Case Number: 3202034/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr James Walker**

Respondents: **(1) The Governors of Arnhem Wharf Primary School**
(2) The Mayor and Burgesses of the London Borough of Tower Hamlets

Heard at: **East London Hearing Centre**

On: **5, 6, 10, 11, 12, 13 & 14 February (hearing days) and 23 (part), 24 & 26 March 2020 (in chambers)**

Before: **Employment Judge John Crosfill**
Members: **Mr G Tomey**
Mrs B K Saund

Representation

Claimant: **Lydia Banerjee of Counsel, instructed by Workwise Legal.**

Respondent: **Hilary Winstone of Counsel, instructed by the 2nd Respondent**

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The Claimant's claim for unfair dismissal made under part X of the Employment Rights Act 1996 is well-founded.**

2. **The Claimant's claims that the Respondent failed to make reasonable adjustments under sections 20, 21 & 39 of the Equality Act 2010 are dismissed.**

3. **The Claimant's claims that the Respondent unlawfully discriminated against him under sections 15 & 39 of the Equality Act 2010 are dismissed.**

4. The Claimant's claim for unlawful deduction from his wages of the 'TLR' supplement brought under Part II of the Employment Rights Act 1996 is well founded.

REASONS

1. Arnhem Wharf Primary School ('the School') is located in London Docklands and serves a diverse community. It is a 'community school' maintained by the Second Respondent ('the Local Authority'). The Claimant, who was formerly a Head Teacher at another school, joined the School initially on a temporary basis but then accepted a role as a teacher of Design and Technology ('DT').

2. On 15 September 2017 one of the school handymen, Gary Corney, fell from a ladder whilst trying to place a cover over the smoke sensor in the DT room. He had been given that cover by a teaching assistant Pam Benjamin. When Pam Benjamin was asked who gave her the cover she identified the Claimant. A disciplinary investigation was instigated against the Claimant, Pam Benjamin and Gary Corney.

3. The Claimant was certified as being unfit for work, initially because of stress, but he was later diagnosed as having Post Traumatic Stress Disorder. The traumatic event that triggered that condition was his treatment by his previous employer both as an employee and during employment tribunal proceedings. It was accepted that from 6 December 2017 the Claimant was disabled for the purposes of the Equality Act 2010.

4. The Claimant complains about the actions of the Respondent in conducting the disciplinary process and, he says, in failing to properly deal with grievances that he raised. He says that these acts and omissions contributed to a serious breach of contract and, in some instances, were acts of disability discrimination being either failures to make reasonable adjustments or unfavourable treatment because of something arising in consequence of the Claimant's disability.

5. A disciplinary meeting was convened on 5 July 2018. The Claimant attended that meeting but part way through he resigned. The finding of the disciplinary panel was that the Claimant's conduct merited a warning. The relationship terminated at that point. The Claimant says that he was entitled to treat himself as being dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996. He brings a claim of unfair dismissal.

6. The Claimant has brought a claim alleging an unlawful deduction from wages. This relates to the payment of a teaching allowance known as a 'TLR'. The Claimant was paid this allowance for several years but the allowance was terminated on 15 November 2017. The Respondent's position was that the Claimant was not entitled to this supplement as a DT teacher and that it had been paid in error. The Claimant sought to appeal against this but was told initially that he had no right to do so. The Claimant says that this was, or contributed to, a serious breach of contract.

Procedural history

7. The matter had been listed for a 5-day final hearing to start on 4 September 2019. One of the members had a conflict of interest because he knew one of the Respondent's witnesses. The parties were unwilling to permit the case be heard by a panel of two and raised concerns about the length of the hearing. The matter was postponed. A direction was given that the Claimant set out further particulars of 'the treatment that individually or cumulatively is said to be a breach of the implied term of mutual trust and confidence'. When the Claimant did so the list of issues required substantial revision as the Claimant relied on about 50 separate matters plus each matter he said was also an act of discrimination.

8. The parties had already exchanged witness statements. As such the Respondents witness statements were not necessarily directed towards the case as it was then understood.

9. Unfortunately, it was necessary for the Tribunal to reduce the length of the hearing through a lack of judicial resources. The hearing was initially reduced to 7 days.

The Hearing

10. The parties attended on the first day of the hearing. In our discussions it transpired that the parties had agreed a list of issues but subject to the Respondent seeking permission to ask questions supplementing the Respondent's witness statements where the Respondent had not anticipated the Claimant's case. The Claimant did not object and this seemed a pragmatic and sensible proposal.

11. We indicated that the remaining part of the first day would be used for reading the witness statements and documents referred to within them. We discussed the timetable. We indicated that we expected the parties to attempt to conclude the case within the days then allocated. We said that we would keep the matter under review and that if necessary chambers days could be added.

12. We then heard evidence over the following 5 days. The witnesses we heard from were:

12.1. The Claimant, who started his evidence shortly after 10am and who concluded his evidence the following morning at about 10:15 on Day 3.

12.2. The Claimant's wife, Becca Walker who gave evidence from 10:16 to about 10:43; and

12.3. Pam Benjamin, the classroom assistant who had worked with the Claimant and who was involved in attempting to place a cover on the smoke alarm sensor she gave evidence from 10:45 to 11:20; then

12.4. Rukia Begum, one of the two Assistant Head Teacher's at the School and the person allocated to keep in touch with the Claimant during his sickness absence who gave evidence from shortly after 11:20 to

1:00pm when she was showing some signs of distress and from 14:00 to 15:40; and

12.5. Zakia Khatum the other Assistant Head Teacher at the School and the person allocated the task of managing the Claimant's absence who gave evidence from 15:40 until the end of Day 3.

12.6. At the outset of Day 4 the Respondent sought to interpose two Governors of the School. The first of these, Kenny Fredrick had been appointed as Chair of Governors in May 2018 and had commissioned an investigation into the Claimant's grievance. She gave evidence from 10:12 to 10:50; and

12.7. We then heard from Shane Parker a parent Governor who had been on the panel that heard the disciplinary case against the Claimant on 5 July 2018. He gave evidence from 10:55 to 13:12

12.8. During the remainder of day 4, Zakia Khatun was recalled and completed her evidence by 16:20.

12.9. On Day 5 we heard from Ms De Freitis who had been the Chair of Governors until March 2018 and who had initially dealt with the Claimant's grievances she gave evidence from 10:07 until 12:35.

12.10. We then heard from Zoe Hudson the Business Manager at the School and the person who had conducted the disciplinary investigation into the incident concerning capping of the smoke alarm sensor. She gave evidence from 13:43 until the end of the day when her evidence concluded.

12.11. On day 6 we heard from Atia Williams who work for the Second Respondent in an HR capacity and who had attended the disciplinary meeting on 5 July 2018; and

12.12. Finally, we heard from Sarah Haynes the Headteacher of the School who gave evidence from 11:28 and concluded after our lunchbreak. We then listened to recordings that the Claimant had made during the disciplinary hearing on 5 July 2018.

13. On day 7 we heard oral submissions from both advocates. The advocates had both indicated that they wanted the opportunity to supplement their oral submissions with written submissions. We directed the parties to prepare written submissions and then exchange them. We then permitted each advocate to respond to the submissions of the other. The advocates complied with those directions with unexpected enthusiasm we received substantial submissions from both parties. We do not attempt to summarise those submissions but have had regard to them when reaching our conclusions.

14. We were to meet in chambers on 23 March 2020. That coincided with the closure of the Tribunal Centre. The members collected their bundles and notes from the Tribunal and we were able to commence our discussions by telephone.

The issues

15. As set out above the parties had prepared an agreed list of issues. We shall not set out that list here as some matters were abandoned by the Claimant during the hearing. We refer to each issue in our discussions and conclusions below where we refer to the paragraph numbers of the final version of the agreed list of issues.

Additional documents and rulings

16. During the hearing additional documents were produced. These were admitted into evidence without objection by either party.

17. We refer below to a School Governor, Mr Bodewig, deciding to resign after he had started the process of hearing the Claimant's grievances. He was later contacted by Sara Haynes and she had made a note of their conversation. That note was at Page 730 of our bundle. The Respondent had redacted parts of that note that referred to a discussion about Mr Bodewig's health. We decided that the Claimant was entitled to see an unredacted copy of that document as one of the matters we were invited to consider was the entirety of Mr Bodewig's reasons for resigning as a Governor. It has not been necessary for us to refer to the nature of his condition (which in any event was unclear from the note made) in order to decide the issues in this case. We gave our reasons at the time for that decision and shall not repeat them here.

General Findings of Fact

18. Within this section we make the general findings of fact that have enabled us to reach our conclusions in this case. We shall not in this section make secondary findings such as the reasons why various actions took place but return to those matters in our discussions and conclusions below. We should stress that we were presented with a great deal of evidence and it would be disproportionate for us to make findings in respect of every disputed point and we have not attempted to do so. In reaching our conclusions we have had regard to all the evidence we have heard and all the documents we were expressly referred to.

Pre-employment matters

19. The Claimant qualified as a primary school teacher in 1978. Between 1999 and 2010 he was a headteacher in the London Borough of Lambeth. The Claimant says that he was unfairly and unjustly accused of bullying which ultimately led to his resignation. He then brought successful tribunal proceedings and obtained a finding that he had been unfairly dismissed. He says that as a consequence his mental health deteriorated and in 2010 it was suggested that he was suffering from symptoms of post-traumatic stress disorder ('PTSD').

20. The Claimant says and we accept that after the tribunal proceedings his mental health started to recover. He started working again as a supply teacher.

Employment by the Respondent

21. The Claimant started working at the school in 2012 as a supply teacher. When he first started he was asked to complete an employee monitoring form on which he declared that he did not suffer from any disabilities. From that we have concluded that the Claimant himself considered that he had recovered from his past illness. In January 2013 the Claimant was employed on a fixed term contract as a teacher but with the additional responsibility of being the 'subject lead' for mathematics. In that post he was entitled to and received a teaching and learning responsibility (TLR) supplement of £4225.00 per annum on top of his normal salary.

22. The Claimant's initial fixed term contract was extended in May 2013 for a further fixed term expiring at the end of August 2014. Again, Claimant was given a TLR payment as the subject lead in mathematics.

23. In July 2014 the Claimant was given a further contract of employment for a new role. This contract was described as temporary as it was covering the maternity absence of a member of staff. It could be terminated if the member of staff returned to work. The Claimant was given a statement of acceptance which set out the salary that he would receive and referred to him being paid a TLR payment of £4268.00. The member of staff on maternity leave had also been in receipt of a TLR in respect of the work that she did, and the Claimant covered.

24. In 2015 the Claimant was offered a permanent teaching post at the school. From this we infer that he had satisfied the School that he was a competent teacher and a useful staff member. All previous appointments had been recorded in writing and the Claimant given at least a confirmation of the extension to his contract. In 2015, for reasons which are entirely unexplained, the Claimant was not given a written contract nor any statement of the terms and conditions that would apply to his permanent employment.

25. The Claimant says that during the spring or summer term in 2015 he met with the then deputy headteacher Katherine Diaper at the time to discuss his future employment. He says, and we accept, that she suggested that the Claimant could be involved to develop the teaching of Design and Technology across the school. A dedicated room was to be set up for DT activities over the summer holidays. The outcome of those discussions was recorded in an email from Katherine Diaper to Sara Haynes into which the Claimant was copied. That email read as follows:

> *'Dear Sara,*
>
> *James was delighted with our plans for his role next year and the new plans for the ICT room - soon to be DT including cookery suite.*
>
> - *Teaching DT Y5 (Mon am), Y4 (Wed am), Y2 (Tue am) 1.5 days*
> - *NQT cover wed pm 0.5 day*
> - *Peer Coaching (tue am and thur am) 1 day (until 12 each day)*
> - *KS1 Interventions (Mon pm, Fri all day) 1.5 days*
> - *PPA with Y1 (thurs pm (0.5 day)*

in addition to this we would plan his TLR role for next year-perhaps linked to developing DT planning link to curriculum topics and ensuring progression in all year groups (EYFS to Y6) and supporting EYFS, Y1, Y3 and Y6 in developing their teaching and learning of DT.

Many thanks

Katherine'

26. The Claimant believed that he would continue to receive a TLR payment when he commenced the DT role.

27. The DT room was a conversion of the existing ICT suite. As we understand it the building works took place over the summer of 2015. The person responsible for overseeing the project at the school was Zoe Hudson.

28. The Claimant says, and we accept, that his work as the DT teacher appeared to have been appreciated and that he was a respected member of staff. From the outset of his employment as the DT teacher the Claimant continued to receive a TLR supplement to his pay.

29. When the Claimant started his role as the DT Teacher his basic salary was determined by reference to nationally agreed pay scales. The Claimant's pay had been set at 'Upper Pay Scale 1'. Progression to the upper pay scales was not automatic and was required significant teaching experience and added responsibilities. There were 3 points on the Upper Pay Scale. A determination of whether a teacher would progress through the Upper Pay Scale was made by the School's Pay Committee following an annual appraisal and a recommendation made by the Head Teacher. Whilst the Pay Committee were not required to accept the recommendation of the Head Teacher Sara Haynes suggested that that would ordinarily be the case.

30. On 5 January 2016 Sara Haynes informed the Claimant of the outcome of his pay review. She informed him that the Pay Committee had accepted her recommendation that he be moved to Upper Pay Scale 2. She said:

'The reason for our decision is that you made good progress against your objectives as discussed at your recent performance management review, demonstrating that the criteria for progression as set by the pay policy have been met. This is recorded in your performance management review statement. There was also sufficient evidence that you consistently meet the criteria for performance on the upper pay scale as set out in the Pay and Performance Management policies.'

31. As in previous years the Claimant was sent a 'Teacher Salary Assessment Form'. That form set out his basic salary which following the decision taken on 5 January 2016 showed him as being paid on the Upper Pay Scale 2 salary. It also showed that he was being paid a TLR supplement at the rate TLR2 (as he had been in previous years). The form has a section for justifying the TLR payment against which the reason was stated as 'D & T' the form was signed by a member of the

governing body. On the back of the form there were notes which set out the criteria required for making a TLR2 payment. These were as follows:

> *'Before awarding a TLR2 the Governing Body must be satisfied that the teacher's duties include a significant responsibility that is not required of all classroom teachers and that it:*
>
> *(a) is focused on teaching and learning*
>
> *(b) requires the exercise of the teacher's professional skills and judgment*
>
> *(c) requires the teacher to lead, manage and develop a subject or curriculum area or to lead and manage pupil development across the curriculum*
>
> *(d) has an impact on the educational progress of pupils other than the teacher's assigned classes or groups of pupils*
>
> *(e) involves leading, developing and enhancing the teaching practices of other staff*'

32. In the academic year commencing September 2016 the Claimant had his annual Performance Management Review on 13 September 2016 he was reviewed by Rukia Begum. She recorded that the Claimant had met all of the objectives that he had been set and in addition she listed a number of matters where the Claimant had made other contributions to the school. There is a record of a conversation in which the Claimant stated that he thought that he should be considered for a move to Upper Pay Scale Three the following year once he had "embedded the developments in DT across the whole school". Rukia Begum records that she agreed with that decision. As in previous years the Claimant was sent his Annual Pay Determination which recorded that he would remain on Upper Pay Scale U2. The Teacher Salary Assessment Form that accompanied that letter recorded his basic salary and his TLR two payment again giving the reason for that payment as being "D and T". Again, that form was signed by a member of the governing body.

<u>Progression to upper pay scale U3</u>

33. At the outset of the academic year in 2017, as in previous years, the Claimant had his annual appraisal. A meeting took place on 14 September 2017 between the Claimant and Rukia Begum. The record of that meeting shows that Rukia Begum considered that the Claimant had met all of the objectives that he had been set. Again there is a list of additional contributions made by the Claimant The pro forma used to record the appraisal meeting permitted the Claimant to set out his justification for why he should progress through the pay scale he listed a number of matters which he thought would justify pay increase. Rukia Begum was prepared to recommend the Claimant for a pay rise.

34. Rukia Begum spoke to Sara Haynes about the Claimant's wish to be recommended for a pay rise. When she did so Sara Haynes expressed some reservations. Those reservations centred around the question of whether the Claimant was following the School's behaviour management policy. That policy provided that pupils should only be sent out of the classroom in rare circumstances

and then swiftly readmitted once their behaviour had calmed down any an apology given (a 'repair and reparation' policy). The policy had been amended in 2016 and we find had not met with universal approval. The Claimant in his witness statement refers to a staff meeting in 2016 where he had spoken about the new behaviour policy. He was asked to discuss what he said with Sara Haynes at a meeting in December. On the Claimant's own account that meeting was professional. The Claimant was later asked for his input into the new behaviour policy. In June 2017 the Claimant sent Sara Haynes an e-mail where he expresses his view that the behaviour management policy was not effective. He makes an offer of support and cites his previous experience as a deputy and head teacher.

35. The Claimant accepts that he had on a number of occasions sent children out of his classroom. He explains this by referring to a small group of *'openly defiant'* pupils. He says that he was being criticised for matters *'beyond his control'*. We find that there was a difference of opinion between the Claimant and Sara Haynes about the extent to which children ought to be excluded from the classroom and for how long. We accept Sara Haynes' evidence that she had genuine concerns that the Claimant had not *'bought in'* to the policy adopted by the school. We find that Sara Haynes was entitled to expect the Claimant to follow the policy adopted and, when considering whether to recommend the Claimant for a pay rise was entitled to express her genuine concerns about this. We find that, in this instance, the Claimant's attitude was that he knew best and that he resented being told how to do his job. This may have reflected the fact that his present role was a step down for him or it may reflect his attitude generally. We do not have to decide that.

36. On 21 September 2017 Rukia Begum met with the Claimant and told him of Sara Haynes concerns. In her witness statement she says that the Claimant reacted very badly to this. She says he became emotional and slightly aggressive and stormed out of her office. We accept her evidence. Whilst the Claimant may well have been disappointed, his behaviour was an overreaction to what was a professional difference of opinion. Later in the day the Claimant protested in an e-mail and suggested that excluding children from the DT room could be for health and safety reasons. Rukia Begum spoke again to Sara Haynes and they decided that the Claimant would be recommended for pay progression a decision which was later ratified by the Pay Committee of the Governing body.

37. The Claimant has sought to link the disagreement over the pay progression issue with the decision that he would be investigated in connection with an incident that occurred on 15 September 2017 which we deal with below. We are entirely satisfied that the two matters had no connection whatsoever. The Claimant's suggestion that the disciplinary issue was a device to thwart his pay progression is entirely fanciful and had no evidential foundation at all.

<u>The events of 15 September 2017 – capping the fire alarm</u>

38. As we have set out above in the summer of 2015 the former ICT suite was converted into a DT room. The installation included equipping the room with cooking equipment. As might be expected the school has a fire alarm system which, if an alarm sounds, automatically results in a visit from the fire brigade. The sensor in the DT room was a smoke sensor. When the building works were completed the

Claimant noticed that a cap had been placed over the smoke sensor presumably to avoid it being triggered by building dust. The Claimant did not draw attention to what in our view was a negligent act by the builder but instead stored the cap in a cupboard or drawer.

39. In March 2017 there were two occasions when the fire alarm was triggered by smoke in the DT room. There had been other occasions where the fire alarm is triggered elsewhere. We accept that such false alarms were very disruptive in that if the children were at school they would need to be evacuated.

40. Zoe Hudson who was responsible for health and safety at school told us, and we accept, that following the two false fire alarms in the DT room a staff bulletin was produced and circulated advising that whenever cooking was taking place windows should be opened to ensure that the alarm was not triggered. She also told us, and we accept, that the fire alarm system was inspected annually by the fire brigade and that the School acted on all recommendations. In October 2017 the smoke alarm sensor was replaced by a heat sensor. During the disciplinary process the Claimant claimed to have spoken to the Premises Manager at the time the room was converted and suggested that a heat sensor was installed. We do not accept that he ever raised this with Zoe Hudson or anybody else in the senior leadership team. The Claimant was the person charged with drawing up a risk assessment for the use of the DT room. Had the Claimant wished to raise a concern about the type of sensor in the DT room there would have been no difficulty in escalating that concern.

41. It is common ground that on 15 September 2017 Pamela Benjamin asked the Premises Assistant Gary Corney to fit a cap on the smoke alarm in the DT room. When standing on a chair Gary Corney fell and was injured. He needed to be taken to hospital in an ambulance where it was found he had some internal bruising. This led to Zoe Hudson taking statements from both Pamela Benjamin and Gary Corney which she says, and we accept, were initially aimed at seeking an explanation for how Gary Corney had come to suffer an injury. In the process of making these enquiries Zoe Hudson discovered that Gary Corney had been in the process of fitting a cap to the smoke alarm.

42. Zoe Hudson asked Pamela Benjamin what had happened and took a record of the answers which Pamela Benjamin accepts were correct she said:

> *'I asked Gary if he could put the cap on as James [the Claimant] said we should use it when we are cooking. I asked James where it was and he said was under the sink. I took it out and asked Gary to put it up.*
>
> *I didn't see Gary fall or put up the stopper.*
>
> *I always put the cap on when cooking.*
>
> *Danny told me on the day that there not to Alarm and should open up the windows and doors.'*

43. In his witness statement the Claimant says that he was approached by Pam Benjamin on 15 September 2017. He says she was visibly stressed and explained she was about to work with a group of children in the DT suite cooking pizzas. The

Claimant says that; *'I mentioned one possible thing she could consider for the period of cooking was to use the dust cover to prevent the alarm going off. I stated that it must be removed after the cooking session. I retrieved the dust cover from this cupboard and handed it to her'*. As such the Claimant accepts that it was he who drew attention to the possibility of placing a cap on the sensor but limits his involvement to a suggestion that the cap might be used.

44. In order to determine what actually occurred on 15 September 2017 we need to look at later accounts of events which were taken during the disciplinary proceedings. Pamela Benjamin was interviewed by Zoe Hudson on 13 October 2017. She was asked whether this was the first time that the cap had been placed on during cooking activities. She said that it was not and that it happened roughly 5 or six times in the past. She gave this general explanation:

> '*last time the fire alarm went off. When we was [sic] coming back in following the fire alarm, Sara was not happy. [The Claimant] told me that, in future, when doing cooking to stop like this from happening again - I have a cap for you to use to cap the smoke alarm'*

45. Pamela Benjamin said that the Claimant had put the cap up on some occasions and Gary Corney had put it up on others. She was asked what the Claimant has criticised as a leading question *'did you have any concerns regarding this instruction'.* It seems to us that this was a reference back to the Claimant telling Pam *Benjamin 'I have a cap for you to use'*. He was a teacher whereas she was a classroom assistant. Pamela Benjamin's response was that because the Claimant was the DT manager she was following his instructions.

