabled and asserting claims as a disabled worker or pursuing her claim in a particular way by reason of her disability. Instead, it related to the Respondent's need to be organised in the face of an employee who was pursuing complaints on various fronts or, as Ms Hammond observed, throwing the kitchen sink at them.

43. In summary, we find that Mr Horn did not say the specific words attributed to him, so that any claims pursued in reliance upon them cannot succeed. Furthermore, and in any event, Mr Horn's actual comment did not relate to the Claimant's disability or to disability more generally. We would have said in any event that it would have been unreasonable for the Claimant to have regarded Mr Horn's comment as having the effect of creating an intimidating etc working environment for her. Tribunal proceedings are adversarial in nature; it is not unusual for the parties' positions to become entrenched or even polarised at an early stage in litigation and, in our experience, it is commonplace for conflictual language to be deployed when the parties are discussing the case and, particularly, their opponent. The Claimant herself is no stranger to such language, having questioned others' honesty and integrity. Given that the Claimant understood Mr Horn to be speaking in private with a senior HR colleague, it would be unreasonable for her to consider that an intimidating etc working environment was created because Mr Horn expressed himself a little more directly in private than he might have done had he been discussing the Claimant's claim with a wider group or with the Claimant herself. In our judgement, he certainly did not cross a line by directing this comment or any other comments of his at the Claimant as a disabled person.

Issue B - "She'll have a policy about a policy".

44. Mr Horn has no recollection of having made any such comment. We have already found that the alleged comment was added by the Claimant to her

contemporaneous notes at a later stage. Even then, the words actually noted down by her were, 'policy about policy'; they appear in her notes in single quotation marks, which we find signifies that they reflect that she was paraphrasing in the matter, rather than making a verbatim note of what he had said.

45. We find that with the passage of time, the Claimant has come to believe that Mr Horn said to Ms Hammond on 25 August 2022 that the Claimant would have a policy about a policy and that his comments were therefore directed at or otherwise related to her OCD. Given the passage of time, we have no evidence from either party as to what Mr Horn said to Ms Hammond on 25 August 2022 that may have led the Claimant to paraphrase his comments in the terms she did. Although that is not necessarily fatal in terms of any claims she might pursue in respect of this matter, we have regard to the fact that the Claimant is mistaken on Issue A above, namely an allegedly similar comment to the effect that she was a stickler for policy, even obsessive in that regard. During the hearing we observed that the Claimant did not always wait to listen to the questions that were asked of her and that she had a tendency to react. We do not intend that as a pejorative observation, particularly given her PTSD and documented anxiety and depression, but it provides some insight as to how the Claimant responds in stressful situations. By 25 August 2022 the Claimant found herself in conflict with the Respondent. She had raised various complaints and grievances, and had commenced a Tribunal claim. The planned meeting would undoubtedly have caused a degree of worry and anxiety. The Claimant was plainly sufficiently unhappy about what she heard as she sat outside Mrs Graham's room on 25 August 2022 that she began to record the discussion and thereafter was sufficiently offended and agitated that she was unwilling or unable to speak at any length with Ms Hammond when she emerged from Ms Graham's room and discovered the Claimant outside. In all the circumstances, we approach her evidence with a degree of caution; we are not persuaded, on the balance of probabilities that Mr Horn said on 25 August 2022 that she would have a policy about a policy or words to that effect. Accordingly, any claims pursued in reliance upon his alleged comment cannot succeed.

Issue C - "Can I wave my mug around in court?"

46. It is not in dispute that Mr Horn made the comment. The point he was making to Ms Hammond was that the Claimant had given him a personalised mug following his appointment as Principal in 2020, with the words, *"In case of emergency ask Graham, the source of all wisdom"* printed on the mug. Mr Horn suggests that he was trying to covey to Ms Hammond his confusion as to how it was that the situation had escalated in the way that it had, particularly given his constructive dialogue with the Claimant some weeks earlier on 12 July 2022. Whilst we think he has endeavoured to put some gloss on the matter, if he was frustrated or, as we think, even irritated with the Claimant for having initiated legal proceedings without first engaging with him, his comment did not relate to the Claimant's disability. Instead, he considered her claim to be unfounded and believed the mug would undermine her position in the proceedings. As we have noted already, there is no s.27 complaint. The s.26 EqA 2010 complaint does not succeed.