46. Pamela Benjamin also said: *'after the incident where Gary fell I explained to [the Claimant] what had happened and told [the Claimant] that I thought we were going to get into trouble. [The Claimant] asked me 'you didn't say anything did you?' I told [the Claimant] that I was not going to lie and that the cap had been taken away. He replied saying that 'he would use cling film now to cap the alarm'.*

47. Gary Corney was interviewed by Zoe Hudson on 19 October 2017. He had sent an email on 3 October 2017 in advance of the meeting saying that he had thought it was okay to put a cap over the alarm sensor. He had said that it was not just him that had done it and that it had been done in the past. When he was interviewed he again said that the cap had been used during cooking activities but he declined to give the names of the people responsible. He denied personally ever having put the cap on and suggested that he was standing on a chair under the sensor *'assessing the situation'*. We find that this was a false account and that he was in the process of fitting the cap as Pam Benjamin said. When asked whether either the headteacher or his own manager had said it was okay to cap the fire alarm Gary Corney said that the last time the fire brigade had come they said it was okay to cap the alarm to stop it from going off as long as the room was not left unattended. When asked if anybody else had told him it was okay he said that the Claimant had. Then added that it might have been somebody else but that he couldn't remember.

48. We need to resolve the conflict between the Claimant's evidence and in part Gary Corney's account and that of Pamela Benjamin. We find that the Claimant has significantly downplayed his involvement in this incident. Pamela Benjamin gave

evidence before us. Her witness statement was consistent with the account that she had given previously. She had consistently said that this was not the first occasion that the cap had been placed over the smoke sensor. This was clearly an admission against her own interests. We see no reason why she would have lied about that nor indeed about anything else that she said. In her evidence she accepted her own wrongdoing. Her evidence is consistent with the parts of the account given by Gary Corney who also said that the smoke sensor had been covered on a number of occasions. We do not place much reliance on other parts of Gary Corney's account given his fanciful suggestion that he was standing on a chair with the cover for the smoke alarm to hand in order to 'assess the situation'. We find he was being less than frank in order to cover his own back. Nevertheless, he was clear that the cover had been used on a number of occasions.

49. In particular, we accept Pam Benjamin's evidence that she had spoken to the Claimant and that he had asked her whether she had said anything to anybody about the use of the cover on the smoke sensor and gone on to suggest that he would use cling film in future. That is an unlikely thing to make up. We concluded that the Claimant was less than frank about the number of times the cover had been placed on the smoke sensor and infer that he recognised at the time that his actions had been foolish and that he needed to minimise his involvement. Asking Pam Benjamin whether she had told anybody of his involvement is consistent with that.

50. In trying to minimise his own involvement the Claimant has sought to say that decision to place a cover on the smoke alarm was Pam Benjamin's. Whilst she accepted responsibility for her own actions she quite properly pointed to the fact that she was used to taking direction from the Claimant. We find that the Claimant was the person who promoted the use of the cap and that he told more junior staff members that it could be used in the expectation that it would be. The judgment call that that was the right thing to do was his.

51. The Claimant says that placing a cover on the smoke alarm was a perfectly proper response to the false fire alarms. We need to determine whether the response of the School was undertaken with reasonable cause. In support of his position that covering the smoke sensor was a reasonable step to take in response to the false alarms the Claimant later produced a guidance document produced by central government entitled *"A guide to reducing the number of false alarms from fire detection and fire alarm systems".* That guide rightly emphasises the drain on the resources of the Fire Brigade caused by false alarms. It also draws attention to the fact that false alarms create a safety hazard of their own because they will lead to a reduction in confidence in the alarm system and might cause people to assume that a genuine alarm was a false alarm.

52. The Claimant draws attention to the fact that guide points out that smoke alarms can often be triggered by cooking in particular by making toast and that heat sensors might be preferred in kitchens and bathrooms. He relies on one particular passage under a heading "activities near detectors" which says:

> *'Many false alarms result from activities carried out near fire detectors particularly smoke detectors. A common example is burning toast in the toaster…….. This type of alarm can be tackled by carrying out the activity*

> *elsewhere, fitting a temporary cover on the detector while the activities being carried out, changing the type of detector or moving it, or changing the way the fire alarm system responds with the detectors triggered if you use temporary colours on these detectors, these should be fitted only by approved staff and remove carefully as soon as possible after the activity has ended..'*

53. During the disciplinary process when the Claimant drew this document to Zoe Hudson's attention she sought advice from the local authority. She wrote to a Stuart McGregor who was a team leader in the Corporate Health and Safety and HTA Compliance team. By an email sent on 9 February 2018 she asked him *'Please could you provide advice on the appropriate use of temporary smoke alarm caps in schools? Are the particular times when temporary covers can be used? If so, when could they be used and what procedures would you recommend for the use of a temporary cover?'*. She provided a link to the guidance relied upon by the Claimant. Stuart McGregor responded as follows:

> *'These shouldn't ever be used unless there is a specific short-term reason for example maintenance works creating dust. This of course being on a risk assessed basis by a competent person, supervised and suitable control measures in place.*
>
> *I take it you are having some false alarms? If that is the case the fire alarm system should be reviewed as you may have the incorrect type of detectors located in areas.'*

54. We find that the advice that given by Stuart McGregor is straightforward common sense and is not inconsistent with the advice relied upon by the Claimant. There are certainly circumstances in which it might be appropriate to cover a smoke alarm in order to prevent a false alarm. However, it is not a sensible long-term solution as a covered sensor means that there is no sensor at all in that area. A fire might go undetected. The clear risk associated with covering a smoke sensor is well illustrated by the circumstances in which the Claimant found the cover in the first place. It had been left on by accident. There was no functional fire alarm sensor in the room. The guidance given by Stuart McGregor that use of a temporary cover should always be coupled with 'control measures' is consistent with the advice of central government that the covers should be placed and removed by *'approved staff*'. There is a significant gulf between the ad hoc use of a cover on the sensor known only to those persons who had placed the cover on the sensor and a sensible risk assessed approach which would inevitably involve a system of checks and most likely a written record of when the smoke sensor was disabled. It is easy to imagine a person responsible for a group of small children becoming distracted and overlooking removing the sensor cover.

55. The ad hoc approach of the Claimant was irresponsible and unnecessary. If the Claimant was concerned about false alarms he could have raised the matter with Zoe Hudson. If he had not already read the staff bulletin, his attention could then have been drawn to the perfectly sensible recommendation that the doors and windows were left open during cookery. If that had resulted in further false alarms it might have sped up the installation of a different sensor. He did not escalate his concerns (assuming he had any). That left the impression that the control measures

that had been suggested were effective when in fact they might not have been. Instead of drawing attention to the issue of false alarms through the proper channels he took matters into his own hands and then, when his actions came to light, he attempted to minimise his involvement.

The start of the disciplinary investigation

56. In her witness statement Zoe Hudson suggested that she first contacted the School's external HR provider EPM after she had spoken to Gary Corney on 18 September 2017. An email responding to her enquiry was included in the agreed bundle but was undated. In the course of the hearing, enquiries were made and the original email was obtained. That was dated 15 September 2017 the day of the incident itself. It was unclear whether Zoe Hudson had made her enquiry by email or over the telephone but it is clear from the response that the enquiry was to ask whether disciplinary action was appropriate and, if so, at what level. The response came from Stephanie Scott-Waters an HR Administrator. She said that looking at the disciplinary policy the Second Respondent considered unauthorised removal and use of the school/local authority property or serious breaches of the Council's health and safety policies and practices to amount to gross misconduct. She was told to speak to the headteacher who would if she thought it appropriate to appoint an investigating officer.

57. Zoe Hudson then spoke to Sara Haynes who decided that the conduct of Gary Corney, Pam Benjamin and the Claimant ought to be investigated. Letters were written to each employee. On 22 September 2017 Sara Haynes handed the Claimant a letter notifying him that there was to be an investigation. The letter had a heading *'Notification of an investigation into an allegation of gross misconduct'*. The letter commenced with a paragraph which said:

> *'I write to inform you that an [sic] concerns have arisen regarding your conduct at work. The concern is that you may have breached the health and safety policy by advising other employees to cap the smoke detector before cooking in the Design and Technology room.'*

58. The letter accurately described the process that would ordinarily follow under the Schools disciplinary procedure. The first step being that there would be an investigation after which it would be determined whether a disciplinary hearing was necessary. If it was, then the employee will be informed of the grounds in writing and would have the opportunity to state his case at a hearing,

59. The letter that was sent to Pam Benjamin differed slightly. That letter was written on 20 September 2017. There was no reference in that letter to gross misconduct. The letter sent to Gary Corney did not expressly refer to gross misconduct but did refer to a serious breach of health and safety policy. When read together with the disciplinary procedure, which was included with the letter, it would have been obvious to him that he was facing an allegation of gross misconduct.

60. In his witness statement the Claimant says he was devastated and stunned to receive this letter. He goes on to say that no one had spoken to him about the incident or indicated he had done anything wrong. We have found that both he and Pamela Benjamin were aware that they were likely to be in some trouble. That is the

natural inference to be drawn from the Claimant enquiring whether Pamela Benjamin had said anything about his involvement. Being told that there was an investigation was unlikely to be as surprising as the Claimant suggests. The Claimant did not learn of the wording of the initial letters sent to Pam Benjamin and Gary Corney by Sara Haynes until much later in the process by which time it was clear that they too had faced allegations of gross misconduct.

61. The Claimant suggests that it was a breach of contract and/or a failure to make reasonable adjustments that there was no 'informal' discussion with him about the incident before a formal investigation was triggered. The Respondent's Disciplinary Procedure (mirroring the ACAS Code on the point) suggests that 'less serious breaches of conduct' night be dealt with informally. The Respondent did not consider covering the smoke sensor to be a 'less serious' matter. We agree. This was never a matter that was suitable for an informal resolution. The Respondent was entitled to, and did, take this seriously.

62. Zoe Hudson wrote to all three employees on 2 October 2017 to advise them that she had been appointed to investigate the allegations against them. The letter sent to the Claimant referred to the allegation as being one of gross misconduct. It described the conduct as: 'It is alleged that you instructed a member of staff to cover the smoke detector in the Design and Technology room when she undertook cooking activities with the children and this is considered to be a serious breach of health and safety. The letters to the two other employees expressly referred to the allegations as being allegations of gross misconduct.

<u>The start of the Claimant's sick leave</u>

63. On 25 September 2017 the Claimant telephone Sara Haynes and informed her that he was unwell. The following day the Claimant's wife contact the school so the Claimant been signed off work until 9 October 2017. For the purposes only of the claims under the Equality Act 2010 we make the following findings. At the beginning of October 2017 the Claimant had contacted his trade union and his representative contacted Sara Haynes and suggested that the Claimant be given a compensation package in return for his resignation. Sara Haynes did not think that it was either necessary or appropriate to discuss paying any compensation at that stage.

64. On 26 September 2017 Rukia Begum, the Claimant's line manager, sent him a text message saying that she hoped he was well. This was clearly well intentioned and kind. The Claimant had previously got on well with Rukia Begum and if he had wished to he could have telephoned her to discuss any aspect of his health that he wished. The Claimant was expected to return to work on 9 October 2017 at which point he would have been asked to attend a return to work meeting which was standard practice after a period of absence.

65. Zakia Khatun had been asked to be the person responsible for managing the Claimant's absence. She was the person who would ordinarily conduct return to work meetings. The School has an absence management policy which provides that after 4 weeks of absence there will 'automatically' be a reference to the School's occupational health provider. The policy has an appendix dealing with stress at work. It is stated in that appendix that for any stress related conditions the school will

automatically refer the employee to Occupational Health. No particular time frame is specified.

66. On 10 October 2017 the Claimant was signed off work for a further month. On 13 October 2017 Zakia Khatun made a referral to Occupational Health. The Claimant and his trade Union representative were advised of this and an appointment was made for 30 October 2017. On 23 October 2017 the Claimant contacted the Occupational Health provider and stated that he wished to change the appointment as he had an important meeting at his son's school. Nathan Lodge an HR Manager at EPM was copied in to that e-mail and pointed out that the Claimant could be required to ask for leave if he wished to attend a personal appointment rather than a OH appointment. In the event the Claimant was granted leave by Sara Haynes on 21 October 2017 and the appointment was postponed until 7 November 2017. On 13 October 2017 the Claimant contacted Rukia Begum apologising for the inconvenience his absence might be causing. Rukia Begum responded saying that she hoped that he was OK and that there was no need for any apology. Again, this was a kind and clearly well-meaning response.

67. The Claimant's case in his ET1 is that nobody at the School contacted him about his ill health for 8 weeks. That is incorrect. He was contacted and told that a referral to OH was being made within 4 weeks of falling ill. On 3 November 2017 Zakia Khatum wrote to the Claimant inviting him to an absence review meeting on to take place on 17 November 2017 when it was anticipated that the OH report would have been received. The Claimant wanted to attend with his Trade Union Representative who was unavailable and so the meeting was re-arranged. Zakia Khatum's letter contained the following passage:

> *'I have not wanted to disturb you whilst you have been off sick, but of course I am more than happy to support you where I can, so please do contact me if you would like to talk on the phone before this meeting'*

68. We do not consider that there was anything in the Claimant's absence management at this stage that he could reasonably complain of. When Zakia Khatum gave evidence, she explained the difficulties faced by an employer when an employee says that they are suffering stress at work. She described the dilemma of initiating contact without information, not knowing whether that would alleviate or exacerbate the stress. We agree and conclude that the actions of the Respondent were reasonable (i.e. with reasonable cause). We regard taking steps to obtain an occupational health report 18 days after the first absence as excellent practice in these circumstances.

<u>The Claimant's First Grievance</u>

69. On 18 October 2017 the Claimant sent a letter to the then Chair of Governor's Alesha De Freitas. The letter was headed 'Strictly private and confidential'. The letter itself was just 2 pages long but the Claimant attached 5 appendices. The letter ends with a request by the Claimant to suspend the disciplinary investigation pending his grievances being dealt with.

70. Later on, the Claimant suggests that his letter included protected disclosures. The Claimant did refer to a number of instances at the school where there had been

some risk of injury in the past. Any fair reading of the letter would not suggest that the Claimant was drawing attention to previous health and safety concerns for the purposes of action being taken in relation to them but for the purposes of arguing that the disciplinary action against him was unjust. The Claimant says in terms that *'the decision to escalate to a gross misconduct investigation in this case amounts to victimisation and demonstrates that the school's management of health and safety is inconsistent'.*

71. The three matters referred to by the Claimant were as follows:

71.1. The Claimant refers to Razor Wire being found in the playground and that the Children were permitted to enter the playground before it was removed. Sara Haynes told us and we accept that this referred to an incident where in high winds razor wire from a neighbouring building was blown into the playground. As soon as it was noted the neighbours were alerted and it was removed. Whilst children were permitted to use the playground Zakia Khatum effectively stood guard to ensure they did not play near any danger. All of these facts were well known.

71.2. A glass plate that had been installed by independent contractors on a stairway. It had fallen and broken. Nobody was injured and the Claimant makes no complaint about the steps taken to control risk to children or adults after the event. There is no suggestion that anybody at the school could have taken any steps to prevent this happening or that anybody was to blame.

71.3. A child with special needs had on one occasion managed to leave the school premises. Sara Haynes told us and we accept that the incident was fully investigated with the 'LADO'. Nobody at the School was singled out for any criticism.

72. We find that the Claimant knew that the Senior Management were well aware of these incidents. He knew that in each case appropriate steps had been taken to mitigate any harm or any recurrence. Whether he recognised it or not the circumstances were not directly comparable to the smoke sensor incident. This was immediately obvious to everybody else at the School.

73. Appendix 1 was headed 'Grievances'. All but one of the 6 points made complained of the instigation and conduct of the disciplinary process. The last of these was a baseless suggestion that the disciplinary allegations had been made as a way of avoiding increasing his pay to the third point on the upper pay scale. The fourth point made complained that there had been no contact with him about his illness.

74. In his second point the Claimant refers to the three instances where he says that there were health and safety risks to children. We have dealt with those above.

75. The 5th point taken by the Claimant was to suggest that it was inappropriate for Zoe Hudson to conduct an investigation. He said that the Disciplinary Policy suggested that any investigation be conducted by a Line Manager. The Disciplinary Policy does state that investigations 'should normally' be carried out by a line

manager but says that if this is not 'practical or appropriate' then some other person would be appointed. The Claimant said:

> *This decision fails to meet the requirements of natural justice to ensure impartiality. Ms Hudson was responsible for overseeing the conversion and refurbishment of the DT room, which included the installation of two ovens and two hobs. When this conversion took place Ms Hudson chose to install a smoke detector rather than a heat sensor, as recommended the kitchens by the London Fire Brigade.*

76. Zoe Hudson was the person responsible for Health and Safety at the School. We find that her appointment was entirely appropriate. The alleged misconduct fell within her remit and, because she investigated how Gary Corney came to fall off a chair, she had already had some involvement.

77. We do not accept that there was any 'conflict of interest or impartiality'. The issue that was being investigated was not who was responsible for the choice of sensor but whether the Claimant had been involved in the decision to disable the sensor that had been installed. A conflict of interest would arise only where it would be in Ms Hudson's personal interests to find the Claimant responsible for covering up the sensor. We cannot see that this would serve Ms Hudson's personal interests at all. On the contrary, a conclusion that staff members had decided to deal with the sensor in this way highlighted rather than concealed the fact that the sensor may not have been the wisest choice.

78. At Appendix 2 the Claimant set out his account of how the cover was placed on the smoke alarm. He acknowledges only that he said that Pam Benjamin 'could consider' using the cover. His account includes the following passage:

> *'I can confirm that I have never used the dust cover myself whilst cooking or undertaking any other activity in the DT room but as I said above I have removed it. Furthermore, I did not instruct anyone to cover the smoke alarm with a dust cover.'*

79. The Claimant did not give a full and frank account of his involvement. In particular, he did not mention other occasions when he had put or advised others to put a cover on the smoke sensor. He did not make it sufficiently clear that it was him who had come up with the idea of using the cover. We find that his attempts to minimise his involvement came from a recognition that his conduct had fallen below what was expected.

80. The Claimant set out in his letter, and at Appendix 3, a description of his commitment and achievements at the school. We record for the purposes of the Equality Act claims that, in his letter, he went on to propose a negotiated settlement. He included details of his previous tribunal proceedings against Lambeth. We find that his reasons for doing so were not as he later suggests to explain how he felt, but that he hoped to secure a settlement from the School or persuade the School to abandon the disciplinary investigation.

81. The Claimant's letter asked Alesha de Freitas to follow the ACAS code of practice in respect of grievances. We note the tension between the Claimant saying

that he was not sufficiently well to attend an investigatory meeting whilst asking that Alesha de Freitas follow the ACAS code in respect of grievances which would involve holding a grievance meeting.

82. The Claimant's grievance was sent to the School during the half term holiday. As the Claimant would have known, that would not have come to the attention of anybody at the School until after the holiday. When she received the letter Alesha de Freitas spoke to Sara Haynes, Ruckia Begum and Zoe Hudson to ascertain what the letter was all about. She then took advice from the Schools HR advisers. On 1 November 2017 the Claimant's wife emailed Alesha de Freitas asking why there had been no acknowledgement of the documentations and asking for the plans/timescales for investigating the grievances and disclosures. Alesha de Freitas responded on 3 November explaining that she had not got the papers until earlier that this week because of the half term holiday. She said that she had spoken to the HR providers, she appreciated the urgency of the matter and said *'you should be hearing from me next week regarding the next steps'*. The Claimant's wife chased again on 9 November 2017 (three days in to the following week) asserting that there had been no progress in investigating the grievances. Alesha de Freitas provided her response on 10 November 2017 within the timescales that she had proposed in her e-mail of 3 November 2017.

83. The first point that Alesha de Freitas made in her letter was to state that contrary to the Claimant's suggestion that the disciplinary process was a means to thwart his pay progression his progression to the third point of the upper pay scale had been approved. In terms of the matters concerning the disciplinary allegation she said this:

> *I understand from your email that the investigation is causing you stress; however, the best way to address this concern is for the school to proceed with the investigation as quickly as possible in order to bring this matter to a close. As I understand, the School has referred you to Occupational Health confidential counselling and you will be written to separately regarding this.*
>
> *I am grateful to you for your statement regarding the smoke alarm in the DT room and am happy to pass this to the investigating officer (Zoe Hudson) in order to speed up the investigation, however this will be explored with you in detail during the Investigation Interview.*

84. In short, the stance taken by Alesha de Freitas was that a grievance concerning a disciplinary investigation was best dealt with within the disciplinary process. The grievance policy which the School used has, in Section 4, a list of matters excluded from the process. Included in that list were *'Issues which are the subject of any other school Human Resources procedure's [sic]'*. We consider that Alesha de Freitas' response was entirely reasonable and consistent with the grievance policy. The issue of whether disciplinary proceedings would, or should, be started was best dealt with in the disciplinary process. If the Claimant wished to explain his conduct he could do so within that process. Within that process he could, if he wished, have maintained his baseless suggestion that the disciplinary process was a means of avoiding giving him a pay rise. The Claimant's grievance was a collateral attack on that process the resolution that was plainly sought was the

termination of the disciplinary process. At that point the two other employees were also being investigated in relation to the same incident. The Claimant's grievance if entertained outside the disciplinary process would have a knock-on effect on the investigations into the others.

85. Contrary to what she had apparently promised, Alesha de Freitas, did not pass on the Claimant's statement about the events of 15 September 2017 to Zoe Hudson. When she gave evidence, she explained that omission by saying that she had noted that the letter was marked private and confidential and having expressed that she was 'happy to pass on' the Claimant's statement she thought that the Claimant needed to come back to her he wanted her to do this.

86. The Claimant's wife was not satisfied with Alesha de Freitas's stance and wrote a letter to Alesha de Freitas at her work address which she then hand-delivered to that work address. In evidence the Claimant's wife explained that decision by saying that she thought that the letter the Claimant had been sent on 10 November 2017 was so badly written that it could not have come from a senior civil servant. The letter is blunt. It described Alesha De Freitas's letter of 10 November 2017 as 'ill judged', it criticised the tone and it referred to the Claimant getting expert advice. On 14 November 2017 the Claimant's wife followed up her letter with an email enquiring whether the documents had been received. In her witness statement the Claimant's wife complains that the tone of the response from Alesha De Freitas was 'one of annoyance'. That is totally unfair. It was quite plainly inappropriate to deliver documents to a volunteer school governor at their work address. The letter that Alesha de Freitas had sent to the Claimant was in no sense badly written. It simply did not provide the Claimant with what he wanted. There were no reasonable grounds for suspecting that it had not been written by Alesha De Freitas as the Claimant's wife has tried to suggest.

87. Alesha de Freitas' response was measured. In an e-mail sent on 14 November 2017 she said;

> '*Yes I did, but I request that in future you do not contact me at work.*
>
> *I do understand your concerns and will respond as quickly as I can; however, these things do need to go through official channels and I do need to consult with HR to ensure the following proper procedures. So, I'm afraid that responses back to you will take longer than would otherwise be desirable'*

88. Alesha de Freitas took advice from Nathan Lodge but, on 16 November 2017, before she was able to respond, she received an e-mail from the Claimant seeking to appeal her decision 'to dismiss his grievances'. We find that the Claimant knew that the decision was not to shut out the issues raised in his letter but to point out that they should be raised in the disciplinary process. We are confident that the Claimant recognised that as this was recognised in correspondence by the Claimant's trade union representative on 14 November 2017 (although he agreed with the Claimant that the grievances should be dealt with separately).