Issue D - "If that is how we play the game I will get all of my policies written down".

47. The comment is admitted and in any event was recorded by the Claimant. It is in a similar vein to Mr Horn's comment above that he would have all the policies printed out. Even if this further comment by him was ineloquently expressed, it did not relate to the Claimant's disability, or to disability more generally, rather to the need for the Respondent and for Mr Horn, as one of a number of people singled out by the Claimant for criticism, to get their 'ducks in a row' if the Respondent was to successfully resist the Claimant's Tribunal claim. We would have said, in any event, it would be unreasonable for her to consider that an intimidating etc working environment was created because Mr Horn expressed himself in such terms in private. There is no s.27 complaint. The s.26 EqA 2010 complaint does not succeed

Issue E - "Why would I give her a chance?"

48. We have already found that this was the first contemporaneous note kept by the Claimant once she began to document the conversation and before she started recording it. The Claimant has not offered any further explanation or context in terms of what was being discussed between Mr Horn and Ms Hammond, including what was allegedly said by either of them immediately prior to or after the comment in question. In spite of our encouragement to the Claimant to explore each of Mr Horn's alleged comments with him, she did not ask him about this one. His evidence in the matter is therefore unchallenged, namely that whilst he could not recollect making any such comment, it would have been an odd sentiment for him to have to expressed in circumstances where he was intending to offer the Claimant the option of reverting to teaching English.

49. Without any further explanation or context we cannot be certain that the alleged comment related to the Claimant, though the fact she noted it down is presumably because she understood it to relate to her rather than to any other member of staff. In any event, there is nothing on the face of the words themselves and no further context to suggest that they related in any way to the Claimant's disability or to disability more generally. The s.26 EqA 2010 complaint does not succeed.

Issue F - "I am quite happy to make her look stupid."

50. Mr Horn does not dispute that he said this. We accept his evidence that he was referring to the potential collective grievance, specifically that any suggestion a staff room was to be decommissioned was unfounded gossip. The staff room in question was not, as some staff believed, going to be used for storage. At Tribunal Mr Horn referred to his choice of language as "clumsy". Be that as it may, the Claimant might have lost face and in that sense have been made to look stupid, had she led a collective grievance about something that was not going to happen and was never planned to happen. Mr Horn's comment was not related to the Claimant's disability, or to disability in general. The s.26 EqA 2010 complaint does not succeed.

Issue G - "I will get her out on capability."

51. Mr Horn accepts that he and Ms Hammond discussed the GCSE results. That is entirely unsurprising. It is equally unsurprising that a pass rate of somewhere between six and twelve per cent for IT and Media might have given material cause for concern, including immediate questions regarding the relevant teaching cohort. Mr Horn denies saying that he would get the Claimant out on capability. The alleged comment is at odds with the Respondent's approach in relation to the Claimant's colleagues, all of whom were the subject of an informal support plan rather than a formal capability process. That does not evidence to us the sort of 'gung-ho' approach that would be indicated by the words attributed to Mr Horn.

52. The comment recorded in the Claimant's notes is "get her on competency" (page 250 of the Hearing Bundle). Even then the comment has the appearance of having subsequently been added to the notes, since it is positioned towards the left hand side of the page, seems to have been 'squeezed' in between other comments and is one of a number of comments that appear to be a thicker and/or darker ink. Mr Horn's documented remarks differ slightly to what the Claimant now alleges he said; the Claimant noted Mr Horn's intention to "get her" rather than "get her out". It is a subtle but not insignificant difference.

53. In her second ET1 claim form, the Claimant linked this alleged comment by Mr Horn with further alleged comments by him that he would fabricate documents and get colleagues to say false things about the Claimant. Those particularly serious allegations are not repeated in the List of Issues (unless it can be said that they fall within the ambit of Issue H below).