89. The Claimant's appeal complains that there had been a failure to follow the grievance procedures. He says that his 'protected disclosures' were not specifically referred to in the letter of 10 November 2017. This is a reference to the three

incidents we have referred to above. Whilst this was true the Claimant had only referred to those incidents as a means of suggesting that the disciplinary investigation was an act of 'victimisation'.

90. Amongst the matters raised by the Claimant was a complaint that nobody at the School had spoken to him in the 7 weeks he had been off work and that *'there was no attempt to follow up on the OH report which the school commissioned and received last week'*. This last allegation sets the flavour of the correspondence. The Claimant had asked for a new OH appointment to suit his personal circumstances. That had taken place on 7 November 2017 and the OH Report sent to Zakia Khatun on 10 November 2017. A meeting had been set for 17 November 2017 to discuss the Claimant's health which had been arranged at the Claimant's convenience. The suggestion that there had been any failure to act responsibly was utterly misguided.

91. We find that the Claimant's grievance and his 'appeal' against the decision of Alesha de Freitas not to treat the complaints as grievances was calculated to derail the disciplinary process by putting pressure on the School to abandon it. We find that the Respondent acted entirely reasonably in pushing back against this and insisting that the disciplinary process take precedence.

92. On 24 November 2017 Alesha de Freitas wrote to the Claimant reiterating her position in respect of the Claimant's grievances. She said:

> *'I would like to be clear that the matters you have raised in your letter of 18 October 2017, are not considered to fall within the scope of a grievance. The matters you have raised in relation to the disciplinary investigation are to be dealt with as part of that process and I encourage you to provide the Investigating Officer with the information in your possession as this will be recorded as evidence in accordance with the School disciplinary procedure.'*

93. Alesha de Freitas went on to deal with a number of specific points. In respect of the health and safety incidents that the Claimant had principally relied on to show a disparity between the treatment of him and the treatment of others she said that if the Claimant wished to follow the whistleblowing policy he was free to do so (he never did) other matters should be raised in the disciplinary process. Alesha de Freitas disagreed with the Claimant about whether Zoe Hudson had a conflict of interest and stated that she believed that it was appropriate to her to be the investigating officer. She said this:

> *'Moreover, continue to encourage you to engage as quickly and thoroughly as possible with the investigation into the allegations against you, so that this issue can reach its natural conclusion. At the investigatory interview, you will have the opportunity to raise the matters of procedure and processing outlining your email/letter and in your statement regarding the smoke alarm in the DT room. Issues that directly relate to the disciplinary must be addressed as part disciplinary process and not separate process. This is in accordance with both the disciplinary procedure and the ACAS code of practice.'*

<u>The decision to remove the Claimant's TLR2</u>

94. Alesha de Freitas, from the point that the Claimant raised his grievance, had been trying to confirm her understanding that the Claimant had been permitted to progress to the Upper Pay Scale point 3. She had asked whether the formal pay statement had been sent. This prompted Sara Haynes to look at the Claimant's personnel file. She noted the fact that the Claimant's last written contract was described as temporary. She also noted that the Claimant was receiving a TLR2 pay supplement.

95. Sara Haynes decided that the Claimant had not been entitled to a TLR2 supplement from the time that he started as the DT teacher. She wrote to the Claimant in the following terms:

> *'Following your recent annual appraisal review, I am writing to confirm the pay determination taken by the Pay Committee to accept the recommendation provided in your annual appraisal report and confirm that your salary will increase to Upper Pay Scale 3 with effect from first of September 2017.*
>
> *We have noticed that you are still on a fixed term contract from your start date of 7 January 2013. As you have been with Arnhem Wharf Primary School for more than two years you will now be put on a permanent contract starting from 1 December 2017. Your file highlights that the temporary one year TLR2b which accompanied the role in 2013 should have been ended after one year but as it was an error on our half [sic] we will not reclaim the over payment to you but will terminate the additional TLR2b payment from 30th November 2017.'*

96. The effect of this letter was that the Claimant's pay would be reduced by £4355 per annum. It was a decision taken without any consultation or warning. We analyse below whether it was a breach of contract but, even if it was not it was bad news delivered in a somewhat brutal manner. The Claimant was not asked for his understanding he is simply told that he is not entitled to this supplement. Unsurprisingly the Claimant was angered by this decision. We infer that the decision was communicated to the Claimant shortly after he submitted or wrote his grievance appeal as that letter makes no mention of the pay cut. The bundle contains an email sent to his Trade Union Representative later in the day in which he expresses his astonishment at this decision.

97. The timing of the decision was unfortunate as the Claimant assumed that this was just a further act of victimising him. On 24 November 2017 the Claimant wrote to Mai-Anh who we understand was Sara Haynes' PA asking to appeal against her decision. He *said 'I have been given leadership and management duties each year since 2013. This is evidenced by my annual pay statement and the performance management documentation'.*

<u>The First Absence review meeting and the OH report</u>

98. The occupational health report provided to the School on 10 November 2017 advised that the Claimant was not fit for work 'at the present time'. Dr Steven Sperber who wrote the report advised:

'Mr Walker has a background history psychological ill health triggered by significant stresses he experiences previous role and current workplace issues have led to him suffering some flashbacks to emotions and symptoms associated with that time in his life.

From a medical point of view, he is currently not fit for work. I feel he would benefit from a course of psychological counselling and advise him to speak to his GP regarding this as soon as possible.

I can think of no workplace adjustments which would allow him to return to work at this stage. However, I would advise management conclude its investigation as soon as possible, in order to help Mr Walker achieve psychological closure and to move forward'

99. Having received that report Zakia Khatum wrote to the Occupational Health Dr asking whether the Claimant was fit to attend meetings at the school so that the disciplinary process could be concluded as advised in the report. Dr Sperber responded indicating that he believed that the Claimant could attend meetings of those suggested these were at a neutral venue. It is not clear to us whether that advice was received in advance of the absence review meeting or shortly afterwards.

100. The Claimant attended the first absence review meeting together with his Trade Union Representative. Zakia Khatum was accompanied by Nathan Lodge a human resources advisor. During the meeting the Claimant spoke at length about his previous experiences in Lambeth and produced a paper which referred to his health in 2009. It also set out some of the findings from his Employment Tribunal case he said: 'I am fearful of being bullied and treated this the way I was previously. My mental state relates the anxiety caused by actions towards me which are not even handed, fair, reasonable and in accordance with agreed procedures'. We find that the Claimant's references to his experiences at Lambeth principally motivated by a desire to signal to the School that he was prepared to litigate only in part by a desire to explain the stress that he was experiencing.

101. During the absence review meeting the Claimant's trade union representative suggested that, the Claimant having provided a statement about the incident on 15 September 2017, there was no case to answer. The Claimant recalls that Mr Lodge points out that *'at some point this needs to be investigated'*. We find that once again the Claimant was focused on trying to bring the disciplinary investigation to a premature end or, if he was unable to do that, obtain an assurance that he would not be dismissed. It was agreed in the meeting that the Claimant would be sent written questions about the incident of 15 September 2017 and he could respond in writing.

102. During the meeting the Claimant complained about a lack of contact. Zakia Khatum proposed that going forwards Rukia Begum should contact the Claimant at least once a week to provide a link to the School. The Claimant was directed towards the mental health charity MIND. Zakia Khatum offered to meet with the Claimant a week before his then current sicknote expired but the Claimant declined.

103. As might be expected Zakia Khatum wrote to the Claimant on 13 December 2017 summarising what had been discussed. The Claimant takes exception to this letter referring to it (at times) as minutes of the meeting. We do not consider that it

was ever intended that the letter would amount to minutes of a meeting. In our experience that would be most unusual. It is however a reasonable summary of what was discussed. Whilst the Claimant refers to inaccuracies we have not detected any material omissions. The Claimant's trade union representative sent an email to Zakia Khatum on 14 December 2017. He took exception to the final paragraph in the letter which was in the following terms*: 'Please be advised that, in accordance with the Schools Sickness Procedure, in circumstances where you as an employee, are unable to sustain good attendance, thus enabling you to undertake the duties defined in your role as a teacher in accordance with your contract of employment, then a Contractual Review Meeting may ensue which could regrettably lead to your dismissal with appropriate notice, should option such as redeployment or job to redesign not be suitable options'*. He complained that that was not expressly stated at the meeting. This is utterly unrealistic. The Claimant was well aware of the school's absence management policy and the purposes of the meeting. He had been a headteacher and must have been aware of standard absence management processes. He would have been aware that the letter produced was a pro forma and that it was entirely normal to refer to the possible consequences of further absences.

104. The email also complained that the letter omitted to summarise the paperwork produced by the Claimant where he set out a history of the stress caused by Lambeth. Finally, there is a complaint that the letter does not record that it had been discussed that the Claimant would respond to the Disciplinary Investigation by providing written answers. Whilst that last point is true the Claimant had already been sent a letter by Zoe Hudson on 8 December 2017 asking him to respond to written questions. In other words, by the time the complaint is made the Claimant knew that the Respondent had acknowledged and acted upon his request. Any omission in the letter is entirely immaterial.

<u>The request to answer written questions and the deterioration in the Claimant's health.</u>

105. As set out above on 8 December 2017 Zoe Hudson wrote to the Claimant inviting him to attend an investigatory meeting on 18 December 2017. She says that if the Claimant would like to meet at a neutral venue then he should let her know. This is in accordance with the specific advice on the topic that had been obtained from occupational health. To reiterate, the advice was that the Claimant was fit to attend meetings but that he might prefer a neutral venue.

106. Zoe Hudson included a list of 17 short questions. These included asking the Claimant to comment on what Pam Benjamin had said about how often the fire alarm sensor had been covered, whether he had previously placed the cover on the sensor, whether he had asked Pam Benjamin whether she had 'said anything' to Zoe Hudson and whether he had made the comment about using cling film. The overall tone of the letter is clear and professional and we consider the questions to be entirely unobjectionable. The level of involvement of the Claimant was clearly a relevant matter and would inform the decision maker's view of the severity of the allegation.

107. Zoe Hudson asked the Claimant to respond to her written questions by no later than 13 December 2017. The Claimant suggest that the only gave him two days

to reply. In his evidence, when asked why he said that was two days, he responded that the other two days were made up of the weekend. We regret to say that this was typical of the Claimant's approach. He used the fact that there were two weekend days to suggest that it was difficult or impossible for him to complete the task that he had been asked to do. Zoe Hudson could reasonably have believed that answering the questions was relatively straightforward and would not have taken him more than a couple of hours. There is nothing unreasonable about her deadline.

108. Zoe Hudson explained her wish to hold a meeting once written responses were received as being that she might wish to ask follow-up questions. It had not been made categorically clear by the Claimant up to this point that he would not be fit enough to attend a meeting. In fact, he had just attended a meeting without any apparent difficulty.

109. On 9 December 2017 the Claimant became ill. At some point he had climbed into his children's treehouse. The Claimant's wife became concerned about his mental health. Rukia Begum had endeavoured to keep in touch with the Claimant throughout his absence. She had sent him text messages on 19, 27 and 29 November 2017 and she called him on 30 November 2017. The Claimant explained that he was stressed and it brought back memories of suicidal thoughts he had had in 2009/2010. Rukia Begum attempted to reassure the Claimant that he was cared about by a lot of people. They discussed keeping in touch regularly. They spoke again on 6 December 2017. Rukia Begum had heard from another member of staff that the Claimant was feeling suicidal and wanted to offer her support. The Claimant suggested that he had all the support he needed.

110. On 9 December 2017, a Saturday, the Claimant's health took a turn for the worse. Ultimately, he was taken to A& E but was discharged after a couple of hours. During the hiatus that this caused, the Claimant's wife rang Rukia Begum. Rukia Begum's account of this was disturbing. Recalling the events was plainly a difficult experience. The Claimant's wife did not simply call to explain that the Claimant was unwell but made it clear that she considered that the School were responsible for her husband's health issues in particular by sending the list of written questions and invitation to an investigation meeting. She threatened to involve the media and intimated legal action. Rukia Begum, to her credit, was principally concerned that the Claimant received the treatment that he needed. She asked whether an ambulance had been called. She endeavoured to keep in contact with the Claimant's wife throughout the weekend. She remained worried and concerned but was not in any position to offer immediate assistance. We understand that the Claimant's wife must have been very distressed at the time. In her evidence before us she seemed confident that her conduct was fair and reasonable. We disagree it showed a lack of empathy for Rukia Begum.

111. 9 December 2017 is the date on which the Respondents admit that the Claimant satisfied the statutory definition of disability set out in Section 6 of the Equality Act 2010.

112. On 12 December 2017 the Claimant's wife provided a letter from the Claimant's GP that said that he was unfit to answer any written questions or attend the investigatory meeting. The meeting did not proceed.

113. On 17 December 2017 Alesha De Freitas sent an e-mail to the Claimant offering to meet to discuss any concerns that the Claimant had with the exception of the disciplinary investigation. She offered a meeting on 20 December 2017 but if that was inconvenient invited the Claimant to propose alternative dates.

114. The Claimant's wife responded on 18 December 2017 and said that the Claimant was unfit to attend any meeting in the following week. She starts by referring to the correspondence from Zoe Hudson as 'hostile'. Whilst it might have been perceived as 'hostile' by the Claimant given his health difficulties his wife had no such excuse. The criticism was combatative and unwarranted. She gave no indication of whether she thought that a meeting would be beneficial but did say that she thought the remedy for the complaint about removing the TLR was 'self-evident'.

115. On 18 December 2017 The Claimant's wife sent a long letter to Zakia Khatum in which she criticised the letter summarising the absence review meeting. She again referred to Zoe Hudson's letter as 'hostile'. She included a transcript of the meeting apparently made from notes taken. She also attached appendices. Two of these referred to the Claimant's experiences at Lambeth the third listed what was said to be unfair treatment. It was not at all clear what the Claimant's wife expected the School to do with this correspondence.

116. On 3 January 2017 the Claimant attended a further appointment with the Respondent's HR provider. The report that was provided informed the Respondent that the Claimant was unfit for work or any meetings but that he could participate by answering any questions posed by management.

117. On 3 January 2018 the Claimant's wife wrote a letter to Alesha De Freitas. The letter repeats contentions that were dealt with in earlier correspondence. In particular, the Claimant's wife seeks to re-argue the point that the Claimant's complaints sent in his first grievance ought to have been considered under the grievance procedure. She attacks Alesha De Freitas personally and suggests that her initial response to the Claimant's grievance was 'riddled with errors'. She seeks to compare her attendance at Alesha De Freitas's workplace with the fact that Alesha De Freitas (a volunteer governor) sent e-mails to the Claimant outside office hours. There is little that is constructive about the letter. In particular, it does not refer to the offer to meet the Claimant and discuss any concerns he had. We understand that the Claimant's wife wished to support him but her correspondence did little to assist him when couched in these terms.

118. On 23 January 2018 the Claimant responded to the questions posed by Zoe Hudson. He sent those to Alesha De Freitas because he said that he did not consider Zoe Hudson to be impartial. Alesha De Freitas as she had said previously did not agree and passed them on to Zoe Hudson who responded on 2 February 2018 saying that she hoped to be in a position of giving an investigation outcome by 2 March 2018. The Claimant included a lengthy explanation of why he thought his actions, as far as he admitted them were reasonable and an extensive criticism of the process followed by the School. In his responses to Zoe Hudson's questions he said that he had personally never covered the sensor but did accept that he had informed another teaching assistant where it was kept. He denied instructing anybody to use the cover and denied that he had asked Pam Benjamin whether she

had said anything about his involvement. He denied saying that he would use cling film in future.

119. There were still material differences between Pam Benjamin's account and that of the Claimant. We have preferred Pamela Benjamin's account of the events. It appears that the Claimant was less sure of his own account as well. On 1 February 2018 his wife wrote to Alesha De Freitas and Zoe Hudson and amongst other things said; *'He still maintains that he did not use the cap but he is worried that it is possible he may have used the cap but can't remember'.* This is a very different suggestion to that made in the Claimant's initial witness statement which accompanied the grievance sent to Alesha De Freitas.

120. On 23 February 2018 Zoe Hudson interviewed Quentin Montville who was the other Teaching Assistant in the D & T suite. He said that on one occasion when he had been cooking the Claimant had said something about putting 'some red thing' on the fire alarm when cooking as the alarm used to go off. He said that it was a suggestion and that he was not told he had to use it.

The Second Absence Management meeting

121. On 23 February 2018 the Claimant attended a second absence management meeting. In advance of that meeting he prepared a document in which he complained about what he said was a failure to contact him during his sickness or provide any support for him. He talked about the medical treatment that he had received and what was recommended. Finally, under a heading requested management action he said:

> *'As my sick leave amounts to a mental injury caused by management action, I'm requesting my full pay sick leave is extended in line with the national terms and conditions document.*
>
> *At the root of my anxiety is a belief that I'm not been treated fairly and in accordance with natural justice. The fear is borne out by the fact that despite a number of requests and the involvement of ACAS, the grievances I have submitted have not been heard in accordance with the school policy.*
>
> *I therefore wish to request an appeal hearing of my grievances with the Vice Chair of the governing body, Alex Bodewig.*
>
> *Following the diagnosis of my PTSD my situation places me within the provisions of the Equality Act 2010 and I therefore requesting [sic] that the following reasonable adjustments are made:-*
>
> *(1) That the school management reviews its actions in relation to me in the light of events.*
>
> *(2) That I am able to represented at meetings by a close friend.'*

122. At the sickness review meeting the Claimant was informed that his pay would be reduced to half pay in accordance with the ordinary guidelines. The Claimant also voiced his request to speak to a member of the Governing Body. This caused

Nathan Lodge to make enquiries of Alesha De Freitas who informed him that she had already made an offer to meet with the Claimant in December.

123. On 24 February 2018 the Claimant's wife wrote both of the local authority and to Sara Haynes asking for the Claimant's pay to be reinstated. On 26 February 2018 Claimants wife wrote to Alex Bodewig who had been appointed as the new Chair of Governors as Alesha De Freitas had resigned because she was to take maternity leave. Surprisingly, the Claimants wife wrote to Alex Bodewig's work address at the Bank of England. The Claimant had also involved his local MP who had in turn written to the Minister of State for School Standards.

124. On 9 March 2018 Zakia Khatum wrote to the Claimant summarising the meeting that had been held on 23rd of February 2018. She recorded that the Claimant had, as requested, been accompanied by a friend rather his trade union representative. The letter records the fact that the Claimant was told that his pay would reduce to 50% and that he was advised if he objected that he should write to Sara Haynes. On 12 March 2018 the Claimant responded asking that some additional points be noted as having been discussed in the meeting.

The investigation was concluded

125. On 2 March as she had promised, Zoe Hudson wrote to the Claimant informing him of the outcome of her conclusion. She had concluded that there was evidence to support the allegation that the Claimant had instructed a member of staff to cover the smoke detector in the design and technology room and that that was considered to be a serious breach of health and safety. She informed the Claimant that if her recommendation was accepted a disciplinary hearing would be formally convened.

The decision on the Claimant's request for full pay

126. On 8 March 2018 Sara Haynes wrote to the Claimant and informed him that she was not prepared to pay him full pay whilst off sick. She dealt point by point with the matters raised in the Claimant wife's correspondence. She refers to the letter sent by Zoe Hudson to the Claimant that he claims made him unwell and states, correctly in our view, that she was unable to determine why he felt that letter was threatening. She concludes by saying that she did not consider that the Claimant's request for full pay was appropriate either by way of a reasonable adjustment or indeed in accordance with the ordinary sick pay policy. To summarise her position her conclusion was that school had behaved entirely properly in relation to the disciplinary investigation.

Invitation to a disciplinary meeting

127. On 15 March 2018 the Claimant was sent a copy of Zoe Hudson's investigation report by Sara Haynes. The allegation against the Claimant had been slightly amended and now read that the Claimant had *'advised multiple members of staff to cover the smoke detector in the design and technology room on numerous occasions….'.* The Claimant was invited to attend a disciplinary meeting on 29 March 2018. Had that meeting gone ahead it would have been conducted in accordance with the ordinary disciplinary policy by a panel comprising Sara Haynes and one of

the governors in this instance Kenny Frederick. The Claimant was sent a further letter requiring him to attend a disciplinary meeting as a witness. He was not told that this was to be the disciplinary meeting of Pamela Benjamin.

128. On 23 March 2018 the Claimant responded to Sara Haynes saying that he was not fit to attend a disciplinary hearing whether on his own account or as a witness in any other proceedings. Sara Haynes acceded to that request in respect of the Claimant's disciplinary hearing. She also rearranged the hearing for Pamela Benjamin until 9 May 2018. She wrote to the Occupational health advisor seeking advice on whether the Claimant was correct in his assertion that he had a disability for the purposes of the Equality Act and also asking what adjustments might be made to a disciplinary hearing. The response to that letter took some time as Dr Sperber was on annual leave.

Invitation to a grievance meeting and the Grievance process

129. A decision was taken, we assume in conjunction with the School's HR advisors that the Claimant should be granted an opportunity to aire appropriate grievances with a member of the Governors. Alesha De Freitas has resigned as chair because she was starting maternity leave. On 17 April 2018 the Claimant was sent an invitation to attend a grievance meeting to address the concerns he had raised in his letter of 19 March 2018. The letter was sent by the then Chair of Governors Alex Bodewig. The date proposed was 24 April 2018. The Claimant wrote on 19 April 2018 and explained that he could not prepare in time. He also sought adjustments including breaks, a breakout room, a structure for the hearing and an ability to record the hearing. He did not explain why his condition made it necessary to record the hearing in that letter.

130. On 18 April 2018 the Claimant offered to attend a disciplinary hearing. In his witness statement the Claimant says that he recognised that his health would only improve once the hearing was concluded 'and he was vindicated'. We find that that is an accurate statement of the Claimant's state of mind. Nothing short of vindication was likely to satisfy the Claimant or facilitate his return to work. His letter includes the controversial statement *'as you know I was diagnosed with PTSD in December 2017 as a result of management action during the period of the disciplinary investigation'*. He then goes on to ask for what he says are reasonable adjustments. These included being accompanied by his wife, being given breaks/adjournment, having access to a breakout room, having outline structure for the hearing, and an agreement that he can record the hearing. Sara Haynes responded on 1 May 2018 agreeing to all the requests with the exception of the Claimant's request to record the meeting where she made a provisional decision to decline the request. She said that there would be a minute taker present and that the Claimant's wife could take notes if she wished. She told the Claimant that she would seek the advice of the Occupational Health service as to whether he ought to be permitted to record the meeting.

131. The Claimant complains of delays by Alex Bodewig responding to his request for adjustments, but behind the scenes, Alex Bodewig was taking advice on the Claimant's requests. Alex Bodewig responded to the Claimant on 2 May 2018 saying that the re-arranged grievance hearing was to be held on 11 May 2018. In response

to the request for adjustments Alex Bodewig said that Sara Haynes had responded to the request for adjustments to the disciplinary hearing and by implication suggesting that his response would be the same.