54. We are certain that Mr Horn did not say to Ms Hammond that he would fabricate documents or encourage the Claimant's colleagues to lie. The Claimant's baseless allegations in that regard undermine her related assertion that Mr Horn told Ms Hammond he would get the Claimant out on capability, indeed they serve to undermine her credibility more generally. We find that the alleged comment was not made and, accordingly, that any claims pursued with reference to it cannot succeed. In any event, the Claimant has not explained why the alleged comment or any related concerns on the part of the Respondent regarding that year's IT and Media GCSE results might have related to her disability, or to disability more generally. The Claimant is suggesting that Mr Horn intended to single her out. In a sense, she was singled out, though not as she alleges. She was not included as part of the informal support plan and no other remedial action was taken in relation to her. As such, she was treated more favourably in the matter than her colleagues.

Issue H - "We'll say she did not mark the course work, we will say Steve Bradbury did this."

55. This does not reflect what is documented in the Claimant's handwritten notes (the alleged comment was not recorded by the Claimant). She wrote down, "he marked all the work" and in the margin of the page additionally wrote, "he signed them off" (page 250 of the Hearing Bundle). It is impossible to know whether those additional words are allegedly a

record of Mr Horn having corrected himself, or whether instead they are a note by the Claimant to herself to the effect that although Mr Bradbury may have signed off the course work she had marked it. She did not use inverted commas to signify which it may have been. Either way, there is no reference in the notes to Mr Horn telling Ms Hammond that they would lie and say that Mr Bradbury had been obliged to do work that the Claimant should have done.

56. We contrast what is alleged within these proceedings not only with the contemporaneous notes but with what the Claimant said approximately two weeks later when interviewed by Simon Bainbridge on 9 September 2022 as part of his investigation into the matter. It is documented that she told Mr Bainbridge,

> "GH said that the HOD *[head of department]* signs off the assessment sheets - I'll get him to say this …" (page 364 of the Hearing Bundle)

In our judgement, it was an innocuous, factually accurate statement on his part. It does not correspond with what is now alleged by the Claimant and serves to undermine our ability to be confident as to what the Claimant now says.

57. The Claimant has failed to discharge her burden in the matter to establish that the alleged comment was made by Mr Horn. Any claims pursued with reference to it cannot succeed.

Issue I - "It's so ridiculous, she's so ridiculous, she's a ridiculous woman."

58. Mr Horn referred to the Claimant as a ridiculous woman. Whilst we accept that he thought that it was ridiculous that the situation had developed in the way it had, he evidently believed that the Claimant was being unreasonable or, as he expressed it in the moment, "ridiculous". It was an unwanted comment, albeit one that did not relate to the Claimant's disability or to disability more generally. As the Claimant recognised at Tribunal, if there was any reference to any protected characteristic of hers, it was to her gender. Since there is no sex harassment complaint before the Tribunal, we do not offer any further view in that regard. The Claimant's s.26 EqA 2010 disability harassment complaint does not succeed.

Issue J - "We've got to win if we take it on."

59. The comment was recorded by the Claimant. It seems to us entirely unsurprising that Mr Horn might have expressed the view to Ms Hammond that if the organisation was going to commit time and resource to the Tribunal proceedings, this had to be on the basis that the organisation had good prospects in the matter. Mr Horn's observation in the matters was unexceptional. His comment was not directed at the Claimant as a disabled person or at disabled employees or disabled litigants more generally. It did not relate to disability and cannot succeed as a s.26 EqA 2010 complaint. In any event, for the reasons set out in relation to Issue A, it would have been unreasonable for the Claimant to have regarded Mr Horn's comment as having the effect of creating an intimidating etc

working environment for her.

Issue K - "If there is a basis of going forward that will be different."

60. The ordinary and natural meaning of this comment is not easy to discern. However, in the context of Mr Horn's comments regarding the Respondent's need to organise itself with a view to addressing the Claimant's Tribunal claim, we find that that he was giving further expression to his belief that the Claimant's concerns were unfounded, but that a different approach might be warranted if Ms Hammond considered the Claimant in fact had valid grounds for concern. For the same reasons his other comments were not related to disability, this further comment by him did not relate to the Claimant's disability or to disability more generally. In any event, it would have been unreasonable for the Claimant to have regarded Mr Horn's comment as having the effect of creating an intimidating etc working environment for her. The s.26 EqA 2010 complaint does not succeed.

Issue L - "My prediction is that it will be bigger than the Humanities one."

61. The Claimant did not challenge Mr Horn's evidence that his comments related to a different employee with an unrelated dispute. Even if we had been persuaded that some comparison was being drawn between the claim that had by then been brought by the Claimant and an unrelated staff dispute, it seems to us entirely unexceptional that Mr Horn might have made that comparison or expressed the view that his sense of the matter was that it gave rise to a greater number or complexity of issues. His observation does not relate to disability. In our judgment it was not directed at how the Claimant might conduct any litigation by reason of her mental health issues. Furthermore, it would have been unreasonable for the Claimant to have regarded Mr Horn's comment as having the effect of creating an intimidating etc working environment for her. The s.26 EqA 2010 complaint does not succeed.

Ms Hammond

62. It is accepted by the Respondent that Ms Hammond made the following three comments, two of which were in any event recorded by the Claimant:

Issue A - "Even if we paid her off she can come back."

Issue B - "She is chucking the kitchen sink at us."

Issue C - "What I don't know is, is she trying to be a pain in the backside or whether she truly wants to go to Tribunal. I don't know, I don't know if she knows."

The Claimant no longer alleges that Ms Hammond said "Who the heck can be that brazen?" She accepts that she was mistaken in that regard.

63. Ms Hammond is understandably embarrassed by her reference to the

Claimant as a potential pain in the backside. In spite of Mr Peacock's valiant efforts when cross examining the Claimant, the comments were clearly with reference to the Claimant rather than, as was suggested, a reference to the Tribunal claim being a pain in the backside. Ms Hammond was articulating what perhaps many employers feel when confronted with what they consider to be unfounded complaints, grievances or claims. They invariably require a significant commitment of time and resource, in this case taking those involved away from their teaching and school leadership responsibilities.

64. We are satisfied that Ms Hammond's comments were unrelated to the Claimant's disability, or to disability more generally. The first comment was simply an expression of the legal reality that settling with the Claimant would not prevent her from pursuing further complaints, grievances and claims, or from coming back to school.

65. Ms Hammond believed the Claimant to be throwing the proverbial kitchen sink at the Respondent. It was not an outlandish observation on her part given the number of complaints and grievances that had by then been raised by the Claimant, and the number of complaints indicated by her Tribunal claim. In that context Ms Hammond posed the question to Mr Horn that any strategically minded HR professional might do, namely whether the Claimant was likely to be fully committed to seeing any legal process through to a conclusion, or instead simply kicking up a fuss or intending to make a point.

66. It is, regrettable that Ms Hammond expressed herself in the terms that she did, but in our judgement none of her comments were directed at or related to the Claimant as a person with a disability. Nor were they related to disability more generally. The s.26 EqA 2010 complaints do not succeed.

67. We should add in this regard that when the Claimant submitted a complaint to the Respondent on 25 August 2022 about the events that day, and followed this up on 26 August 2022 with a further email that summarised her concerns in relation to each of Mr Horn and Ms Hammond, she did not identify that Ms Hammond's actions were harassment (see page 334 of the Hearing Bundle). That is in marked contrast to her assertion that Mr Horn had allegedly harassed and victimised her.

<u>The Claimant's grievances</u>

68. The Claimant's complaint in respect of the events of 25 August 2022 went forward as a grievance ("the August 2022 grievance"). The grievance was not upheld by Mr D'Cunha. Although this does not form part of her claim, we were a little surprised to learn that Mr D'Cunha had not met with the Claimant before he decided the grievance. Notwithstanding she met with the Investigating Officer, Mr Bainbridge, it is good practice (and indeed the ACAS Code of Practice envisages) that the person who hears the grievance will meet with the aggrieved employee or at least offer them the opportunity of a meeting.