132. The Claimant had been asked to attend as a witness in Pam Benjamin's disciplinary hearing on 9 May 2018. In the event he was unable to attend because of a tragic death in his family meant that he had to attend a funeral. Not knowing about the funeral Rukia Begum chose that day to send the Claimant a pleasant e-mail where she started by saying *'I hope life is getting a bit easier for you. You are constantly in our thoughts'*. The response she got was less empathetic. The Claimant explained that his relative had taken his own life and he drew parallels with his own situation. He said, *'this isn't something that can be swept under the carpet and neither is my own situation…that you saying repeatedly that you hope I am now feeling better – is not something that does actually help me or make me feel supported.'* Rukia Begum responded promptly sending her condolences. In her evidence before us it became clear that she was deeply upset at the suggestion that she had been insensitive.

133. Pam Benjamin's disciplinary hearing went ahead despite the fact that the Claimant could not attend. Sara Haynes and a Governor heard the disciplinary in accordance with the ordinary policy. Pamela Benjamin told us and we accept that she admitted her involvement. She had said that she had done what the Claimant had suggested as she believed him to be more senior and responsible. At the conclusion of the hearing the disciplinary sanction imposed was to give Pam Benjamin a written warning. Pam Benjamin told us and we accept that the whole process had put her under enormous strain. She said at the conclusion of her evidence that she knew she had made a mistake and that she wanted to admit it and move on.

134. In advance of the meeting with Alex Bodewig the Claimant prepared a bundle of documents. He included all his grievances including the letter sent to Alesha De Freitas on 18 October 2018 thereby expanding his grievances by a considerable margin and including his complaints about the fact that he was being subjected to disciplinary proceedings.

135. The Claimant attended the grievance meeting with his wife. Alex Bodewig was accompanied by an HR advisor from EPM, Georgina Twin, and there was a note taker from the local authority. At the outset of the meeting Alex Bodewig told the Claimant that he would listen to the grievances and then carry out an investigation. The Claimant's wife complained that the Claimant had not been provided with a guide as to how the meeting would be structured. Georgina Twin pointed out that the procedure for conducting any hearing would depend on the issues that needed to be discussed. Alex Bodewig told the Claimant that he was happy if he wished to contact witnesses provided that discussions were limited to the matters raised by the grievances.

136. Alex Bodewig is recorded as having noted that there was an overlap between the sum of the grievances raised by the Claimant and the matters raised in the disciplinary proceedings. The Claimant's response was to say that if he was told that he could not raise those concerns at the meeting he would have to do make *"a*

protected disclosure to my MP". He went on to say *"There has been a gross abuse of natural justice and I am full of anxiety that I will be treated unreasonably. That's been my experience and I've been told that's the root of my diagnosis"*. Georgina Twin is recorded as telling the Claimant that he would not be allowed to raise grievances which related to the disciplinary issues.

137. As might have been expected, Alex Bodewig, asked the Claimant what resolution he sought from his grievances. Surprisingly, the Claimant was not prepared to discuss that *'in a grievance meeting'*. We infer that the Claimant wanted something more than the simple resolution of his grievances.

138. It was agreed that the Claimant would be permitted to speak to and call witnesses and that in order for the matter to be concluded a further meeting would need to be fixed. The meeting ended at that point. After the meeting the Claimant's wife was sent a copy of the minutes it seems that she was satisfied with the record that had been made of the hearing as she said: "*Many thanks for your work to produce [sic] a good set of notes-this is greatly appreciated."*

139. On 14 May 2018 the Claimant wrote to Alex Bodewig. He started his letter by thanking Alex Bodewig for beginning the process of hearing and investigating the grievances. He then went on to list what he said were additional issues and further grievances. In this letter the Claimant takes issue with the suggestion that he should not be allowed to bring grievances about matters concerning the disciplinary procedure. He ends the letter by repeating the request to record further meetings.

140. On 16 May 2018 the Claimant attended a further occupational health review with Dr Sperber that had been organised principally for the purposes of ascertaining what if any adjustments needed to be made to allow the Claimant to participate in the grievance and disciplinary hearings. Dr Sperber expressed an opinion that concluding outstanding grievance and disciplinary process and fair manner and within a reasonable timeframe would be of assistance to the Claimant psychological closure and assist his recovery. In respect of the issue of whether the Claimant should be permitted to record the meeting is Dr Sperber said: *"Whether or not the hearing is recorded is not, in my opinion, a medical issue and I will leave it to the school and Mr Walker to come to an agreement on how best to proceed".*

141. On 21 May 2018 Sara Haynes spoke to Alex Bodewig who told her that he wished to resign as a Chair of Governors and that he was not prepared to continue to deal with the Claimant's grievances. Sara Haynes made what appear to be detailed notes of that conversation. The copy of those notes that had been included in the trial bundle had been partially redacted. We accept that the reason for the redaction was that redacted parts refer to Alex Bodewig's health. However, as the reason for Alex Bodewig deciding to resign was relevant we asked to see the unredacted document. We then ruled that the document should be disclosed in its entirety. We gave reasons for this at the time and they shall not be repeated here.

142. Sara Haynes note reveals that there were two reasons why Alex Bodewig did not wish to continue to hear the grievances. The first concerned his own health. It is sufficient to say that he had a serious health condition and wished to concentrate on getting better. The second concerns related to the Claimant. Sara Haynes notes set out the following in bullet points:

- *impact professionally on me*
- *his intention is to go to tribunal*
- *has already named Alex*
- *he was very aggressive*
- *he accused [Alex Bodewig] of victimising him*
- *can't put myself in a situation like that- not in frame of mind - might say something and give him ammunition*
- *best if someone else takes it forward*
- *don't think I can go back into a situation like that again - stayed legal -advice*
- *trying to trip up.*

143. Sara Haynes in her witness statement gives some additional information. She says that Alex Bodewig had already received correspondence from the Claimant at his place of work and was concerned about his professional reputation. We accept that that was said as it is consistent with the brief notes that were made.

144. The Claimant and his wife had, from 11 May 2018 onwards pressed to learn when the resumed hearing would take place. Their emails were sent both to the HR provider and to Alex Bodewig. They complained that the delay was hard on the Claimant.

145. Alex Bodewig could not be persuaded to carry on and indeed disengaged entirely with the school making it difficult to finally agree the minutes of the hearing. A holding response was sent on 23 May 2018 by Runa Basit who was the Head of Governance and Information, Governor Services, at the local authority. She informed the Claimant that the meeting would not be reconvened the following week as had been anticipated and she apologised for the frustration and inconvenience caused. This prompted an immediate response from the Claimant's wife who referred to excessive delays in investigating the grievances, made reference to the effect of the delays on the Claimant's health and demanded an immediate response.

146. At some point between the 23 and 25 of May 2018 Kenny Fredrick agreed to be appointed as Acting Chair of Governors. Georgina Twin prepared a draft letter to send to the Claimant and sending by email to Kenny Fredrick and Sara Haynes on 25 May 2018. She said this:

> *'The employee and his wife is very frustrated that there has been no contact from the CoG for two weeks and will no doubt ask further questions around the reasons for this. However, I don't know what Alex is comfortable with us sharing because I haven't been able to make contact with him so I think we just limited to personal reasons and if questioned we can inform the employee that we are not able to disclose any further detail relating to those reasons due to impersonal and confidential.'*

147. Kenny Fredrick approved the draft letter which went out to the Claimant on 25 May 2018. In that letter Kenny Fredrick informed the Claimant that Alex Bodewig had decided to stand down and could not continue to hear the grievance that was expressed as being for "personal reasons". She went on to say this:

I would like to reassure you that we wish to address your grievances as quickly as possible and in order to do this, an external independent Investigating Officer is being appointed to investigate your complaint which will now be heard by me, as Acting Chair of Governors'

148. An external consultant, Terry Geater, was then appointed to undertake an investigation into the Claimants grievances. On 11 June 2018 the Claimant wrote to Kenny Fredrick and amongst other things repeated his request to record any further grievance or disciplinary hearings. On 12 June 2018 the Claimant agreed to attend a disciplinary hearing scheduled for 5 July 2018. There was some difficulty finding a convenient date and Sara Haynes thought it important that the matter was concluded before the summer holidays.

Delays – grievance report

149. On 22 June 2018 Sara Haynes wrote to the Claimant inviting him to attend the disciplinary hearing. Her letter set out the charge against him in the same terms as the letter of 15 March 2018. It informed the Claimant that the hearing would be chaired by 2 Governors Jane Hewland and Shane Parker. Sara Haynes had taken the decision, sensibly in our view, that she should not be one of the decision makers. The letter suggested that Pamela Benjamin, Gary Corney and Quentin Montville (the other teaching assistant) would be present to give evidence as witnesses. The Claimant was warned that Gary Corney may not attend as he was no longer an employee. The letter then dealt with the adjustments sought by the Claimant. Sara Haynes told the Claimant that he might be accompanied by his wife (and the hearing had been arranged to accommodate that). She also had arranged for a room to be available for the Claimant and told him to request breaks if needed. She also agreed to the Claimant's request that he be permitted to record the meeting. She said that in any event the School would follow its usual practice of having a manual notetaker.

150. On 19 June 2018 the Claimant and his wife met Terry Geater at the local authority's offices. We were provided with minutes of that meeting and a transcript prepared by the Claimant. The minutes show that Terry Geater introduced himself and explained that he would be interviewing the Claimant and then interviewing others after the meeting he would then at prepare a final written report. He asked the Claimant whether he was happy to be interviewed by him. The minutes and transcript then show that the Claimant had an opportunity to explain what his grievances were including those grievances which had a direct connection with the decision that he should face disciplinary proceedings.

151. One of the allegations made is that Terry Geater did not ask neutral questions. If that is intended to suggest that there were no neutral questions then that is flatly contradicted by the notes of the meeting. There are a large number of open questions that were asked. We find that Terry Geater took the Claimant through his grievances in a manner consistent with a person trying to understand them. There is nothing in that interview record or the transcript that would suggest that he was not approaching the task professionally.

152. In her submissions Mrs Banerjee refers to a passage in Terry Geater's interview of Zoe Hudson as demonstrating bias. The passage she refers to follows on from a point where Zoe Hudson is sufficiently upset that she is offered tissues

when Terry Geater has read a passage of the Claimant's grievance to her and then put to her that she had put the words 'instructed' in Pam Benjamin's mouth. The passage objected to is Terry Geater saying that he did not necessarily believe the matters that he was putting to her and asking her not to be upset. In our view Terry Geater is doing nothing more than trying to calm Zoe Hudson and explain his role. He does not say that he does not believe what the Claimant said. We do not believe that that passage comes close to establishing that he was biased. Mrs Banerjee also referred to passages when Sara Haynes was interviewed. These too do not in our view demonstrate a closed mind or any bias.

153. In the event Terry Geater did not complete his report or investigation until after the Claimant resigned. As a matter of fact, he did not uphold the Claimant's grievances but that has little bearing on our decision.

The final absence review meeting

154. On 21 June 2018 the Claimant attended an absence review meeting. That was conducted by Zakia Khatun attended by Fiona Singlehurst from EFM. The Claimant was accompanied by his wife and was permitted to record the meeting. Fiona Singlehurst attempted to control the subject matter of the meeting by informing the Claimant that this was not the time and place to air grievances. That was to no avail and the notes of the meeting show that the Claimant raise numerous matters including the removal of his TLR payment.

The disciplinary hearing and the Claimant's resignation.

155. The Claimant was invited to a disciplinary hearing to take place on 5 July 2018 by Sara Haynes under cover of a letter dated 22 June 2018. That letter informed the Claimant that the panel would comprise of 2 Governors Jane Hewland and Shane Parker. He was told that Pamela Benjamin, Gary Corney and Quentin Monville would be present to give evidence and that if the Claimant wanted any additional witnesses he should let Sara Haynes know by 2 July 2018. He was put on notice that Gary Corney's attendance could not be assured. In fact, he had been dismissed much earlier on an unrelated matter. The Claimant responded on 28 June and said that he wanted Sara Haynes herself, Zoe Hudson and Nathan Lodge to be present to give evidence.

156. On 3 July 2018 the Claimant sent an e-mail to Sara Haynes asking for 'confirmation of the witnesses for Thursday 5 July'. Sara Haynes simply responded that she had passed on the e-mail to the panel.

157. The disciplinary hearing commenced on 5 July 2018. We need to make a number of findings of fact as to what occurred. The basic format of the hearing was intended to be that Zoe Hudson would outline the management case against the Claimant and then call any relevant witnesses. The Claimant was to be permitted to ask Zoe Hudson any questions. However, it is common ground that before completing his questioning of Zoe Hudson the Claimant resigned. He then left. The meeting continued and a decision was made that the disciplinary allegations were made out but that the appropriate sanction was to give the Claimant a written warning.

158. We had the benefit of the notes taken by Runa Basit who acted as a clerk to the hearing. We also had a transcript of the recording made by the Claimant which included a discussion between the Claimant and his wife in private shortly before the Claimant return to the hearing room and resigned.

159. We have to deal with the following allegations made by the Claimant:

159.1. that the was a delay in starting the meeting without any adequate update as to the reasons; and

159.2. that the Claimant was not provided with suitable facilities during the delay; and

159.3. that additional people attended the meeting which had not been indicated in advance; and

159.4. an allegation that Caroline Sheffield, an HR advisor, who assisted Zoe Hudson improperly interfered with her evidence during questioning; and

159.5. that there was a failure to permit the Claimant to raise his concerns over the investigation and disciplinary process; and

159.6. that lines of questioning were restricted; and

159.7. that material the Claimant had sent to the panel had not been provided to Zoe Hudson; and

159.8. that there was no confirmation in advance of the hearing which witnesses would be there; and

159.9. a generalised allegation that there was a failure to consider or understand the impact of the Claimant's disability; and

159.10. an allegation that Shane Parker and/or Attia Williams improperly interrupted the Claimant; and

159.11. that there was a failure to acknowledge act upon or engage adequate or at all with the faults in the process raised by the Claimant during disciplinary hearing; and

159.12. that Shane Parker raised his voice creating an intimidating environment.

160. The Claimant had been told that the meeting would be starting at 9 AM and attended with his wife in good time. He had been allocated a room for his private use.

161. The meeting did not start at 9 o'clock because Runa Basit had not arrived. She mistakenly thought that the meeting was due to start at 10 AM. The Claimant in his witness statement says: '*I felt like this was done purposely to unnerve me. It felt spiteful at worst, neglectful at best. My symptoms were already significantly*

heightened taken a great effort to and composure to attend'. On the Claimant's own case he was given an update and when the meeting convened an apology was proffered to him straight away. We find that the Claimant was aware of the reasons why the meeting started late. We note that at the outset of the hearing the Claimant's wife acknowledged that they had asked for the hearing to start at 10 AM and that this might have caused the error to have been made.

162. The hearing took place in July and the room that had been allocated to the Claimant was warm. The Claimant complains that there were no tea and coffee making facilities. The Respondent's witnesses were surprised at that suggestion. We are confident that had the Claimant actually asked for tea or coffee that would have been provided to him and in the absence of that it is churlish to complain that he was not provided with a kettle in the room that had been allocated to him. We do not consider that the facilities offered to the Claimant were in any sense inadequate or unreasonable. The hearing was conducted in a school and there were a finite number of rooms available.

163. The Claimant is correct that more people attended the meeting than had been explained in the invitation letter. As we understand it his particular objection was that Zoe Hudson had the support of Caroline Sheffield during the hearing. A decision had been taken to offer Zoe Hudson the support of an HR advisor to assist her when presenting the management case at the hearing principally because she was at that stage very heavily pregnant and there was some concern about her well-being. Whether the Claimant or his wife recognised it, their correspondence and demeanour could be strident and aggressive. We consider it significant that Alex Bodewig considered the Claimant to be simply too much to deal with. We consider that offering HR support in those circumstances was reasonable and responsible.

164. The allegation that Caroline Sheffield interfered in the evidence of Zoe Hudson relates to the part of the hearing when the Claimant was asking Zoe Hudson questions. All the Claimant is able to say was that on some occasions Caroline Sheffield spoke to Zoe Hudson in whispers. He does not claim to have any notion of what she might have said. Zoe Hudson was asked about this in cross examination she explained that Caroline Sheffield had simply asked her whether she wanted to take a break in the proceedings. We have no hesitation in accepting that evidence. There was neither any interference with the evidence given nor was there any conduct which would give the impression that Caroline Sheffield was interfering in the evidence. The Claimant's perception of wrongdoing, and that of his wife, is fuelled by their suspicion of everything that the Respondents' witnesses said or did.

165. At the meeting the Claimant raised the fact that he had not had any confirmation of which witnesses had attended. The Claimant ought to have realised that Zoe Hudson would be there as he would have known that the disciplinary policy required her to present her investigation report. Sara Haynes had attended. Gary Corney had not and nor had Nathan Lodge. As the Claimant knew he no longer worked for EFM.

166. At the outset of the hearing Shane Parker who effectively chaired the meeting set out the allegations against the Claimant. The Claimant's response was to refer to his outstanding grievances. Shane Parker explained that the purpose of the hearing

was to 'hear the events of 15 September 2017' and he asked the Claimant to stay on track. The Claimant's wife suggested that the grievances *'question the integrity of what you're doing today'*. The Claimant then suggested that he needs to talk about pay and the removal of his TLR allowance he said *'I have to do all these things. If you're saying I can't talk about those…'*. Then his wife interjected and said *'are you saying that'.* Attia Williams then proceeded to give an explanation of what was and was not within the scope of the meeting she said:

> *'Can I explain please that how we do processes. So where was a disciplinary, where those disciplinary and often you'll find the employee who's under disciplinary does have grievances. If those grievances are related to the disciplinary then they are heard as part of the disciplinary so where you're, if you're saying, whatever reason your giving regarding the allegation, if it's related to the disciplinary then yes will hear it if it's related the disciplinary okay but we are here to hear this charge- if whatever you're saying would have you feel you want to say is in relation to this charge and you are able to raise it'*

167. We consider that it was perfectly reasonable to restrict the disciplinary meeting to those matters necessary to determine whether the Claimant had indeed committed the conduct complained of and, if so, to decide whether there were any mitigating circumstances. That might include looking at whether the investigation of that allegation was fair but would not include other complaints that the Claimant might have.

168. We find that the Claimant and his wife were so worked up at this stage that they were reluctant to accept these perfectly reasonable boundaries. As such we find that Shane Parker had a difficult job because he entirely reasonably wished to keep the matter on track. In order to do so we find that he did have to interject on a number of occasions. An example of how the meeting was at risk of being derailed was a passage near the outset of the meeting in which the Claimant's wife insisted on explaining why they thought it important that the meeting was recorded. She went through her contention that previous meetings had been inaccurately recorded. Shane Parker on a number of occasions pointed out the fact as this meeting was recorded the could be no inaccuracy.

169. There were instances during the meeting where Shane Parker did interject where the Claimant was pursuing questions where the relevance was not immediately obvious but where the relevance did emerge. The Claimant did not assist himself as he tended to ask long questions that included arguments some of which were hard to follow. One example of which was the relevance of other instances of health and safety breaches at the school. We find that what Shane Parker was doing was his level best to try and understand the Claimants lines of questioning but that he occasionally failed to do so. Given that these were domestic proceedings we do not find that there was any deliberate attempt to cut off lines of relevant questions.

170. Zoe Hudson summarised her findings. In her view there was little in dispute. The Claimant had accepted that he had been the person who had drawn attention to the use of the cover over the smoke detector in the design and technology room.

She took that as an admission of the charge against the Claimant. In advance of the hearing the Claimant had sent in documents which he sought to rely on during the hearing. When asking Zoe Hudson questions, it transpired that she had not been provided with a copy of the Claimant's information although it had been provided to the disciplinary panel. The transcript shows that Attia Williams intervened to ensure that a copy of the documentation was provided to Zoe Hudson. A short adjournment was required in order to allow her time to read the material. That simple step was all that was required to permit the Claimant to question Zoe Hudson on the material provided. We do not consider it in any way unreasonable for the School not to have anticipated how the Claimant wished to use material that he had supplied.

171. The Claimant ask Zoe Hudson about her responsibility for the design of the DT room. He suggested to her that a heat sensor should have been installed at that stage and suggested that he had mentioned that in a meeting with the Premises Manager. Zoe Hudson said that there had been no issue with the sensor until March 2017. She thought that the type of sensor was not an issue. She said that the first time that she had learnt that a cap had been left on the smoke sensor by the builder was when she read the Claimants account. She criticised him for not reporting it.

172. There was one point during the meeting where the Claimant's wife said that Shane Parker was *'talking in quite a loud voice'*. That was true. He immediately acknowledged this and apologised. We have listened to the entire recording. During the hearing there are numerous occasions where the participants were talking across each other. This was frequently the Claimant and his wife but not exclusively so. Shane Parker has an Australian accent and does have quite a loud voice. He remained calm and polite throughout the hearing. We do not find that he raised his voice other than to make reasonable attempts to keep the meeting on track.

173. The Claimant questioned Zoe Hudson for some time. He put to her that she had a conflict of interest. He suggested that she had ignored evidence that the teaching assistants were worried about false fire alarms. Many of the questions were openly critical. After some time, the Claimant asked a very long question about whether Zoe Hudson had portrayed his actions in a negative light. The Claimant's wife then joined in and it was at that point that Caroline Sheffield suggested that Zoe Hudson might need a break. Zoe Hudson started to explain she would like a break but was interrupted by the Claimant's wife. Shane Parker quite properly intervened and there was a short break in the proceedings.

174. After the break the Claimant asked a few more questions before indicating that he had finished. Shane Parker asked some questions including picking up on a point raised by the Claimant that nobody had spoken to him about the incident before the formal investigation started. The Claimant became upset and there was a break in the proceedings. The recording device was taken out of the room by the Claimant or his wife and we were played the recording of their conversation.

175. The Claimant's wife says and we accept that the Claimant was behaving oddly in that he was cleaning the window in the room they had been allocated. She said: 'do it'. After the break the Claimant returned to the hearing room and resigned. We infer that the Claimant and his wife had already discussed the possibility of the Claimant resigning from his employment.

176. A decision was taken that the disciplinary panel would continue. A discussion took place about whether the Claimant would be likely to attend a resumed hearing and a decision taken that that was unlikely. The panel then heard from Pamela Benjamin. She gave broadly the same account to the panel as she had done previously. She was clear that the cover had been placed on the smoke alarm on a number of occasions. She accepted that her part in this was a mistake and she said that she had learned her lesson. She explained the disciplinary sanction that she had received was a written warning.

177. Sara Haynes was then called to give evidence. There had been no confirmation prior to that of her attendance. The panel asked Sara Haynes why Zoe Hudson had not spoken to the Claimant immediately. Sara Haynes said that she had not advised her to do so and is recorded as accepting that that might have been a misjudgement (we do not agree – we think there were perfectly good reasons for not doing so). The panel asked about the frequency of false alarms and whether the staff were anxious. The panel raised and discussed the three other health and safety incidents referred to by the Claimant. We find that the panel were exploring the points raised by the Claimant and which he might have asked had he remained.