69. There was a separate investigation by an independent external investigator, Marilyn Smith, into the Claimant's July 2022 grievance. As we have noted already, none of the matters raised in the course of that grievance, which was the basis of the first Tribunal claim, have been pursued further within these proceedings, even if the allegation were repeated in some detail in the Claimant's witness statement.

70. The Claimant's appeal against the rejection of her August 2022 grievance was heard on 16 November 2022, with the outcome being notified to her by letter dated 17 November 2022. Whilst the Appeal Panel upheld Mr D'Cunha's decision not to uphold the grievance, it recommended that the Claimant provide him with her recording of Mr Horn and Ms Hammond's conversation on 25 August 2022 so that he might consider whether the recording had any bearing on his decision. This was on the basis that his further review would be final. Subsequently, on 21 December 2022, Mr D'Cunha wrote to the Claimant to say that having listened to the recording he considered there was nothing in the recording that would lead him to change his original decision not to uphold her August 2022 grievance. His letter concluded,

> "Having received the recording it is clear to me that you have breached the school rules by recording a private conversation between colleagues that you were not part of, on a personal device. As I am now in receipt of this information I have no alternative but to take advice in line with the school's disciplinary procedures." (page 506 of the Hearing Bundle)

71. The parallel process in respect of the July 2022 grievance, concluded on 4 January 2023 when the Chair of the Appeal Committee, Gill Thomas wrote to the Claimant to inform her that the Committee had upheld the original decision not to uphold that grievance. The Claimant was informed that there was no further right of appeal, and accordingly that she had reached the end of the process.

<u>The section 13 and 15 Equality Act 2010 complaints</u>

72. As with her further complaint that she was constructively dismissed, we are concerned with Issues "C", "D", "E", "F", "I", "J", "K" and "L" in relation to Mr Horn and Issues "A", "B" and "C" in relation to Ms Hammond.

73. In terms of s.13 of the EqA 2010, the question is whether the Claimant was treated less favourably than the Respondent would have treated someone without a disability in her situation.

74. Although the Claimant has not identified the circumstances of any hypothetical comparator, we are satisfied, had a non-disabled employee met with Mr Horn on 12 July 2022 following a flexible working request and thereafter gone on to submit various complaints and grievances, as well as a Tribunal Claim, which alleged, amongst other things, that they had been harassed and ignored by Mr Horn, in circumstances where he believed their flexible working request to have been accommodated and further considered them to be pursuing unfounded complaints and grievances, that he would have been equally frustrated and irritated with

such an employee. For the reasons set out above, none of Mr Horn's comments on 25 August 2022 related to the Claimant's disability. He was frustrated and irritated, and also under some pressure on GCSE exam results day, and in our judgement he would have made essentially the same comments about a non-disabled teacher whom he perceived to be raising unjustified complaints, grievances and claims. The Claimant has not put forward facts from which we might infer that a non-disabled person who conducted themselves as she was perceived to be conducting herself, would have been treated any differently in the matter. The Claimant's s.13 EqA 2010 complaints that she was directly discriminated against are not well founded.