178. At the conclusion of the hearing the panel deliberated and decided that the Claimant has advised staff to cover the smoke alarm on a number of occasions. They thought it relevant that Zoe Hudson had not spoken to the Claimant after the incident but said that that did not 'absolve him'. They did not think that the other health and safety incidents referred to by the Claimant had any bearing on the matter they were deciding. They considered it a mitigating feature that the children were not left alone in the DT room when the sensor was covered.

179. In the letter subsequently sent to the Claimant the conclusion was as follows: *'You made a unilateral unsupported decision to hold on to the smoke detector cap and then offered it to staff to use for covering up the smoke alarm before a cookery lesson. We accept that you did this to be helpful but nevertheless you were aware that it would not be acceptable'.* The findings of the disciplinary panel mirror our own. They are expressed in measured terms. We find that this reflected the approach of the panel throughout the hearing. They decided that in all the circumstances there was misconduct but it did not amount to gross misconduct. They decided that the appropriate penalty would be a written warning.

180. On 10 July 2018 the Claimant confirmed his resignation in writing. That letter is long and summarises, from the Claimant's perspective, his complaints against the School. On 16 July 2018 Kenny Frederick wrote to the Claimant. In the opening paragraphs of her letter she invites the Claimant to reconsider his resignation in the light of the outcome of the disciplinary process. She then goes on to explain that the grievance meeting that had been scheduled for 19 July 2018 could not go ahead as Terry Greater had not managed to complete his report. She ended her latter by saying *'I am confident that we can support you to return to work with appropriate medical advice and hope that you will reconsider your resignation accordingly'.* On 18 July 2018 the Claimant stated that he would not withdraw his resignation nor would he attend any grievance hearing.

181. Shortly thereafter the school closed for the summer holiday. Terry Greater finally signed off his report on 1 September 2018. The Claimant having decided to take no further part in the Grievance process Kenny Frederick simply considered the report and accepted its conclusions.

The law to be applied

The burden and standard of proof

182. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established. As a general rule the party making an assertion of any fact to support their claim or defence bears the burden of establishing that fact.

Burden of proof – claims under the Equality Act 2010

183. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> *136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

184. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

> *17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867,*

attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

185. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

186. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it*

may be furnished by the context in which the act has allegedly occurred" see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

187. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

188. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and*** **another** ***v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

189. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

190. The 'shifting burden' provisions apply to all claims under the Equality Act 2010. Guidance as to their application in reasonable adjustments case has been given in Project ***Management Institute v Latif*** **2007 IRLR 579, EAT**. which was dealing with the position under the Disability Discrimination Act 1995 but has been held to be of equal application under the Equality Act 2010. Elias J (as he was) said:

> *50 In this connection Ms Clement relies upon para. 4.43 of the Disability Rights Commission's code of practice: Employment and Occupation which provides as follows:*
>
> *'To prove an allegation that there has been a failure to comply with the duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty had arisen, and that it had been breached. If the employee does this the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard.'*
>
> *This certainly implies that something more than the two conditions of an arrangement resulting in a substantial disadvantage is required before the burden shifts……*

53 We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.

54 In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.'

Equality Act 2010 - Statutory Code of Practice

191. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code ('the code of practice') was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

Reasonable adjustments

192. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

193. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

194. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)…..

195. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

196. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

197. The proper approach to a reasonable adjustments claim remains that suggested in ***Environment Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

a) the provision, criterion or practice applied by or on behalf of the employer; or

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

198. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*

- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*

- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

199. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v*** **Harvey** **UKEAT/0032/12JOJ**. This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

200. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

201. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Discrimination because of something arising in consequence of disability

202. Section 15 of the Equality Act 2010 says:

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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

203. ***Secretary of State for Justice and anor v Dunn*** **EAT 0234/16** the EAT confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a S.15 claim are:

203.1. there must be unfavourable treatment

203.2. there must be something that arises in consequence of the claimant's disability

203.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

203.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

204. The Statutory Code describes what might amount to a detriment in paragraph 5.7. It says:

For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

205. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **2019 ICR 230, SC** the Supreme Court approved the guidance in the Statutory Code with Lord Carnwath, giving the Judgment of the Court saying**:**

……little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

206. In asking whether treatment is unfavourable there is no need to seek a comparison with the treatment of others. The Statutory code says, at paragraph 5.6:

'Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary

to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.'

207. At paragraphs 5.8 and 5.9 the Statutory Code says this about the requirement to show that there is 'something' that arises as a consequence of disability:

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

208. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and anor*** **2016 IRLR 170, EAT** where Simler P (as she was) said:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the

causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

209. To demonstrate that unfavourable treatment was ‘because of’ something arising in consequence of disability it is sufficient to show that the ‘something’ was an effective cause and, if it was, it is immaterial that there were other effective causes of

the treatment see ***Hall v Chief Constable of West Yorkshire Police*** **2015 IRLR 893, EAT** and ***Charlesworth v Dransfields Engineering Services Ltd*** **EAT 0197/16**

210. An employer cannot be liable under this section for any unfavourable treatment unless they knew or ought to have known that the Claimant was disabled – see sub-section 15(2) above. However, once they know of disability it is irrelevant whether they recognised that the 'something' that caused their act or omission was because of disability, see ***City of York Council v Grosset*** **2018 ICR 1492, CA**.

211. The Statutory Code sets out the requirements of the justification defence – that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

> *"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.*
>
> *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:*
>
> > *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*
>
> *He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:*
>
> > *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*
>
> *As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the*

real needs of the undertaking, against the discriminatory effects of the requirement."

212. Where the unfavourable treatment arises because the employer has failed to make reasonable adjustments, the employer is unlikely to be able to make out the defence of justification. See paragraphs 5.20 – 5.22 of the Statutory Code and see also ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA**

Time limits for the claims brought under the Equality Act 2010.

213. Section 123 of the Equality Act 2010 imposes a time limit for the presentation of claims to an employment tribunal. The material parts say:

'123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.'

214. The leading case on the meaning of the expression 'act extending over a period' used in sub section 123(3) of the Equality Act 2010 is ***Commissioner of Police of the Metropolis v Hendricks*** **2003 ICR 530, CA** as confirmed in ***Lyfar v Brighton and Sussex University Hospitals Trust*** **2006 EWCA Civ** 1548**, CA.** The test is not whether the employer operated a policy practice or regime but to focus on

the substance of the complaint and ask whether there was an ongoing situation or continuing state of affairs amounting to an 'act extending over a period as distinct from a succession of isolated or specific acts. Even where there is an act extending over a period it is necessary to show that that continued to a point where a complaint relying upon a single act would have been in time

215. If any claim has been presented after the ordinary time limit imposed by sub-section 123(1)(a) of the Equality Act 2010 (a period within 3 months extended by the provisions governing extensions of time for early conciliation) then the tribunal cannot entertain the complaint unless it is just and equitable to do so. The following propositions have emerged from the case law:

215.1. ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA** reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule.

215.2. In deciding whether or not to extend time a tribunal might usually have regard to the statutory factors set out in the Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT**.

215.3. Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018 ICR 1194, CA**.

215.4. It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**

Unfair dismissal

216. Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by his or her employer.

217. For the Claimant to be able to establish his claim of unfair dismissal he must show that she has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(c) *'the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct'.*

218. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

219. The question of whether a failure to pay wages on time or at all amounts to a serious breach of contract was *addressed* by the Court of Appeal in ***Cantor Fitzgerald International v Callaghan*** **[1999] IRLR 234** where Judge LJ said:

> *At paragraph 36: "In reality, it is difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and efforts in exchange for his pay: that is the understanding at the heart of the contractual arrangement between him and his employer."*
>
> *At paragraph 41: "In my judgment, the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see for example Adams v Charles Zub Associates Ltd [1978] IRLR 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory."*
>
> *At paragraph 42: "Where, however, an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. Therefore, an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory."*
>
> *And at paragraph 43: "I very much doubt whether de minimis has any relevance in this field. If the amount at stake is very small, and the circumstances justifying a minimal reduction are explained to the employee, then the likelihood is that he would be prepared to accept new terms by way of mutual variation of the original contract. However, an apparently slight change imposed on a reluctant employee by economic pressure exercised by the employer should not be confused with a consensual variation, and in such circumstances an employee would be entitled to treat the contract of employment as discharged by the employer's breach.*

220. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as

dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

221. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**. In ***Omilaju*** it was said:

> *'19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*
>
> *21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'*

222. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

223. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination ***Doherty v British Midland Airways*** **[2006] IRLR 90, EAT**. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see ***Green v Barnsley MBC*** **[2006] IRLR 98** and ***Amnesty International v Ahmed***

224. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

225. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

226. The proper approach, in the main distilled from the cases set out above has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

> *'it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

227. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

228. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

229. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'

230. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussion and Conclusions

231. It is necessary for us to address each of the issues that the parties have asked us to decide. As set out above the parties had prepared a list of issues. Within this section we use headings to identify the issue we are deciding. Those headings include references to paragraph numbers which are the numbered paragraphs in the list of issues.

232. Before turning to the issues, we shall deal with the question of whether we should have regard to discussions about settlement referred to by both parties in their evidence and in the documents in the bundle. We need to consider not only the position at common law but also under Section 111A of the Employment Rights Act 1996. We have regard to the guidance in ***Faithorn Farrell Timms LLP v Bailey*** **UKEAT/0025/16/RN**.

233. As we have recorded above at a very early stage the Claimant proposed via his trade union representative that he leave with a settlement package. We find that this was a proposal to terminate the contract of employment and falls within the scope of Section 111A of the Employment Rights Act 1996. The parties cannot waive the effect of that section. We have therefore disregarded all references to that proposal for the purposes of the unfair dismissal claim along with all further discussions that arose as a consequence.

234. The position at common law is different. At the time the Claimant made his proposal to accept a settlement there was no 'dispute' between the parties. As such the proposal is not inadmissible at common law because of the public interest in without prejudice negotiations remaining confidential. We have therefore referred to the early settlement proposal but only in respect of the Equality Act claims. We find that at the point that the TLR allowance was unilaterally removed there was a dispute. We consider that all further discussions about settlement would fall within

the without prejudice rule. We had raised the question of whether there had been waiver of privilege as both parties had referred to their discussions. In the event we have not felt the need to rule on this as the fact that the Claimant maintained his attempts to seek a settlement was not a material finding in the case and we have disregarded it for all purposes. Our findings that the Claimant intimated litigation are made independently of this evidence.

The Unfair Dismissal Claim

235. The first question that arises in the unfair dismissal claim is whether the acts and omissions of the Respondent amounted to a serious breach of contract. The list of issues sets out how the Claimant puts his case. He has identified 51 separate matters that he says amounted to simple breached of contract. These include the removal of the TLR allowance which is also said to give rise to a claim for wages either as a freestanding claim for breach of contract or as a claim for unlawful deduction from wages. In addition, the Claimant says that each of the allegations he makes under the equality act (12 reasonable adjustment claims and 4 claims under Section 15) also amount to serious breaches of contract or contribute to such a breach. Rather than repeat ourselves we shall in this section deal with the breaches that are not said to be discriminatory and simply import our findings in relation to the Equality Act claims.

236. Whilst we deal with every alleged breach we shall deal with some allegations briefly. Our reasons for taking that approach include the fact that we have concluded that there was a serious breach of contract, and a dismissal, because of the fact of and manner in which the TLR allowance was removed. In addition, the complaints are so numerous that it is simply disproportionate to give elaborate reasons why we do not think that any of those other matters, individually or cumulatively amounted to a serious breach of contract. We shall start with some general conclusions that must be read together with our individual reasons for rejecting the Claimant's case in respect of almost all matters with the exclusion of the TLR allowance.

237. It is the Claimant's position that the School seriously over-reacted when labelling the allegation against him as 'gross misconduct'. He goes on to say that even if that was appropriate initially as time went on the School should have reviewed that, recognised that it was unsustainable and reduced the severity of the disciplinary charge. We disagree with all these points.

238. We accept that an employer might breach an employee's contract of employment by commencing an unwarranted disciplinary investigation. ***Gogay v Hertfordshire County Council*** **[2000] IRLR 703** being a well-known example of that. As that case recognises the key issue is whether the employer acts with reasonable cause. The test is an objective one and it is for us as a tribunal to decide whether there was or was not reasonable cause for the School to act as it did. Deciding how to respond to allegations of misconduct is necessarily a judgment call and as in other areas of employment law two employers might respond differently but both may act reasonably.

239. We considered the context to be important. These events concerned the fire alarm system installed at a school. The Claimant argues that the possibility of children being harmed by the smoke sensor being covered were so remote that they

could effectively be discounted altogether. We would accept that for there to be any harm to a child there would either have to be the double contingency of the cover being left on by accident coupled with a subsequent fire or smoke source in the DT room or that if there was a fire when the sensor was covered no adult was able to use the manual 'break glass' alarm. We would agree that both these possibilities are unlikely. However, we do not agree that they are so unlikely that it was excusable to cover the smoke sensor. Many unlikely events warrant sensible precautions as everybody who has sat through a safety briefing on an aircraft would immediately recognise. The more serious the consequences the greater the need to prevent even a remote risk. One could only imagine the reaction of parents and the press if there was an injury or death when the fire alarm was disabled in an ad-hoc manner known only to those who had participated.

240. The Claimant says that Gary Corney was told by the Fire Brigade that it was acceptable to cover the sensor. Gary Corney was not honest when he was first asked what had happened and there is little reason to be confident in any hearsay account given by him of advice given by the fire brigade. The Claimant then relies on the document he found on the internet from the Office of the Deputy Prime Minister. That document does provide a robust rational for avoiding false alarms and does warn against the use of smoke detectors in kitchens. It does suggest covering sensors but in limited circumstances by approved staff. We do not accept that that document supports the suggestion that anybody who was worried that a smoke sensor might be triggered should cover it without letting those responsible for safety know about it. We believe that the advice given to Zoe Hudson by the Local Authority correctly sums up the circumstances where it might be acceptable to cover a smoke sensor. In short, rarely, and never as a long-term solution.

241. A further difficulty with the ad-hoc approach adopted by the Claimant was that it made it impossible to see whether the very sensible mitigation steps suggested after the two false alarms of opening doors and windows when cooking had been effective. Had they not been then that would no doubt have accelerated the decision to change the type of sensor.

242. We find that, if the Claimant was sufficiently concerned about false alarms to promote the use of a cover then he ought to have drawn this to the attention of the School. We see no good or proper reason for this failure.

243. We would accept that it was immediately apparent that the use of the cover was designed to prevent false alarms and that there were plainly good intentions. That said many careless acts are done with good intentions.

244. A matter that can properly be taken into account when disciplinary action is contemplated is whether the misconduct was a one-off act or part of a pattern. From the outset Pam Benjamin accepted that the cover had been used on a number of occasions. She accepted at once that she was at fault and we find told the truth about what she and others had done. As we say above she had no reason to make admissions against her own interests and were find that her account was accurate. Her approach is in contrast to that of the Claimant. The Claimant was at pains to distance himself from the decision to use the cover despite the fact that it was clearly his idea. He played down the number of times that it had been used initially

suggesting that it was a one off. We do not know whether the Claimant came to convince himself of his version of events or whether he was being dishonest. It is not necessary for us to make a finding in that respect.

245. The Claimant has tried to deflect blame onto others. He started by suggesting that Pam Benjamin took the decision to cover the sensor. This played down the previous instances where the cover had been used and the fact that he had retained it and came up with the idea of covering the alarm. He has also endeavoured to deflect criticism by attacking Zoe Hudson who he says is responsible for the choice of sensor. Whilst it is clear that a heat sensor might have been a better choice that does not in any way excuse disabling the sensor that was in place. Zoe Hudson is right to point out that the type of sensor had not caused any issues from the summer of 2015 to March 2017. Both false alarms had been triggered by spills or a dirty oven. She then put in place sensible advice to avoid further false alarms. We consider that the suggestion that she had any conflict of interest when investigating the three employees who had been involved with covering the sensor is entirely misconceived.

246. The Claimant's attempts to draw parallels with other occasions where there might have been a risk of injury are unedifying and did little to advance his cause. In these instances it was not thought that any member of staff had been the cause of any risk. It is not surprising that there was no disciplinary action.

247. The School's disciplinary policy gives as an example of gross misconduct a serious breach of health and safety. Zoe Hudson took advice from EFM and followed it when describing the allegation as gross misconduct. The disciplinary policy makes it clear that an allegation of gross misconduct <u>may</u> lead to dismissal and not that that is inevitable. The Claimant, who has been a Headteacher, would or ought to have been able to recognise that he would have an opportunity to explain his actions and put forward any mitigating circumstances.

248. As we have found above we find that it was entirely reasonable for the School to commence a disciplinary investigation. It was entirely reasonable to categorise the allegation as one of gross misconduct. We suspect that had the Claimant not reacted in the way that he did and had been prepared to recognise that he had made a mistake the matter would have been concluded within weeks.

249. Mrs Banerjee suggested that the Respondents had improperly categorised the Claimant as combatative and litigious rather than disabled and in need of accommodation. We do not thing that there is any such dichotomy. Whilst some accommodation must be afforded to those who's conduct is a consequence of disability we do not find that in this case that would extend entirely overlooking serious misconduct. Unfortunately, for the Claimant, complete vindication was and remains his goal. It was never remotely possible that the School would accommodate that and they did not act unreasonably in resisting the pressure from the Claimant to do so.

250. Having made those general points, we turn to the issues identified by the parties.

<u>Failing to hold an informal discussion with the Claimant – Paragraph 1(a)(i)</u>

251. The Schools disciplinary policy suggests that less serious issues of conduct should be dealt with informally. That is normal and sensible. Zoe Hudson and Sara Haynes considered that they were dealing with a matter where there had been a serious health and safety breach. The policy does not envisage, in those circumstances, that the matter would be resolved informally.

252. The Claimant compares his treatment to that of Gary Corney and Pam Benjamin. We accept Zoe Hudson's evidence that the difference in the treatment was explained by the fact that she spoke to both individuals to find out how Gary Corney's accident occurred.

253. The Claimant appears to suggest that the matter could simply have been resolved with an informal chat. In doing so he relies upon his own assessment of his culpability. He relies on his own inaccurate version of events which conflicted with the account of Pam Benjamin. We find that Zoe Hudson and Sara Haynes acted entirely reasonably in dealing with the matter more formally. The Claimant has pointed to a conversation between Sara Haynes and his trade union representative where she said that her preference was for informal resolution. We accept that something like that was said but that does not assist the Claimant. Sara Haynes having listened to the views of HR decided against any informal resolution recognising against any preference that it was not appropriate in this case.

254. We accept that in the disciplinary outcome letter Shane Parker suggested that there were flaws in the investigation which may be a reference to the absence of any informal conversation. Terry Geater in his grievance report ascertained that Sara Haynes may have expresses a preference for an informal resolution but that she was guided by HR advice. He concluded that the Claimant could have had no legitimate expectation that the matter would be resolved informally.

255. If Zoe Hudson and Sara Haynes were relying on HR advice then we consider that they were right to do so. We bear in mind that commencing a formal process permitted both sides to ensure that anything said was not later misrepresented and, in the Claimant's case, entitled him to representation at any interview.

256. There were good reasons to treat the matter formally and the School acted with reasonable cause when it did so.

<u>Treating the allegation as one of gross misconduct – paragraph 1(a)(ii)</u>

257. We have set out above our reasons why we consider that Zoe Hudson and Sara Haynes acted with reasonable cause in classing the acts of all three employees as 'gross misconduct'. Objectively the Claimant's conduct was serious and any responsible employer would wish to leave open the possibility of dismissal.

258. The extent to which was treated differently to the other employees involved was limited to the letter he was given on 22 September 2017 which referred to the allegation as one of gross misconduct whereas the letters to the other employees did not. This was rectified before anybody was interviewed. We do not find that the Claimant has any reasonable basis to complain that he was singled out for a more serious charge than the other two employees.

Altering the allegation from 'advised' on 20 September 2017 to 'instructed' on 2 October 2017 – Paragraph 1(a)(iii)

259. Whilst this allegation is expressed as 'including but not being limited to' this change of wording no other reasonable objection is identified to other than the change of wording in respect of the matter being investigated.

260. The Claimant suggests that there was no reasonable basis for alleging that he 'instructed' Pamela Benjamin to use the cover on the smoke sensor. We disagree. When Pam Benjamin was first spoken to, she said; *'James said we should use it when we are cooking'*. We consider that put in context there is very little difference between the wording 'advising' and 'instructing'. Instructing is broader than giving orders and includes giving instruction. On the Claimant's own account, he instructed Pam Benjamin that it was possible to cover the sensor and he provided access to the cap. If the Claimant is objecting to the suggestion that he was the person who promoted the idea of using the cap then his protestations are misguided. Using the cap was his idea and he did promote its use. He was the most senior employee and we consider that the word 'instructing' was appropriate. The fact that in the disciplinary hearing the Claimant persuaded Zoe Hudson to apologise for using that expression does not make any difference to our conclusions.

Failing 'timeously or at all' to pass on the Claimant's first statement - Paragraph 1(a)(iv)

261. We accept that viewed objectively Alesha De Freitas' letter to the Claimant of 10 November 2017 would have led the Claimant to believe that his initial account of the events of 15 September 2017 would be passed to Zoe Hudson. We accept that the reasons for not doing that were inadvertent but they were unknown to the Claimant.

262. We assess the gravity of this omission taking into account the fact that the Claimant was very anxious. In her letter of 10 November 2017 Alesha De Freitas does say in terms that the Claimant will have an opportunity to put forward his account of events. That was always going to be the case. The content of the Claimant's statement was never going to be sufficient to persuade Zoe Hudson that the disciplinary allegations should be dropped or lowered. The statement had marked inconsistencies with what Pam Benjamin said. At the meeting with Zakia Khatum on 27 November 2017 the Claimant knew he was to be given an opportunity to respond to the allegations in writing.

263. Whilst we find that it would have been better had Alesha De Freitas forwarded the Claimant's statement without waiting for his permission we do not consider the failure to do so was by itself conduct likely to seriously damage trust and confidence. In the light of our other conclusions no further contractual analysis is necessary.

Failing to contact the Claimant for 7 weeks – Paragraph 1(a)(v)

264. Taken literally the Claimant's allegation that nobody contacted him for 7 weeks is untrue. We have found that on 13 October 2017 just under three weeks after the Claimant commenced his sick leave the Claimant was referred to Occupational health for the purposes of making enquiries about his health. An

Occupational Health appointment was rescheduled at the Claimant's request. On a more informal basis Rukia Begum sent the Claimant text messages on 26 September 2017 and she responded to a message from the Claimant on 13 October 2017.

265. We have accepted Zakia Khatum's evidence, which accords with our own view, that an employer faced with an employee suffering from stress at work is to a degree dammed if they initiate contact and dammed if they do not. They cannot know whether contact will be welcomed or resented. We find that a delegating enquiries about health to a professional OH provider was entirely responsible in the circumstances. Any delays in setting up a meeting to discuss the Claimant's health condition were occasioned by the Claimant wishing to attend a personal appointment and then organising a meeting around the availability of his trade union representative.