75. Her s.15 EqA 2010 complaints are equally unfounded. She made no submissions in respect of this element of her claim in closing. In an effort to assist the Claimant in the matter, we gave the example of a person with Tourette's Syndrome who is disciplined by their employer for swearing. Uncontrollable outbursts and swearing are something arising from the disability and an employee with Tourette's Syndrome will be treated unfavourably because of something arising from their disability if they are disciplined for such conduct. The List of Issues identifies that a need to follow policies appropriately was something that arose in consequence of the Claimant's disability, and that Mr Horn and Ms Hammond's respective comments related to that need. However, we have not upheld that the alleged comments identified as Issues A and B in relation to Mr Horn were in fact made. The comments we have found to have been made by Mr Horn, identified as Issues A, C, D, I, J, K and L all related to the Claimant's Tribunal claim which, although she was disabled, was not something arising from her disability. The comments were certainly not related to her need to follow policies. The comment identified as Issue E in relation to Mr Horn has no obvious connection to the Claimant's need to follow policies and certainly no such connection was advanced by the Claimant at Tribunal. The comment identified as Issue F in relation to Mr Horn arose out of the collective grievance. The Claimant's evidence was that she had become involved in the matter because she felt that colleagues were complaining about the staff room but failing to take action in relation to it. She did not suggest that this was connected to her OCD, let alone to a need to follow policies. Finally, Mr Horn's description of the Claimant as ridiculous was, if anything, gender related in so far as her referred to her as a ridiculous woman. He considered her Tribunal claim and indeed her complaints and grievances more generally to be ridiculous; in giving expression to that he was not offering any commentary as to her perceived need to follow policies. Ms Hammond's comments equally all related to the Tribunal claim rather than to any need on the part of the Claimant to follow policies.

76. It has not been suggested by the Claimant that her mental health conditions led her to pursue baseless complaints and grievances, as for example might be the case where a person has borderline personality disorder, a mental health condition which commonly gives rise to perceptual distortions. One can readily understand why such a person might pursue a s.15 EqA 2010 complaint if their employer reacts disproportionately to unfounded complaints and grievances rooted in such distortions. Notwithstanding the parties' differing perceptions and

recollections, this is not a case where the Claimant has, or has claimed to have, distorted perceptions and recollections because of her OCD and PTSD. No such distortions or increased propensity for litigation are indicated in the available medical evidence. In any event, the s.15 claims are not pursued on this basis, rather by reference to her stated need to follow policies. For all the reasons set out above, the comments found to have been made by Mr Horn and Ms Hammond did not relate to something arising from the Claimant's disability. Her s.15 EqA 2010 claims are not well founded.

Unfair Constructive Dismissal

77. Turning then to the Claimant's claim that she was unfairly constructively dismissed. The Claimant relies upon four alleged breaches as justifying her resignation, namely:

(a) Mr Horn's alleged comments on 25 August 2022;

(b) Ms Hammond's alleged comments on 25 August 2022;

(c) The Respondent's alleged failure to take "appropriate action" against them; and

(d) Allegedly being threatened with disciplinary action by Mr D'Cunha when he wrote to her on 21 December 2022.

78. As regards the third matter, it is an implied term in contracts of employment that the employer will afford a reasonable and prompt opportunity for redress of any grievance the employee may have. We are satisfied that the Respondent discharged its responsibilities to the Claimant in this regard, in the case of her July 2022 grievance by referring the matter for investigation by an independent third party.

79. The Claimant had no right to any particular outcome as long as she was afforded the opportunity referred to. She has not identified what she says would have been "appropriate action" for the Respondent to take against Mr Horn and Ms Hammond. In his initial letter to the Claimant of 7 October 2022, notifying the outcome of her grievance regarding the events of 25 August 2022, Mr D'Cunha suggested that mediation should be explored to repair the Claimant's relationship with Mr Horn and Ms Hammond. In our judgement that was an eminently sensible suggestion on his part. It was not taken up by the Claimant who remained focused instead on articulating her concerns rather than on how they might be resolved. The Claimant's somewhat inflexible approach, or at least her failure to reflect on what a resolution might look like, is also indicated by her earlier 25 July 2022 grievance in which she said that a Tribunal was the best place for any decisions to be made. We find that she had the same mindset in respect of her August 2022 grievance.

80. The notes of Mr Bainbridge's meeting with the Claimant on 9 September 2022 (pages 362 – 366 of the Hearing Bundle) evidence that the Claimant would not engage with him in terms of any resolution. She simply said that she did not trust anyone. She did not identify what she considered to be appropriate action in respect of Mr Horn and Ms Hammond. In the

circumstances, and given in particular Mr D'Cunha's eminently sensible suggestion of mediation, we do not consider that the Respondent breached trust and confidence in the matter.