266. Insofar as the Claimant suggests that he had no point of contact or a sympathetic ear we disagree. Rukia Begum was in touch with the Claimant and if he had wished he could have continued to engage with her. Zakia Khatum also offered to speak to the Claimant if he wished.

267. We not accept that there was anything unreasonable about the approach taken by the School.

Not fairly considering the Claimant's grievances - Paragraph 1(a)(vi)

268. Under this heading the Claimant breaks down his complaints into 14 separate matters. We have grouped some of the complaints together as they raise common issues.

The allegations against Alesha De Freitas – Sub Paragraphs 1(a)(vi) (1)- (6)

269. We have found above that the Claimant's grievance raised on 18 October 2017 was intended to be and was rightly identified as a collateral attack on the disciplinary investigation. It was a case of the Claimant getting his retaliation in early in an attempt to bring the process to an end. As we have set out above the School's grievance procedure understandably excludes from the process any matter that is being dealt with under another process.

270. The Claimant complains that nobody spoke to him about his grievance. Had the grievance been thought to fall within the grievance procedure then the policy would dictate that there ought to be a meeting. As it was, a decision was taken that the letter fell outside of that policy.

271. The second point made by the Claimant is delay. He complains that he had no acknowledgement of his grievance until 10 November 2017. As the Claimant would have known he sent his grievance during the half term holiday. His wife chased the progress and Alesha De Freitas told her on 3 November 2017 that she would respond in 1 week. Given that Alesha De Freitas would clearly have to make enquiries about what had prompted the grievance we do not consider that there was any unreasonable delay in responding.

272. The next two points can be taken together. The Claimant wanted to attack the decision to instigate a disciplinary investigation. He had enclosed with his letter a statement (which we have found was inaccurate in parts). Most of the points made in his letter are directed at the disciplinary decision. We consider it entirely sensible for Alesha De Freitas to decline to deal with those matters as a grievance. The proper place for the Claimant to raise those points was the disciplinary investigation itself.

273. Alesha De Freitas did take steps to deal with the Claimant's baseless conspiracy theory that the disciplinary investigation was a response to the issue about his pay and she took steps to ensure that the Claimant was informed that he had been given a pay rise.

274. Given that Alesha De Freitas has declined to treat the Claimant's letter as a grievance it follows that she did not treat his appeal as a proper use of the grievance process. We find that Alesha De Freitas' letter of 24 November 2017 provides a cogent and rational basis for her decision. She pointed out that if the Claimant wished to draw attention to other alleged breaches of health and safety to argue that he should be treated leniently then that was a matter for the disciplinary hearing. If he wanted to draw attention to them as 'protected disclosures' he was directed to the whistleblowing policy and invited to follow that route.

275. We find that it was reasonable for the School to push back against the Claimant's attempts to derail the disciplinary process. To permit him to do so would be to misuse the grievance process. We find that Alesha De Freitas acted with reasonable and proper cause in refusing to hold a grievance hearing in respect of those matters. We have reached our own decision on this but note that Terry Geater reached the same conclusion when he looked at the entirety of the Claimant's grievances.

276. Sub paragraph 1(a)(v)(6) relates to the Claimant's letter of 30 November 2017. His complaint is that Alesha De Freitas did not engage with that letter. The first parts of that letter simply rehearse why the Claimant thought he ought to be allowed to use the grievance process to advance the matters raised in his earlier correspondence. Putting it bluntly he was not taking no for an answer. In fact, he continued to put forward all his grievances throughout the process despite being told that the earlier matters should be raised in the disciplinary meeting. The one new matter that the Claimant did raise in this letter was his desire to appeal the decision to remove his TLR payment. We deal with this separately below. In respect of all other matters we consider that Alesha De Freitas was right to maintain her stance that these were matters that should be addressed in the disciplinary process.

277. With the exception of the TLR payment Alesha De Freitas did not fail to engage with the Claimant's Grievances. She explained why she was not prepared to deal with them under the grievance procedure. We have commented above on the inappropriate conduct and at times downright hostility that she faced including an entirely inappropriate attempt to bring the dispute to her workplace.

<u>The refusal to permit any appeal against the removal of the TLR - Sub paragraph 1(a)(vi) (7)</u>

278. When the Claimant was informed that his TLR supplement was being removed his immediate and understandable reaction was to ask to appeal. He directed a request both to Sara Haynes (on 24 November 2017) and to Alesha De Freitas (on 30 November 2017). His wife makes the same point on 24 February 2018.

279. On 29 November 2017 Sara Haynes wrote to the Claimant explaining why in her opinion the TLR payment had been made in error. She told the Claimant that there was no right of appeal against that decision as the decision was not a performance related pay decision. This was a reference to the School's Pay Policy. That policy sets out a right of appeal against any pay recommendation made as part of the appraisal process. It is therefore directed at progression up any pay scale. The appeal section is silent about any right of appeal against the grant or removal of a TLR. However, it does include the right of appeal against any 'pay decision'. When the Claimant was sent the pay decision for 2017 on 20 November 2017 that included the removal of his TLR allowance. We consider that the pay policy did permit the Claimant to mount an appeal under that policy.

280. However, if we are wrong and if there is no right of appeal under the pay policy then it seems quite clear to us that the Claimant ought to have been permitted to use the grievance policy to advance his contention (correct as we find) that he was entitled to a TLR payment. We have described the removal of around 8% of the Claimant's pay as being somewhat brutal. There was no discussion or meeting in advance of the decision being communicated. In those circumstances we agree with the Claimant that it was essential that he be afforded some hearing at which he could air his concerns. He was given no such opportunity until Terry Geater was appointed in May 2018. Receiving correspondence from Sara Haynes explaining why she thought she was right, who had made the decision, was no substitute for a hearing and if necessary an appeal.

281. We consider that, whether the Claimant was right or wrong about his entitlement to a TLR payment, the failure to offer him a forum where the rights and wrongs of the decision could be explored was conduct likely to seriously damage the mutual duty of trust and confidence. We would have reached the same conclusion on the narrower basis of an implied term that an employer will provide a system to promptly redress grievances recognised in ***W A Goold (Pearmak) Ltd v McConnell*** **[1995] IRLR 516, EAT**

Not engaging adequately or at all to the Claimant's grievances of 26 February 2018 Paragraph 1(a)(vi)(8)

282. This is an allegation which seeks to criticise Alex Bodewig and his involvement with the Claimant's grievances. It was the Claimant's wife that first wrote to Alex Bodewig on 26 February 2018 and that was followed up by correspondence from the Claimant on 19 March 2018. In that correspondence the Claimant sought to re-open the question of whether he should have been afforded a grievance hearing in response to his initial grievances. Whilst it took time to arrange a grievance hearing there was a meeting on 11 May 2018 where it was recognised that this could only have been a preliminary meeting to explore the scope of the grievances. We note that during this time there is discussion about adjustments for the hearing that

runs in parallel with the disciplinary process (where the same adjustments were being considered. We return to Sara Haynes involvement below.

283. Having read the minutes taken of the meeting with Alex Bodewig we do not consider that there is anything that would lead us to find that He did not intend to listen to the Claimant and fairly adjudicate on his grievances. Indeed, we think he might have more firmly sought to weed out the grievances that were a collateral attack on the disciplinary process.

284. The appointment of Mr Bodewig turned out in hindsight to have been a mistake. However, decision makers are not blessed with hindsight and the question was whether it had been appropriate to appoint Mr Bodewig in the first place. We do not consider that there was anything to alert the School that Alex Bodewig would be unable to cope with the grievance process and, as the Chair of the Governors, he was the natural person to undertake this task. Whilst the Claimant's correspondence might have indicated that dealing with his grievances was going to be difficult we would accept that only when Alex Bodewig held the meeting would he have realised the enormity of the task.

285. In our findings below we reject the suggestion that it would have been a reasonable adjustment to use professional people rather than volunteer Governors to hear grievances. The issue for us was whether anything done by the School breached or contributed to a breach of the implied term relied on by the Claimant. We would agree that there were some delays but none we find were excessive. No organisation can anticipate resignations or stop people resigning if they decide that some task is unpalatable. We do not find that the School acted unreasonably other than the fact that it may have been possible to act a little faster than they did.

286. The School's response to Alex Bodewig's decision was impressively swift. A new acting chair of Governors was appointed, Kenny Frederick and she took the sensible decision to place the investigation into the hands of a professional. There was only a slight delay in informing the Claimant of this and it is entirely understandable that the School wanted to put new arrangements into place before informing the Claimant of the reasons for the delay.

<u>Hearing the disciplinary before completing the grievance process - Paragraph 1(a)(vi)(9)</u>

287. The Claimant had expected to complete the grievance process before the disciplinary hearing and indeed that had been the aim of the school. We find that the reason that this was important to the Claimant was that he wished to attack the instigation of the disciplinary process in the grievance process. Despite being told on more than one occasion that he should not use the grievance process as a means to advance his case in the disciplinary proceedings the Claimant insisted on doing so.

288. The reasons for holding the disciplinary meeting in advance of the grievance outcome were accurately set out in Shane Parker's letter after the conclusion of the disciplinary hearing. These were as follows. Terry Geater had not finished his grievance report. The Claimant's complaints were wide ranging and it is no surprise to us that it took some time to complete the investigation. Next was the fact that Zoe Hudson was pregnant and intended to take maternity leave. She would not have

been available to answer any questions on her investigation report. Finally, the end of the academic year was approaching and Sara Haynes for understandable reasons wanted to wrap the matter up before the summer break.

289. We do not think that the Claimant was prejudiced in any way by not having his grievances heard in advance of the disciplinary hearing although he might have been disappointed. Where the 'grievances' were really just the Claimant advancing his position in the disciplinary process then he was able to raise them at the disciplinary hearing. This was made quite clear to him throughout the correspondence and during the hearing itself. Matters that were distinct could be dealt with separately and did not provide any good reason for delaying the disciplinary hearing.

290. Taking all these matters together we find that the Respondent acted with reasonable cause in holding the disciplinary hearing on 5 July 2018.

Refusing to let the Claimant raise his grievances during the hearing of 5 July 2018 – Paragraph 1(a)(vi)(10)

291. We find that it had been made clear to the Claimant in advance of the disciplinary hearing that insofar as his grievances had any bearing on the issues to be considered at the disciplinary hearing he could raise them. That was repeated by Atia Williams in the clearest terms close to the outset of the hearing. The Claimant then took Zoe Hudson through many of the matters which he had raised as grievances. These included her decision to refer to the allegation as gross misconduct, her alleged conflict of interest and the failure to speak to him informally.

292. The Claimant was sometimes asked the relevance of his questions. That is understandable as some of his points were difficult to grasp. For example, his reference to other health and safety incidents was poorly thought through and of marginal relevance.

293. Overall, we are satisfied that the Claimant was permitted to raise such matters that he had raised as grievances that were relevant to the issue at the disciplinary hearing. It was entirely reasonable to restrict him from raising any other matter at that hearing.

Refusing or failing to call witnesses - Paragraph 1(a)(vi)(11)

294. It is correct that Alesha De Freitas did not ask the Claimant or intend to permit the Claimant to call witnesses in the 'grievances' he presented to her. That was for the reasons set out above that she considered that these matters should be dealt with in the disciplinary process. Other than in respect of the TLR payment we consider that she acted reasonably in those decisions.

295. Alex Bodewig was prepared to follow the grievance policy. He was to have arranged a further hearing and would have permitted witnesses.

296. Terry Geater was preparing a report. He was not making a decision. He asked the Claimant who he should speak to and it seems that he did speak to those people named. The grievance policy does not envisage an investigation stage by an

individual other than the decisionmaker nor does it envisage a hearing with witnesses.

297. Calling and questioning witnesses is not an essential part of a grievance process. We find that where an independent investigator is appointed it is reasonable to allow them to question any witnesses outside any formal hearing. The Claimant had been invited to a grievance hearing which was set for 19 July 2018. Ultimately the Claimant declined to attend any grievance hearing.

298. Overall, we are satisfied that there was a reasonable attempt to understand and resolve the Claimant's grievances. We do not consider that there was any refusal to speak to relevant witnesses. We not know what would have happened had the Claimant attended a grievance hearing and challenged any parts of Terry Geater's report of the underlying interviews with witnesses. Overall, we are not satisfied that the Claimant has established any conduct in respect of this matter that was a breach of the implied term he relies upon, or which contributed to such a breach.

Terry Geater failing to ask neutral questions of approach the matter with an open mind - Paragraph 1(a)(vi)(12)

299. We have found above that there is nothing in the interview with the Claimant, Zoe Hudson or Sara Haynes that satisfies us that Terry Geater was biased or did not approach the task he had been set with an open mind.

Terry Geater failing to deal with the Grievance in a reasonable time – Paragraph 1(a)(vi)(13)

300. Terry Geater was appointed on 4 June 2018 and he interviewed the Claimant on 19 June 2018. The Claimant knew that Terry Geater was to interview others. On 5 July 2018 the Claimant could not have reasonably expected that Terry Geater would have finished his report. It is true that thereafter there was a substantial delay but that could not have caused the Claimant to resign and cannot amount to a breach of contract.

301. We find that Terry Geater himself did not unreasonably delay in dealing with the Claimant's grievances up to the point that the Claimant resigned.

Sara Haynes involvement in the grievance process - Paragraph 1(a)(vi)(14)

302. This allegation concerns the fact that Sara Haynes was dealing with issues concerning what if any adjustments should be made to accommodate the Claimant's disability at the point when it was still envisaged that Alex Bodewig would be hearing the Claimant's grievance. The Claimant had asked for the same adjustments to be made for the arrangements in the hearing for both the disciplinary hearing, which Sara Haynes was organising, and the Grievance hearing which was to be conducted by Alex Bodewig. Sara Haynes had taken the sensible step of asking the Schools OH provider about the need for relaxing the Schools usual policy of not permitting meetings to be recorded. Clearly the same enquiries were relevant to both processes. We see no proper objection to her involvement in that respect.

303. In her written submissions Mrs Banerjee refers only to the involvement of Sara Haynes once Alex Bodewig resigns as Chair of the Governors. We consider it unsurprising that she needed to intervene at that stage. She was the Headteacher and it was inevitable that she would be involved in attempting contacting Alex Bodewig when he resigned.

304. What is lacking in this allegation is any suggestion that Sara Haynes attempted to involve herself in any way in the outcome of the grievance process. The Claimant has not satisfied us that there was any conduct that would breach or contribute to a breach of the implied term.

Delay in dealing with correspondence – Paragraph 1(a)(vii)

305. In the list of issues this allegation incorporates paragraph 3(c)(i) which in turn lists 12 instances where the Claimant says that there was unreasonable delay. We shall deal with these allegations when looking at the Claimant's claims under the Equality Act 2010.

306. Overall, we find that the Claimant and his wife were very demanding correspondents. They wrote letter after letter and chased for responses within days. The Claimant had intimated that he would being proceedings from a very early stage. The School very sensibly sought advice from its HR providers. As in all state schools the Governors are volunteers. We reject the suggestion below that some other professional ought to have been engaged to deal with the Claimant. It was unrealistic to expect swift replies to some correspondence. In respect of correspondence with the Head Teacher and Zakia Khatum, we consider that a reasonable time to respond needs to be seen against the fact that these were the leaders of a school. Their ordinary duties would inevitably require a lot of their time.

307. We have accepted that there were some delays and our findings are set out below and incorporated here.

Refusing the Claimant an opportunity to appeal (two instances) Paragraph 1(a)(viii)

308. These allegations repeat the issues at paragraphs 1(a) (vi) (5) and (7) and we have dealt with them above.

Removing the Claimant's TLR Paragraph 1(a)(ix)

309. There are two aspects to this. The first is the question of whether there was a contractual right top the TLR payment. We deal with that issue below and find in the Claimant's favour that he was entitled to the TLR having accepted the DT role on the basis that he would be assigned duties that would entitle him to the pay supplement. We have regard to the principles set out in ***Cantor Fitzgerald International v Callaghan*** and find that that is a serious breach of contract.

310. We have found above that the initial refusal to afford the Claimant a hearing, whether denoted as an appeal or a grievance, was also a serious breach of contract. Whether the Claimant was right or wrong he should have been promptly afforded a hearing within the School's grievance process or otherwise.

311. We also consider that it was inappropriate to make a decision without speaking to the Claimant. We would accept that Sara Haynes thought at the time that the issue was clear cut. She may not have considered the e-mail from the deputy head at the time the Claimant accepted the new role as a DT teacher. This was a case of shoot first and ask questions later and, given that the Claimant was unwell, was harsh and unfair. We consider that it was unreasonable to announce a significant decision without first raising the matter with the Claimant to see if he could shed any light on what had been agreed and understood when he accepted his new post.

Producing meeting notes which did not reflect the content of sickness review meetings – Paragraph (1)(a)(x)

312. This complaint refers to the meetings that the Claimant had with Zakia Khatun on 27 November 2017 and 23 February 2017. In each instance the Claimant complains that the letters were not exhaustive and that they contain passages which were not referred to at the hearing. We do not accept that the letters did not reflect the content of what had been discussed. The context of the letters, as the Claimant, as a former head teacher would have been well aware, was that the School was following its absence management policy. The purpose of the letters was to summarise the meetings and not to produce a verbatim record. In each instance the Claimant was accompanied and could, and indeed did, produce a record of the meetings.

313. We would accept that had the letters produced by Zakia Khatum been misleading or dishonest in any way the Claimant would have grounds to complain. In the meeting of 27 November 2017 the Claimant and his Trade Union representative used the meeting as an opportunity to try and persuade Zakia Khatum that the disciplinary process should be dropped. Zakia Khatum's letter does set out the Claimant's contentions in summary. We find that the letters are a good attempt to summarise the meetings. The fact that they end with standard paragraphs referring to the absence policy would have been no surprise to the Claimant. We do not consider it was necessary or appropriate to record every point made by the Claimant in these meetings.

314. Our conclusion is that Zakia Khatom acted with reasonable cause when she wrote these letters in an attempt to summarise an absence management process. There is nothing put in or left out that would possibly come close to conduct likely to seriously damage trust and confidence. There is scarcely an act of the School that the Claimant does not criticise and in this instance his criticisms are entirely misplaced.

Alesha De Freitas failing to pass the Claimant's complaints on to Zoe Hudson – Paragraph 1(a)(xi).

315. As we have found above on 18 October 2017 the information that the Claimant sent to Alesha De Freitas included a statement containing his version of events relating to the use of the cover on the alarm. His letter was headed 'Private and Confidential'. Alseha De Freitas had written to the Claimant on 10 November 2017 saying that she was happy to pass on the Claimant's statement to Zoe Hudson. It is not disputed that she did not do so at that stage. On 23 January 2018 the

Claimant sent Alesha De Freitas a further letter, also marked Private and Confidential, which included both his responses to Zoe Hudson's questions and a critique of the process that had been followed. Alesha De Freitas passed on the responses to Zoe Hudson to her but did not forward the other attachments to the Claimant's letter.

316. When she gave evidence Alesha De Freitas explained that given the fact that the Claimant had marked his correspondence Private and Confidential she was unsure which parts if any he would have wished to have been passed on the Zoe Hudson. Mrs Banerjee made a fair point when she argued that if there was any uncertainty the position could have been resolved by asking the Claimant in clear terms what he did or did not want to be passed on. It is also true that the Claimant could, if he had wished, sent the material to Zoe Hudson directly.

317. The complaint that is made is that Zoe Hudson did not have either his first statement sent under cover of the letter of 18 October 2017 or his commentary on the disciplinary process – which included matters he says mitigated his actions – at the time that a decision was taken that there was a case to answer.

318. We find that the difficulty with ensuring documents were passed on arose from misunderstandings and not any deliberate attempt to hold documents back. These misunderstandings arose because the Claimant was attempting to mount a collateral attack on the disciplinary policy by writing to Alesha De Freitas rather than to Zoe Hudson. We would accept that more care could have been taken to ask the Claimant what he wished to be passed on but do not consider the failure to do so to be a serious breach of contract nor to contribute to one.

<u>Not conducting a fair and impartial investigation – paragraph 1(a)(xii)</u>

319. As we have set out above the Claimant makes 10 criticisms of the investigation which concluded in a decision that there was a disciplinary case for him to answer. We will start by saying that we consider that the decision reached by Zoe Hudson was plainly right. Even on the Claimant's account he had participated in disabling the smoke alarm without bringing his concerns about the alarm going off to the appropriate persons. The fact that the alarm was capped to avoid false alarms was relevant but did not so excuse the conduct that it rendered disciplinary proceedings unreasonable.

320. The first criticism is that during her interview with Pam Benjamin Zoe Hudson had out words into Pam Benjamin's mouth suggesting that an instruction had been given. We have set out our general findings above our view that it was entirely reasonable to regard the advice given by the Claimant to Pamela Benjamin as an instruction. *'I have a cap for you to use'* coming from the DT Manager is an instruction as to how things should happen in the future. Whilst the follow up question introduces the word instruction Pamela Benjamin adopts it in her reply and says that she had followed the Claimant's instructions. If there was any element of asking a leading question it was minimal and in no sense rendered the investigation unfair or the answers elicited unreliable.

321. The next point made was to suggest that there had been a failure to explore exculpatory evidence with Pam Benjamin and Quentin Monville. What is said was

that there was a failure to explore whether Pam Benjamin was concerned about Sara Haynes being angry. In fact, Pam Benjamin says exactly that and there was no need to take that matter any further. In her investigation report Zoe Hudson refers to the fact that the Claimant had said that members of staff were concerned about false alarms. We do not find any unfairness. The motivation for covering up the alarm was not in dispute.

322. The next two points take much the same point. The suggestion is that Zoe Hudson has failed to appreciate that the aim was to prevent false alarms. Again we would say that that was self-evident. It was not necessary to spell it out. The question was why the Claimant adopted his informal system of capping the alarm rather than take steps to address the problem formally.

323. The next point two points deal with the suggestion that there should have been a heat sensor. That is referred to expressly in the report. Entirely reasonably in our view it was not seen as determinative of whether the Claimant's conduct was improper. The fact that the sensor had been changed would mean that this particular problem would not arise again was of marginal relevance to the question of whether the short cut adopted by the Claimant was grounds for proceeding with a disciplinary case. If a person was cavalier about health and safety in one situation then unless they were checked they may continue to take risks in other situations.

324. The report does not deal with the Claimant's ill health. His ill-health had no bearing on his conduct on 15 September 2017 and there is no suggestion that the Claimant was unable to give his account of events. He had done so in writing. The question was whether there was a case to answer and the Claimant's health had no bearing on that.

325. The next point made was that there was an error not recognising a conflict of interest. We find no error. There was no reason why Zoe Hudson could not fairly investigate the Claimant's involvement in capping the sensor. That she had managerial responsibility for the conversion was neither here nor there. The issue was not who was to blame for choosing the sensor but whether, given that the sensor had caused false alarm, it was appropriate to cover it on an informal basis.