81. In July 2023, the Claimant belatedly sought an apology from the Trust in respect of Mr Horn and Ms Hammond's alleged comments on 25 August 2022. She had by then resigned her employment such that any subsequent perceived failure on the Respondent's part to offer such an apology, or an apology in terms acceptable to her, cannot have informed her earlier decision to resign. In any event, Mr Horn and Ms Hammond had apologised at the time for the fact the Claimant had been upset by what she had overheard.

82. We agree with the Claimant that the Respondent's other conduct did breach trust and confidence. We take into account that Mr Horn and Ms Hammond believed they were engaged in a private discussion on 22 August 2022 and in the circumstances that they did not express themselves as they might have done if they had been discussing the matter in a more public forum or in the presence of a wider group of colleagues. We are not unsympathetic to the pressures in particular that Mr Horn was operating under that day. We do not lose sight that within these proceedings, the Claimant has made a series of unjustified comments about Mr Horn and others, and that she sought to draw a particularly offensive analogy between Mr Horn, Hitler and Saddam Hussain. Be that as it may, her conduct, whether at Tribunal or in the course of the proceedings does not excuse any repudiatory conduct on the part of the Respondent, even if it has served to highlight that people can speak inappropriately in the heat and pressure of the moment.

83. Regardless of the fact that Mr Horn believed that he was speaking in confidence to Ms Hammond, their conversation was audible outside the meeting room, evidencing some lack of care on their part. Indeed, they were content to discuss the matter in front of Mrs Graham. She may well have been a senior colleague but she was also the Claimant's disability champion, meaning that she was potentially professionally embarrassed by what she heard.

84. The Claimant did not set out to eavesdrop the conversation, or entrap Mr Horn and Ms Hammond. Whilst we have found that not all of the alleged comments were made and certainly do not consider, as the Claimant asserted to Ms Hammond in February 2023, that there was a plot to destroy the Claimant's career, Mr Horn's reference in particular to the Claimant being a ridiculous woman as well as his comment that he was quite happy to make her look stupid, together with Ms Hammond's comment suggesting that the Claimant was potentially being a pain in the backside were seriously damaging in terms of trust and confidence even if we have not upheld that they were acts of disability harassment. Viewed objectively and in their entirety, including the slightly intemperate terms in which Mr Horn expressed himself, the discussion between Mr Horn and Ms Hammond breached the 'Malik' implied term.

85. We consider that the comments in Mr D'Cunha's letter also breached trust and confidence. He may have said that he felt obliged to take advice, but

his observations in that regard were preceded by an emphatic statement that the Claimant had breached school rules. Putting aside that he could not identify the relevant rules at Tribunal, he was effectively saying to the Claimant that she was guilty of misconduct without having followed due process in the matter, including first hearing what she had to say as to the circumstances in which she had made notes and kept a recording. In the circumstances it was reasonable for the Claimant to regard his concluding comments as a veiled threat that disciplinary action might follow even if in fact no further action was taken in the matter.

86. However, in our further judgement, the Claimant did not resign in response to the comments in Mr D'Cunha's letter. She did not refer to them in her resignation letter (pages 521 – 522 of the Hearing Bundle), even if she now seeks to rely upon his comments as a repudiatory breach of contract justifying her resignation. In reaching a judgment as to what was in an employee's mind when they resigned their employment, specifically what breaches were relied upon by them, the Tribunal will inevitably have regard to the reasons, if any, put forward by the employee at the point of resignation. The letter of resignation is the most obvious place for an employee to document the matters that have informed their decision to resign. The Claimant is an intelligent, articulate individual. Her various emails, as well as her resignation letter evidence her ability to express her thoughts in the matter. We find that she resigned solely in response to the comments she overheard on 25 August 2022.

87. The Claimant gave notice resigning her employment on 31v May 2023. In our judgement, she waived the breaches in question and affirmed the employment relationship. She has sought to suggest there was a final straw in May 2023 as a result of certain communications with Helen Cassidy at the Respondent. No such last straw was pleaded by the Claimant's former solicitors when they secured permission from the Tribunal to amend her second claim. As we observed in the course of the hearing, the claim cannot proceed on shifting sands and the Claimant's case is not to be found elsewhere than in the pleadings (Chandhok v Tirkey UKEAT/0190/14/KN).

88. The only matters effectively relied upon by the Claimant in resigning her employment were Mr Horn and Ms Hammond's respective comments on 25 August 2022. The Claimant gave notice resigning her employment some nine months later. We have regard to the fact that during that time she was not working and was on sick leave, albeit she has not put these or any other explanation forward as the reason why she did not resign her employment sooner.

89. By 23 February 2023 the Claimant had identified that she would never feel safe again at the Academy, a point she had previously touched upon in her July 2022 Tribunal claim. On 31 July 2022, the Claimant wrote in an email to Ms Hammond that she would be appointing a named firm of solicitors, but that she also had access to free legal advice. She told the Tribunal that her brother-in-law is an employment barrister and that one or more friends are solicitors or have relevant legal knowledge, and that they gave her advice in the matter. She confirmed that she had formally instructed solicitors in January or February 2023. By then she had been in

contact with ACAS twice, namely on 14 July and 16 November 2022, her second Tribunal claim having been submitted on 29 December 2022, just two days before the time limit expired for bringing a claim in respect of the events of 25 August 2022. That evidences to us someone who was well versed in terms of their legal rights, including the applicable time limits for bringing claims.

90. In paragraph 74 of her witness statement, the Claimant refers to having offered to the Respondent to work from home, create schemes of work and mark assessments. She does not say exactly when this was, but would seem to place it towards the end of 2022. Even if she did not then wish to be accountable to Mr Horn (an unrealistic aim on her part given he is the Principal), in our judgement those offers to work by her indicate her ongoing commitment to an employment relationship with the Respondent, if not to a personal working relationship with the Principal. They evidence to us that, even if reluctantly, the Claimant had resolved to continue in the Respondent's employment, was offering to do various work for it and was thereby implicitly affirming the contract and waiving her right to resign in response to the events of 25 August 2022.

91. During the preliminary hearing before Employment Judge George on 23 February 2023, the Claimant acknowledged that her employment was continuing, notwithstanding she had stated in her completed agenda form for the hearing that she had been pushed out. By then, she had reached the end of the road in terms of her grievances and grievance appeals. She was entitled to a reasonable amount of time in which to make up her mind. We have regard to the fact she says she does not drive, limiting her career options, even if she has not put this forward as a reason for not resigning her employment sooner. In our judgement, by January/February 2023 the Claimant had had time in which to take advice and consider her position. She had pursued a data subject access request and was in possession of relevant documents to further inform any decision about her continued employment. On advice, she clearly understood that the Respondent had breached trust and confidence, but remained committed to the Academy and to making the best of the situation, seemingly only changing her mind in May 2023 in response to what she perceived to be gaslighting by Ms Cassidy in the context of the school's management of her ongoing sickness absence, albeit which has not subsequently been pleaded as a last straw event warranting resignation. Absent a pleaded last straw event, the Claimant has not advanced any particular reason why she delayed. Even allowing for any decline in the Claimant's mental health in March 2023 and the distress she experienced at that time, which may have led to suicidal ideation, we infer that she had affirmed the contact by no later than 23 February 2023 when she attended the hearing before Employment Judge George.

92. In these circumstances, the Claimant's resignation in May 2023 was a voluntary act on her part, rather than a dismissal within the meaning of s.95(1)(c) of the Employment Rights Act 1996. Having not been constructively dismissed, the Claimant cannot pursue a claim for unfair dismissal.

93. For all these reasons, the Claimant's claims against the Respondent are

not well founded and shall be dismissed.

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Employment Judge Tynan

Date: 19 June 2024

Judgment sent to the parties on
2 July 2024

For the Tribunal office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/