326. It is said that the report contains 'exaggerated language'. The examples given by Mrs Banerjee were that the report referred to the Claimant telling multiple members of staff about the cap. She says that the Claimant referred to just 2 and says it is an exaggeration to say 'multiple'. The report summarises the evidence given by Gary Corney. He says that two other teaching assistants used the fire alarm cap. We consider it a strain to suggest that telling two people about the cap is not 'multiple' people. In fact there was evidence that at least 4 people were told about the cap, the fact that the report refers to worst case scenarios is unsurprising . We have done the same in our decision. The risk may have been small but the consequences horrendous. It was perfectly reasonable to include the worst-case scenario in the report. Finally, a complaint is made that there is a reference to the cap been used on multiple occasions. There was evidence for that from Pamela Benjamin and indeed Gary Corney. The fact that no dates or times were given is really neither here nor there. The allegation is not exaggerated although it might have been more precise.

327. When the report was written the allegation was reworded from 'instructing' other staff members to 'advising other staff members. The suggestion was that it was unfair not to downgrade the charge to one of simple misconduct thereby making it clear that dismissal was not an available option. We disagree. The allegation was and remained one which could reasonably be considered was a serious breach of contract. The Claimant's position of authority meant that any advice he gave was likely to be followed and it was. The Claimant had not recognised any wrongdoing, he had made no apology and he maintained an account where he minimised his responsibility. His account of the number of instances when the alarm had been capped was inconsistent with the evidence of others and was, as we have found false. We consider that it was entirely appropriate to leave the option of dismissal as one open to any disciplinary panel. That decision is consistent with the disciplinary policy. The allegation was one of a serious breach of health and safety. Tampering with an alarm is a serious matter.

Failing to review the process in the light of the impact on the Claimant's health – Paragraph 1(a)(xiii)

328. There is some overlap between this allegation and the matters we have dealt with above. We have found that the allegation against the Claimant was serious and that it was reasonable to conduct disciplinary proceedings where the possibility of dismissal was kept open. We turn to the question of whether the fact that the Claimant was unwell meant that the allegation should be downgraded or dropped all together.

329. It was not only the Claimant who was facing disciplinary proceedings in relation to this matter. Pamela Benjamin (and initially Gary Corney) was also being disciplined. We think that it was entirely reasonable to adopt a consistent approach. We consider that it would have sent a very poor message to other employees to adopt a position that where an employee falls ill during a disciplinary process the charge should be downgraded or reduced to make them feel better. We would accept that the effect on the individual might be taken into account at any disciplinary hearing when looking at sanction but do not agree that it was unreasonable not to do so before any such hearing.

330. Mrs Banerjee argued that following on from Pam Benjamin's disciplinary hearing where she was given a written warning it was clearly appropriate to tell the Claimant that he would not be dismissed. We disagree. The difference between the approach of the Claimant and Pam Benjamin was as night and day. Pam Benjamin admitted the full extent of her involvement at the first opportunity. The Claimant never did so either because he was dishonest or because he had convinced himself of his version of events. Pam Benjamin was a teaching assistant and the Claimant a senior teacher with leadership responsibilities. The Claimant devised the idea of using the cap on the smoke sensor and Pam Benjamin went along with it. Pam Benjamin was prepared to recognise what she had done was wrong and apologised. The Claimant admits no fault whatsoever. It was entirely reasonable to allow the disciplinary panel to make a decision about the gravity of those matters with the option of dismissal being available if it was thought appropriate.

The conduct of the disciplinary hearing – Paragraph 1(a)(xiv)

331. We have made detailed findings as to the conduct of the hearing. We have set out the specific complaints above. We find that the hearing, whilst difficult for all was conducted in a reasonable and fair way. Given the propensity of the Claimant to introduce irrelevant matters, and occasionally take points where it was difficult to see the relevance, it was unsurprising that Shane Parker had to intervene to try and keep the meeting focussed and on track. In so doing he did on occasions intervene but we find that it would have been clear that any intervention was aimed at keeping on point and moving the meeting forward. We accept that it was unfortunate that the meeting started late. We have also found that there should have been a greater effort to inform the Claimant which witnesses would be attending the hearing. Other than those points we do not accept that there was anything about the manner in which the meeting was conducted that amounted to, or contributed to a serious breach of contract.

The Equality Act claims as a breach of contract - Paragraph 1(a)(xv)

332. We have dealt with the Equality Act claims below. We do not uphold any of the claims. Putting aside any alleged illegality under the Equality Act 2010, and looking at the same facts, we do not find that any of the matters complained of demonstrate, or contribute to, a serious breach of contract.

Conclusions on breach/dismissal

333. We have found that removing the TLR payment, the manner of its removal and the initial refusal to permit the Claimant to pursue a grievance or appeal against that decision was a serious breach of contract. In respect of the other matters we have found no significant faults and had we only been dealing with these matters we would not have concluded that there was a serious breach of contract in respect of those.

334. The first way in which the Claimant put his case is that the conduct of the meeting of 5 July 2010 was the 'final straw'. We have accepted that there was one failure in respect of that meeting and that was to keep the Claimant informed about which witnesses were attending. The failure to notify the Claimant of exactly who was attending was not itself a serious breach of contract. Accordingly we need to consider whether that act is one that forms part of a serious breach in the sense recognised in the fourth question in ***Kaur v Leeds Teaching Hospitals NHS Trust*** and in ***Omilaju v Waltham Forest London Borough Council*** . We find that it is. There was no good reason for the failure nor the earlier breaches we have identified. They are not dissimilar. We find that were it necessary to do so this fairly minor failure was capable of resurrecting the serious breaches of contract that we had identified.

335. Whilst the Claimant has presented his case on the basis that the School's conduct of the disciplinary hearing on 5 July 2018 was the 'final straw' we did not understand the Claimant to be limiting his case to the events of that day. He has identified all the matters we have dealt with as being individually and/or cumulatively a serious breach of contract.

336. We are satisfied that when the Claimant resigned on 5 July 2018 he did so because of all the matters that he perceived were a breach of contract. We have

found that of these only 2 matters were a serious breach of contract. It follows that the Claimant resigned in part because of matters which were not a breach of contract and in part because of matters which were. To establish a dismissal the breach need not be the only reason for the resignation see ***Nottinghamshire County Council and Meikle***. We are satisfied that the removal of his TLR and the initial refusal to afford him any avenue of complaint was a material reason for the Claimant's decision to resign. Accordingly, we are satisfied that he resigned in response to the breach. Whether the other reasons for his resignation might have meant that he would have resigned anyway is a matter that we may need to consider when assessing remedy.

337. We must then consider whether the Claimant had affirmed the contract thereby losing the right to treat the serious breaches we have identified as a dismissal by the School. We find that the two matters that we have identified as serious breaches of contract, the failure to pay the TLR Supplement and the failure to provide prompt redress to the grievance raised by the Claimant were acts of a continuous nature rather than one off acts in the same nature of as the failure to pay wages in ***Reid v Camphill Engravers*** **1990 ICR 435, EAT**.

338. We would accept that by February 2018 the School had agreed to permit the Claimant to bring a grievance about the removal of the TRL payment. However, by July 2018, some 7 months after the Claimant first complained that had not been resolved.

339. Treating the failure to pay the TLR supplement and the delay in providing an outcome to the grievance as a continuous breach of contract we find that the Claimant cannot be said to have affirmed the contract.

340. If we are wrong about the nature of the breaches and there were 2 one-off breaches when there was a unilateral statement that the TLR payment would be removed and the initial position taken that there was no appeal available we would still have concluded that there was no affirmation by the Claimant. He protested vociferously throughout the entire period about both the removal of his TLR and the refusal to afford him an appeal. Whilst the delay was substantial delay alone will not indicate affirmation of the contract.

341. We must then consider whether the dismissal was fair or unfair. The reason for a constructive dismissal is usually determined by asking why the employer acted as it did. In respect of the removal of the TLR we have found that Sara Haynes believed that an error had been made in continuing to pay the TLR. We have found that that was not an error but that an agreement had been reached. The error was that of Sara Haynes in failing to look back at what had actually been agreed at the time. The failure to offer an appeal and/or permit the Claimant to advance was based on a policy which was misunderstood. We have considered whether these matters taken together or separately could amount to 'some other substantial reason' but find that they cannot. The Respondent has not satisfied us that there was any potentially fair reason for the dismissal. Even if we are wrong the failure to follow any fair process when removing the TLR would have led us to the conclusion that the dismissal was unfair when applying the test in Section 98(4) of the Employment Rights Act 1996.

342. The list of issues identifies a point taken by the School that, if we found the dismissal unfair, invites us to conclude that for the purposes of assessing compensation it would not be just and equitable to award any compensation because the Respondent would inevitably have dismissed the Claimant because of the manner in which he, and his wife conducted themselves making attacks on the senior leaders of the School and the Governors.

343. It is for the School to establish the facts necessary to permit the Tribunal to assess the probability of a fair dismissal see ***Software 2000 Ltd v Andrews & Ors*** **[2007] UKEAT 0533**. The School's witnesses did tell us that they had thought that the Claimant and his wife had behaved in a litigious and difficult manner. Our findings are that that was in many, but not all, respects justified. However, there was little of no evidence about what the school would have done about that had the Claimant not resigned. The Employment Judge asked Sara Haynes directly what she would have done. Her response did her and the School some credit but fatally undermined the point advanced by the School. She told us and we accept that the School tries to be as inclusive as possible and, whilst it would have been difficult, she would have initiated steps to repair the relationship. She suggested that she would have attempted mediation. There was no suggestion that further disciplinary proceedings that might have resulted in a fair dismissal were even contemplated. We find that the School would not have dismissed the Claimant by reason of his conduct.

344. Having rejected the School's suggestion that it could and might have fairly dismissed the Claimant there remains an issue, upon which we have not yet heard any submissions, as to whether, but for any breach of contract, the Claimant would or might have resigned in any event. In particular, we will need to consider whether the Claimant would have ever accepted any disciplinary, sanction or whether his aim of complete exoneration would have ment that he would inevitably have resigned. We shall invite the parties to deal with that issue at a remedy hearing.

345. For the reasons set out above we find that the Claimant was unfairly dismissed.

The claims under the Equality Act 2010

Disability

346. The Claimant was diagnosed with PTSD. The parties jointly instructed an expert's report which was directed only at the question of whether the Claimant had a disability. The Respondent subsequently admitted that the Claimant's condition amounted to a disability for the purposes of Section 6 of the Equality Act 2010 from 7 December 2017. The Claimant has made it clear that he does not rely on any earlier act and so the Respondent's concession is sufficient to deal with the claims he wishes to pursue. The Respondent has also conceded that it had actual and/or constructive knowledge of the disability from the same date. No admissions are made as to the knowledge of any substantial disadvantage.

The claims under Sections 20 & 21 of the Equality Act 2010 – reasonable adjustments

347. The Claimant has identified 13 matters that he says amount to provisions, criterion, or practices ('PCPs') which he says place him at a substantial disadvantage in comparison to persons without his disability. We shall deal with each one below. Before we do so we make some general observations.

348. The Claimant has criticised the disciplinary and grievance processes. We have set out above our conclusion that the School acted entirely responsibly in treating seriously the use of the cap on the smoke sensor. What could not have been anticipated was the reaction of the Claimant to having his wrongdoing explored. His response was to immediately go on the attack, to minimise his own involvement, and to suggest others were to blame. It was argued on the Claimant's behalf that he had a heightened sense of injustice. Other than the removal of the TLR which we have found to be entirely improper the Claimant had no rational basis for believing that the investigation into his promotion of the use of a cap on the smoke sensor amounted to an injustice at all. The actions of the School in dealing with the Claimant need to be seen in that context. We find that any duty to accommodate an irrational view would not include adopting that viewpoint.

349. We find that the Claimant would not have been satisfied with anything less than complete exoneration. We find that that was the only thing that would have significantly reduced the Claimant's anxiety. Any other steps may have had a small effect but not a significant one. Given that he had not behaved well, the School could not reasonably be expected to exonerate him. The adjustments that the Claimant says should have been made must be seen in that context.

<u>Utilising staff with other responsibilities to conduct investigations and absence management processes - paragraph 3(a)(i)</u>

350. We would accept that the Local Authority delegated management of all the employees at the School, or at least all the teachers, to the School itself. We would further accept that the responsibility to conduct disciplinary investigations and absence management processes was undertaken by staff members. As such we would accept that that was either a practice or a policy that was adopted by the Local Authority.

351. The Claimant's first objection to this, is that he says it caused delay. He says that that places him at a substantial disadvantage in comparison to other people not having his disability. Delay in following such processes is likely to concern an employee without a disability but given the Claimant's heightened level of anxiety we would accept that any delay would place him at a greater risk of feeling anxious.

352. The reasonable adjustment that the Claimant proposes is avoiding delay. He does not go as far as to say how that might be achieved but the suggestion must be that more time ought to have been dedicated to dealing with the issues. It is the reasonableness of any adjustments that we need to consider. It is implicit in his criticism of using volunteer governors (see below) that the Claimant is suggesting that some individual be found who is dedicated to dealing with these processes. Alternatively, the Claimant is saying that delay should be avoided where it is reasonable to do so.

353. Under this heading we shall deal with the alleged delays in the investigation of the disciplinary allegations and then the alleged delays in respect of the absence management process. The grievance processes, once accepted as such, were dealt with by governors and latterly with the assistance of Terry Geater

354. In dealing with the disciplinary investigation it is not at all clear where the Claimant says there was any delay. The Claimant was to be invited to an investigation meeting but he was ill and unable to attend. That delay was not caused by Zoe Hudson having any alternative duties. Having agreed that the Claimant could submit written answers in respect of the disciplinary matter Zoe Hudson wrote to him on 9 December 2017 inviting him firstly to respond by 13 December 2017 and then to attend a disciplinary investigation meeting on 18 December 2017. Zoe Hudson was not responsible for any significant delay at all. On the contrary, the Claimant's complaint was that she was pressing him to respond earlier than he was able to do so. We do not take it that the Claimant's complaints relate to that period.

355. The Claimant provided his written answers to the questions asked by Zoe Hudson to Alesha De Freitas on 23 January 2018.

356. He then complains that there was a three-week delay before he was told that it would be unnecessary for him to attend a meeting on 9 February 2018. In fact, there was an 18-day delay. The Claimant was informed on 9 February that an outcome would be provided to the display investigation by 2 March 2018 and confirmation that there would be a disciplinary hearing was provided on 15 March 2018. At that stage the disciplinary investigation was complete. The total period from 23 January 2018 to 15 March 2018 was seven weeks and two days. During that period Zoe Hudson had to evaluate the material that she had gathered and produced a disciplinary investigation report which in turn had to be considered by Sara Haynes who evaluated her recommendation that disciplinary action should be followed. We find that these are the only periods of which the Claimant could say that it was the Respondents who were responsible for any delay.

357. Putting aside the Claimant's disability we conclude that the period of time taken to complete the disciplinary investigation was not overly lengthy. These were important decisions and required both Zoe Hudson and Sara Haynes to reach evaluative judgements based on the evidence that had been gathered.

358. It is correct that both Zoe Hudson and Sara Haynes had numerous other duties. Had they not had other duties and dedicated themselves exclusively to dealing with the disciplinary process we have no doubt that the task could have been completed with greater expedition. The question for us is whether there were reasonable steps that could have avoided the delay.

359. The investigation started as soon as the incident of 15 September 2017 came to light. As we have set out above we consider it was entirely appropriate for the investigation to be conducted by Zoe Hudson. This means that the investigation had started before the Respondents could have had any knowledge that the Claimant would be placed at a substantial disadvantage by them following their ordinary policies. There were two possible adjustments. The first would have been to have relieved Zoe Hudson of the task of carrying out the investigation and placed it in the

hands of somebody who could dedicate more time to it or she could have been asked to put other duties to one side and concentrate on the disciplinary process.

360. We find that the Claimant was kept informed to a reasonable extent about the progress of the disciplinary investigation. Accordingly, he knew what stage the process was at all times. We would accept that he was anxious to find out whether he was to face a disciplinary hearing.

361. We find as a matter of fact that had the disciplinary investigation moved on any more rapidly the Claimant's levels of anxiety would not have been substantially reduced. The principal driver of the Claimant's anxiety was not delay but the fact that he was being investigated for his own misconduct. Telling him any earlier that he was to face a disciplinary hearing would have done little or nothing to alleviate his anxiety.

362. We do not consider that it would have been a reasonable adjustment to have found a dedicated individual to undertake the disciplinary investigation. Zoe Hudson had already started and as much, if not more, delay would have been occasioned by a change of personnel from 23 January 2018. Equally we do not find that it would have been a reasonable adjustment to have expected the Respondents to have relieved Zoe Hudson of other duties in order that she could conclude the disciplinary investigation any earlier. Zoe Hudson had other important duties necessary in order to keep the school running smoothly. Contrary to the Claimant's case, reaching a swift decision would not have removed the principal stressor that was making him unwell. An earlier decision that he would be facing disciplinary proceedings was more likely to increase his anxiety. He would still have to face the disciplinary hearing. Taking matters overall, we do not think it would have been a reasonable adjustment to have had to dedicate a member of staff to the task in hand whether that was Zoe Hudson or anybody else.

363. Once there is a decision that there is a disciplinary case to answer a disciplinary hearing was convened but not proceeded with as the Claimant was unwell. The Claimant indicated on 18 April 2018 that he would attend a disciplinary hearing. It is correct that there was some delay in arranging that hearing but that delay must be seen in the context of the Claimant pressing for his grievances to be heard in advance of that hearing. That was something the School had initially agreed to accommodate. In addition, there were responses to outstanding enquiries made to the OH provider about reasonable adjustments for the hearing. We do not accept that these delays were the product of the PCP relied upon. They were not caused by the fact that the people organising the disciplinary hearing had other duties. As such the Claimant has not established that in this regard the PCP placed him at any substantial disadvantage.

364. We then turn to the alleged delays in the absence management process. The complaints that are made relate only to two matters. The first is the suggestion that there were delays in providing outcome letters from the three absence management review meetings. We do not accept that the Claimant was placed at any substantial disadvantage because of this. The outcome letters were as the Claimant was fully aware a summary of what had been discussed at the meeting. The Claimant and his representative on each occasion already knew precisely what had been discussed.

We are not satisfied that any delay in providing an outcome letter would have caused any anxiety at all. If we are wrong about that then we need to deal with the issue of whether it would have been a reasonable adjustment to have avoided the delay either by having a dedicated member of staff or reducing the duties of the Assistant Head Teacher to enable her to turn the letters round with great alacrity. The letters were written with the assistance of Nathan Roberts the HR advisor. We deal below with the reasonableness of using such assistance but import that reasoning into this decision.

365. If there was any anxiety caused by the delays in the outcome letters then we consider it was minimal in comparison to the anxiety caused by the disciplinary process. We do not consider that it would have been a reasonable adjustment to attempt to alleviate such minimal disadvantage by providing a dedicated professional or reducing the duties of the Assistant Head Teacher. No other adjustment would have alleviated any disadvantage.

366. The next delay complained of is providing a 'planned response' to the occupational health report provided to the Respondents on 5 January 2018. An absence review meeting was arranged for 23 February 2018. During this period Sara Haynes who had been unwell had started a phased return back to work. During this period the Claimant's wife sent Zakia Khatun a number of e-mails that were very aggressive indeed. The Claimant also made a subject access request that Zoe Hudson had to deal with. The OH report made it clear that the Claimant was contemplating litigation. He had started a period of ACAS early conciliation on 4 January 2018. It is little wonder that in those circumstances Zakia Khatun sought HR advice in relation to the majority of her dealings with the Claimant. The Claimant had been signed off as unfit for work for two months on 9 January 2018. The occupational health report of 5 January 2018 did not suggest that any return to work was imminent.

367. We do not accept that any delay in organising the Absence Review Meeting was a significant stressor for the Claimant. It may have contributed a small amount but the Claimant's anxiety was focused upon the grievance procedure. The only recommendation in the OH report that was significant was that the Claimant was fit enough to provide written responses to the questions asked by Zoe Hudson and that concluding the process would assist the Claimant. The Claimant knew that Zoe Hudson was preparing her report on 9 February 2018 and was given a timescale in which it would be completed. The Absence Management meeting was not at that stage urgent.

368. We do not consider that there was any significant delay in dealing with the OH report. Speeding the process up would have done little to relieve the Claimant's anxiety over the disciplinary process. Relieving Zakia Khatun of some of her duties so she could have dedicated herself to dealing with the Absence Management process would have caused significant disruption in return for minimum gain to the Claimant. Given the Claimant's stance, any delay caused by seeking advice was entirely understandable and it would not have been a reasonable adjustment to have omitted those actions. In the circumstances we do not find that any of the steps necessary to speed up the process would be reasonable adjustments.

369. The Claimant also says that the use of staff with other responsibilities led to him being sent correspondence out of working hours. He said that that placed him at a substantial disadvantage. We would accept that there was sufficient examples of e-mails being sent outside working hours to amount to a practice. The substantial disadvantage is described in the list of issues as the Claimant not knowing when any piece of correspondence might be received.

370. We consider that any anxiety that the Claimant felt about when correspondence might be received would be the same whether he was checking his e-mail between working hours or after working hours. The e-mails he was sent outside working hours did not demand responses. It was open to the Claimant not to check his e-mails outside working hours thereby restricting the correspondence. We do not find that he was placed at any substantial disadvantage by the practice of sending e-mails outside working hours.

Using volunteer governors to manage grievances against senior staff paragraph 3(a)(ii)

371. The use of voluntary governors at state schools is established by statute. They hold the ultimate responsibility for staffing matters and are deemed to be the employers for some purposes. The School was fortunate to have experienced professionals amongst its Governors. We would include Alex Bodewig in that. We would accept that using Governors to hear grievances is a PCP (in fact it is likely to be all three).

372. The reason that the Claimant says that this placed him at a substantial disadvantage was the delays he complains about. Such delays as there were, and we do not find that any were excessive or unreasonable, were caused by the fact that those people dealing with the Claimant had other matters in their lives and that they needed to seek advice and assistance dealing with what was at times a torrent of correspondence. We accept that the resignation of Alex Bodewig caused some delay but do not consider that it was the fact that he was a volunteer that made him step down. The reasons he gave for stepping down could have applied to anybody.

373. The response of the School, and Kenny Frederick in particular to Alex Bodewig resigning was to appoint a professional independent investigator. Even so the report could not be prepared before the end of the school term. Dealing with the Claimant's grievances and preparing a report would have taken time no matter who was dealing with them.

374. We shall assume that the Claimant was caused some additional anxiety by delays. We repeat what we have said above that the main source of anxiety was the fact that the Claimant was being subjected to a disciplinary process at all. Nevertheless, we shall assume some disadvantage caused by delay.

375. We do not accept that it would have been reasonable to have outsourced the disciplinary or grievance processes. The School is ultimately run by its Governors. It is they that have statutory responsibility for the smooth running of the school. Outsourcing any decision making would not have guaranteed an absence of delay. Delays can happen in any organisation.

376. We do not think that in order to alleviate one element, and a minor element at that, of the Claimant's anxiety it was reasonable to outsource important decisions to third parties. We therefore find that there was no reasonable adjustment that ought to have been made to the PCP of using Governors to conduct the grievance and disciplinary processes.

Checking all correspondence and responses with external HR advisers paragraph 3(a)(iii)

377. We accept that there was a policy of seeking HR advice on HR decisions. We accept that this would mean that the decisions would take longer than if they were taken by a Governor (or Teacher/manager). We accept that the anxiety of the Claimant may have been increased by any delay.

378. Was it reasonable to expect the Schools staff and Governors to act without HR involvement? The answer is very clear to us and that it would not have been a reasonable adjustment to try and speed up the various processes by not taking advice. It was abundantly clear almost from the outset that the Claimant would seek to litigate any dispute that was not resolved in his favour. He had first approached ACAS in January 2018. Even when the Claimant became seriously unwell on 9 December 2017 the Claimant's wife telephoned Rukia Begum and threatened press exposure and that she would hold the school responsible. Speeding up correspondence might have relieved the Claimant of one trigger to his anxiety. It would not have relieved him of the major trigger, the absence of exoneration. We conclude that it would not have been reasonable to adjust the PCP of taking advice from HR when the Claimant sent in correspondence.

Conducting a formal investigation into an allegation of misconduct without having an informal discussion - paragraph 3(a)(iv)

379. It seems to us that it is difficult to sustain this allegation as an allegation of a failure to make a reasonable adjustment under the Equality Act 2010 where Claimant has agreed that he is not making any claim predating 7 December 2017. Formal proceedings were commenced on 22 September 2017. At this time the Claimant does not say he was disabled but, if he was, the School had no knowledge of it. As such no duty to make reasonable adjustments could possibly have arisen.

380. In her written submissions Mrs Banerjee relies upon the fact that Sara Haynes and the governors who heard the disciplinary meeting on 5 July 2018 expressed a view that it might have been better to have spoken informally to the Claimant. It seems to us they are judging matters with hindsight. They do not say what would have happened had there been an informal conversation. It seems to us highly unlikely that the School would simply have accepted the Claimant's word that he had done nothing wrong. The evidence that he had been the prime mover in covering the smoke sensor on numerous occasions was frankly overwhelming. The only advantage to the Claimant would have been that he would had a little more notice that formal proceedings would be instigated.

381. Assuming that the Claimant's case is that the formal process should have been stopped after the school had knowledge of his disability then the question could rise as to whether it would have been a reasonable adjustment to have done so. We

have no hesitation in saying that it would not have been reasonable to have stopped a formal process which has procedural safeguards for both sides in order to have some informal chat. The purpose of the disciplinary investigation conducted by Zoe Hudson was to ascertain whether or not there was a case to answer. There clearly was. We have found that Zoe Hudson reasonably concluded that there had been a serious breach of health and safety. We would have concluded the same. We do not find that it would reasonable to have paused this process to enable the Claimant to raise his arguments informally. For these reasons we do not find there was any failure to make a reasonable adjustment by having an informal conversation either before or after 7 December 2017.

Holding meetings with a notetaker and not permitting recordings to be made - paragraph 3(a)(v)

382. We accept that the School, in common with many employers, had a policy of not permitting internal disciplinary processed to be recorded.

383. We would accept that the Claimant had a fear, although an irrational fear, that records of meetings might be distorted in order to disadvantage him.

384. Ultimately the School agreed to let the Claimant record the grievance meeting with Terry Geater and the disciplinary meeting on 5 July 2018.

385. The Claimant was accompanied at all meetings by the person of his choice. After the earlier Absence Management meetings the Claimant was able to provide a record setting out what he said were omissions from the summary letters that were sent out. We consider that given the nature of those outcome letters there was never any intention that they were a verbatim account of the meeting.

386. When the Claimant met with Alex Bodewig a dedicated notetaker took notes. When those notes were circulated the Claimant's wife complimented the note taker for his accuracy.

387. Should the Respondent have agreed to adjust its ordinary policy any earlier? We do not think so. The Claimant's suspicions that there would be efforts to manipulate the records were baseless. That the Claimant says this had occurred at Lambeth did not mean that the School would do the same. The Claimant was quite capable of talking notes and had a companion who could assist. At the grievance meeting with Alex Bodewig the School provided a competent note taker and there was no complaint about the record.

388. We accept that many employers are reluctant to have employees record meetings. The fact that the meeting is recorded is likely to entrench hostility. It entrenches a view that one party does not trust the other. These were domestic grievance and disciplinary meetings. We would accept that the Schools policy kept the level of formality at an appropriate level. We repeat our finding that the principle driver for the Claimant's anxiety was his misplaced view that the disciplinary proceedings were unjustified. The School could do nothing about that. We do not consider that any adjustments to the ordinary policy of not permitting recordings was appropriate at the stage that the refusal was maintained.

Requiring attendance in person at an investigation meeting paragraph 3(a)(vi)

389. On 9 December 2017 Zoe Hudson sent her letter asking the Claimant to provide written responses to her questions and inviting him to a follow up meeting. We would accept that ordinarily the School's disciplinary policy provided for investigations to take place face-to-face. As such we would accept that there was a policy or practice of conducting face-to-face interviews.

390. The Claimant says that he was unable to attend any such interview. We would accept that the Claimant's mental health made attending face-to-face meetings to discuss the disciplinary issues difficult for him. Whilst the Respondent has accepted that it had knowledge of disability from the time that the Claimant informed Zakia Khartun that he had a diagnosis of PTSD on 7 December 2017 we do not consider that the Respondent knew or ought to have known by 8 December 2017 that being invited to a meeting on 18 December 2017 would have placed the Claimant at a substantial disadvantage. The advice that the School had obtained on 5 December 2017 was that the Claimant was fit to attend meetings. The mere fact that the Claimant notified the School of a diagnosis of PTSD was not in our view sufficient to put Zoe Hudson on notice that the position had changed. We therefore find that the School did not have actual or constructive knowledge at that time that the Claimant would be placed at a substantial disadvantage by being asked to attend a meeting.

391. The Claimant did not attend the meeting proposed by Zoe Hudson. He was then not pressed to attend any further meeting. When he provided his written answers on 23 January 2018 he was told by 9 February 2018 that it would not be necessary for him to attend an investigatory meeting. As such the request that the Claimant attend a disciplinary investigation meeting was abandoned.

392. In these circumstances no duty to make reasonable adjustments to the policy of requiring the Claimant to attend a face-to face meeting arose before Zoe Hudson wrote her letter of 8 December 2017. Insofar as the duty arose later an adjustment was made and the Claimant was not required to attend a disciplinary investigation meeting.

Not providing agendas or details of how the meeting will be conducted in advance of a meeting- paragraph 3(a)(vii)

393. This allegation concerns the grievance and disciplinary meetings. The School has produced disciplinary and grievance policies that include flow charts and explain the process that is going to be followed. The Claimant was for many years a headteacher and would have been familiar with the policies and what the conduct of a grievance or disciplinary hearing. We would accept that there was a policy that the 'agenda' of such meetings would be provided by reference to these policies.

394. The Claimant would have been aware that the purpose of the grievance meetings he attended with Alex Bodewig and then Terry Greater was to understand the nature and scope of his grievances. As the Claimant was told this was not a one size fits all process and what would be discussed would principally be dictated by the Claimant himself. The Claimant says that the absence of an agenda placed him at a substantial disadvantage. We do not accept that is the case. We accept that the Claimant was anxious but that was because he was the subject of a disciplinary

investigation. We so not see that being told in advance of the grievance meetings that Alex Bodewig and then Terry Greater wished to talk to him to get an understanding of his grievances would have told the Claimant anything he did not know already and would have done nothing to reduce his anxiety.

395. We have concluded that there was no failure to make reasonable adjustments by not setting out an agenda in circumstances where there needed to be a degree of flexibility and where the broad nature of the meeting was obvious.

396. We make much the same point in respect of the disciplinary meeting. The Claimant was sent and knew about the disciplinary policy. That policy has a clear explanation of the steps that will be taken during the meeting. We do not find that the Claimant's anxiety would have been increased by the absence of some other document. We conclude that he was not placed at any substantial disadvantage.

397. If there was a substantial disadvantage then we find that it would not have been a reasonable adjustment to have produced some bespoke document when the published policy told the Claimant what to expect at a hearing. The difficulties in doing so (mainly trying to work out what the Claimant wanted) in comparison to any minor additional anxiety mean that it would not have been a reasonable adjustment to attempt the task.

398. If it was intended to include the failure to inform the Claimant of the witnesses who would attend the disciplinary hearing on 5 July 2018, something not identified in Mrs Banerjee's written submissions, then we do not accept that this one-off omission did reflect any PCP. On the contrary as the standard template letter suggests ordinarily conformation of whish witnesses would attend is given. The one-off omission is a consequence of Sara Haynes not correctly understanding what the Claimant was asking or believing that the panel would respond to the Claimant's requests. The necessary element of repetition is missing.

<u>Not engaging with grievances raised during the disciplinary process including his request to review the severity of the charge being investigated - paragraph 3(a)(viii)</u>

399. We accept that the Respondent had a policy or practice of not permitting grievances to be raised where the grievances concerned the questions that would be determined by a disciplinary process.

400. Our findings of fact set out above and elsewhere in these reasons are that we think that it was fair, sensible and proper for the School to take the stance that the Claimant's grievances that went to the commencement of the disciplinary investigation or any of the steps that followed should be dealt with within that process and not as grievances.

401. We have set out elsewhere our findings that nothing that the Claimant raised in his grievances ought to have caused Zoe Hudson to reduce the severity of the allegation against the Claimant. The same is true once the case against Pam Benjamin was disposed of with a warning.

402. We do not consider that whatever level of 'engagement' there had been there was any prospect of reducing the Claimant's anxiety by any step less than

abandoning the process all together. We do not accept that the Claimant would have accepted anything less than total exoneration. That was the only thing that would have reduced his anxiety.

403. We find that it would not have been a reasonable adjustment to have permitted the Claimant to attack the disciplinary process using the grievance process. We find that the Claimant was told that he could, and in fact did air relevant grievances, in the disciplinary hearing.

404. We do not consider that it would have been a reasonable adjustment to have permitted the Claimant to air his grievances about being disciplined outside the disciplinary process. We see no adjustment that would have addressed the core cause of the Claimant's anxiety which was his misplaced view that he was being treated unjustly. We conclude that there was no failure to make reasonable adjustments.

Providing short deadlines for responses - paragraph 3(a)(ix)

405. There was very little focus on this allegation either in the evidence or in the written submissions. The only occasion identified in Mrs Banerjee's written submissions was the letter of Zoe Hudson sent on 8 December 2017 and which arrived on 9 December 2017. That asked the Claimant to respond to questions by 13 December 2017. That was four full days. We have already commented that it is disingenuous to suggest that the Claimant could not have answered those questions on a weekend.

406. The difficulty for the Claimant in respect of this allegation is the same as we have set out above in respect to the requirement to attend face-to-face meetings. Zoe Hudson did not know, and could not reasonably be expected to know, that the Claimant would be placed at any substantial disadvantage by being asked to complete responses to her questions by 13 December 2017. As far as she knew he was fit to attend meetings (because that's what the OH advice said). He had been writing long letters and there was nothing to indicate that he would have any difficulty responding to the questions were asked within the timeframe given. As such no duty to make reasonable adjustments arose.

Using closed or leading questions in investigations paragraph 3(a)(x)

407. This allegation concerns the questions that Zoe Hudson asked the Claimant in writing in her letter of 8 December 2017 and those she asked of Ms Benjamin and Mr Montville during her disciplinary investigations.

408. It is suggested that this amounts to a practice that placed the Claimant at a substantial disadvantage in comparison to people without his disability.

409. We have reviewed the letter sent by Zoe Hudson on 8 December 2017. There are precious few occasions when close questions are included. There is a series of questions which read as follows: *'a witness has stated that you kept a cap for the fire alarm in the DT suite is this correct? Where did you get the cap from?'*. Only the second question is leading and it is contingent on the first. The Claimant was put at no disadvantage because he admitted that he had the cap. Later on, the Claimant is

asked a leading question: *'How many times have you cap the fire alarm in the DT suite?*'. The Claimant gives an answer which we find is incorrect and one which if he had put his mind to it he would have known was incorrect. Whilst this is a leading question it must be seen in context that previous question asked the Claimant an open question commenting on Pam Benjamin's evidence that the Claimant had previously used the cap. There are no other leading questions.

410. We would accept that Zoe Hudson asked the Claimant some difficult questions because it would have been apparent to the Claimant that a witness, Pam Benjamin, had suggested that his involvement was significantly greater when he had put in his witness statement on 18 October 2017. The Claimant would have recognised that Pam Benjamin had revealed that he asked whether *'she had said anything'*. That would tend to show that the Claimant knew that he had done something improper. The questions reveal the cavalier statement about using cling film in the future. Difficult questions are not the same as leading questions. It was only fair to put Pam Benjamin's account of events to the Claimant.

411. Pam Benjamin was interviewed twice but questions complained of are in the second interview that took place on 13 October 2017. There are no leading questions at all in her interview. We have dealt with the use of the word 'instruction' in our analysis above but it is not used in the context of a leading question.

412. The interview of Quentin Montville was conducted on 23 February 2018. He is not asked a single leading question.

413. We conclude that the PCP that is alleged was not applied to the Claimant save for perhaps two questions included in the letter of 8 December 2017.

414. Quite clearly Zoe Hudson could have had no knowledge of the Claimant's disability when she interviewed Pam Benjamin on 13 October 2017.

415. We find that Zoe Hudson did not know and could not have reasonably expected to know that the style of her questioning in her letter of 8 December 2017 would have placed the Claimant at a substantial disadvantage. If the Claimant genuinely was caused anxiety by this style of questions then that was entirely unforeseeable. It was foreseeable that the questions would cause the Claimant anxiety but principally because the questions that were asked disclosed that another witness had said the Claimant had been substantially involved in using a cap on the smoke sensor.

416. In case we are wrong about any of our conclusions above we would go on to consider whether it would have been reasonable to have adjusted the questioning. It seems to us that it was essential to put Pam Benjamin's account of events to the Claimant. The use of leading questions is not inherently hostile or threatening. It can be a useful way of getting straight to the point. Overall, we are satisfied that the questions asked were reasonable and appropriate and to the point. We do not consider it would have been reasonable to have combed through the questions to try and eliminate any sense that they were leading. The Claimant had an opportunity and in fact did refute the premise of the two questions which could be considered leading questions. We have found that the completed his responses inaccurately we

have not gone as far as to find him dishonest because it is unnecessary for us to do so but any anxiety he felt must be seen in that context.

Tight limitations on questions and timing during disciplinary hearing – Paragraph 3(a) xi)

417. We would accept that the School had a policy or practice of attempting to keep disciplinary meetings on track and to complete them within a reasonable time.

418. We have made findings about the meeting of 5 July 2018 above. We make no criticisms of the school in the manner in which the meeting was conducted. The Claimant resigned and left after asking questions of just one participant. His questioning of Zoe Hudson was over 1 hour. He finally indicated that he had no more questions he was not guillotined or cut off at the end.

419. We do not find that there was a Provision Criterion or Practice of imposing strict time limits during the meeting. No time limit was imposed. We accept that there were attempts to keep the Claimant on track. Whilst we do not think that those interjections were unreasonable we accept that the Claimant perceived them as being unreasonable and became anxious. On that basis we would accept that the Claimant suffered a substantial disadvantage in comparison with people without his disability.

420. The question then arises as to whether there should have been reasonable adjustments made. We find that during the meeting the scope of the enquiry and the relevance of any grievances was clearly and succinctly explained by Atia Williams. The same point had been made time and again in previous correspondence. We have listened to the recording of the hearing and we have found and find here that there was a very real need for interventions in order that the meeting could fulfil its intended purpose. We do not find that there was any failure to make reasonable adjustments.

Reduction of pay to half pay after 100 days of absence – paragraph 3(a)(xii)

421. The Claimant sought full pay after his ordinary contractual entitlement was reduced the half pay on the basis that his absence from work was a workplace injury. He bases that suggestion on the fact his health declined significantly when he received Zoe Hudson's letter of 8 December 2017. We have set out above why we do not consider that sending that letter was unreasonable or amounted to a failure to make reasonable adjustments. We have also said that it would have been a difficult letter for the Claimant to read because it reveals the information given by Pam Benjamin which showed the Claimant's involvement in capping the smoke alarm. The letter was sent in circumstances where the most up to date medical advice indicated that the Claimant could attend meetings. The questions that were asked were fair and relevant. The timescale given for a response was, on the information available, fair. We find that it was not foreseeable that receipt of that letter would trigger the reaction that it did.

422. The decision not to extend the contractual sick pay scheme needs to be seen in the context of the fact that there was a strong prima facia case against the Claimant that had yet to be resolved.

423. Those points aside we agree with Mrs Banerjee that the School had a policy of reducing sick pay after 100 days of absence and then not extending the sick pay scheme save for exceptional circumstances. We further accept Mrs Banerjee's submission that this placed the Claimant at a substantial disadvantage because his disability made it more likely that he would be off sick for extended periods. In doing so we reject Mrs Winstone's argument that a non-disabled comparator would be disadvantaged in the same way. We accept that a non-disabled comparator who was sick for more than 100 days would be treated the same way. However more disabled then non-disabled people are likely to reach the trigger reducing their pay. It is in that respect that the substantial disadvantage is suffered. The question is then whether it was a reasonable adjustment to extend the sick pay rather than reducing it.

424. Both parties referred us to the case of ***O'Hanlon v HMRC*** **2007 ICR 1359 CA**. In that case the employee contended that it would be a reasonable adjustment to continue to pay full pay after the point where the sick pay was ordinarily reduced (the case was also argued as being discrimination related to disability – now replaced by Section 15). Hooper LJ said this:

> *'Discussion: is the claim for enhanced sick pay ever sustainable?*
>
> *67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.*
>
> *68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.*
>
> *69. Second, as the Tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more*

money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.'

425. A distinction was recognised in ***O'Hanlon v HMRC*** where the reason for the absences themselves was the failure by the Employer to make reasonable adjustments. We have found that the School were not responsible for the Claimant's ill health. They could not have reasonably foreseen that advancing legitimate disciplinary concerns in a reasonable way would have caused the Claimant to have a relapse of his PTSD. They were under no obligation to abandon the disciplinary process.

426. We find nothing in the facts of the present case that would lead us to conclude that it was reasonable to continue to pay the Claimant full pay. We would accept that the very generous sick pay scheme imposed an already heavy burden. The Respondent needed to cover the Claimant's work. We also accept that a tapering scheme of paying sick pay acts as an incentive for employees to return to work as soon as they were able. Continuing to pay full pay would have done nothing to assist the Claimant return to work and may have incentivised him not to. The correspondence from the Claimant and the stance that he was taking would have suggested to the School that there was every possibility that the Claimant would never return to the School.

427. We have had regard to all the circumstances and have concluded that it would not have been a reasonable adjustment to continue to pay the Claimant his full pay once his entitlement to sick pay reduced.

Segmenting absence management, disciplinary process and grievances - paragraph 3(a)(xiii)

428. The School did allocate different individuals to deal with informal contact (Rukia Begum), the absence management process (Zakia Khatum) the disciplinary process (initially Zoe Hudson, Sara Haynes and then the Governors) and the grievances (the Governors). We would accept that this is the ordinary practice (save perhaps for Rukia Begums role) and consistent with the School's policies. As such there we accept that there was a policy or practice of dividing these matters up.

429. We accept that the Claimant became anxious about not being able to bring grievances about the disciplinary process. As such the policy of not permitting an employee to bring grievances when there was another process covering the same matter did place the Claimant at a substantial disadvantage.

430. We find that the decision not to permit the Claimant to raise grievances as a collateral attack on the decision to instigate a disciplinary investigation sensible proportionate and fair. We do not consider it would be a reasonable adjustment to have combined these processes. When the Claimant raised issues that did not relate to the disciplinary process it would not have been appropriate for those matters to be dealt with within that formal process.

431. We have concluded that it would not have been a reasonable adjustment to have either combined the processes of allocate the same person to deal with both. We repeat our conclusion that the principle cause of the Claimant's anxiety was that he had been subjected a disciplinary process. Whether separate of combined the Claimant would have had much the same level of anxiety unless the School abandoned the process against him.

432. We take the same approach in respect of the absence management process. Whilst the process was used to ascertain what adjustment or steps were required to assist the Claimant participate in the grievance and disciplinary process it had another purpose as well which was to monitor absence and the reasons for it. It is explicit in the absence management policy that if an employee is not able provide reasonable service through ill health then their employment might be terminated. The policy has its own procedural safeguards which would be difficult to maintain by stirring all three processes together as is suggested. Information gathered in that process was disseminated to the people responsible for organising meetings. For example, the Claimant was able to say that he wanted to answer written questions. The OH reports were used to inform the Respondent when meetings were appropriate.

433. Again, we do not consider that it would have been a reasonable adjustment to have combined the absence management process with any other. Because the principle trigger for the Claimant's anxiety (his misplaced belief that he was being disciplined unjustly) would not have gone away any departure from the standard policies would have had little or no benefit. The advantages of following the usual procedures far outweigh the potential benefit to the Claimant of combining then. We find that it would not have been reasonable to make any adjustment to these processes.

434. For the reasons set out above we dismiss all the claims brought by the Claimant that there was a failure to make reasonable adjustments to accommodate his disability.

<u>The claims under Section 15 of the Equality Act 2010</u>

435. The Claimant brings 7 claims under Section 15 of the Equality Act 2010. The 6th allegation being of a broad nature and cross referencing many other aspects of the claims. We shall deal with each in turn.

<u>Not extending the Claimant's sick pay to full pay – Paragraphs 4(a) – (c)</u>

436. This is the same factual complaint as that brought in paragraph 3(a)(xii) but brought under Section 15 of the Equality Act 2010.

437. The 'something arising as a consequence of disability' is the Claimant's absence from work. We accept that the Claimant's absence was a consequence of his disability.

438. The reason that the Claimant's pay was reduced to 50% was that he had been off sick for 100 days. We accept that reducing pay to 50% is something that a

person might reasonable feel was to their disadvantage and would amount to unfavourable treatment.

439. We must ask whether the treatment was a proportionate means of achieving a legitimate aim. Whilst it would be surprising if that yielded a different result to the test of reasonableness in Section 20 we approach the question afresh.

440. The first issue is whether the Respondent has identified a legitimate aim. Three aims have been identified and we deal with them below.

441. The first aim is said to be 'incentivising the Claimant and all parties to work towards a resolution of all outstanding issues'. This is similar but not identical to aim considered in ***O'Hanlon*** where it was recognised that terminating sick pay might incentivise an employee to return to work. The fact that employees might be motivated to re-engage with their employers when not on full sick pay is something each of us has come across in other cases. In this case the School had been told, and believed, that resolving the disciplinary and grievances were a precursor to the Claimant returning to work. We find that it was a legitimate aim to incentivise the Claimant into attending meetings.

442. The next aim is said to be the general aim of the sick pay policy as providing a reasonable level of certainty and security. It appears to us legitimate to devise a policy which seeks to define who should receive sick pay and for how long which can then be applied to all employees. As such we accept that it is a legitimate aim to provide a consistent policy.

443. The third aim is said to be the proper management of the school budget and ultimately public funds. As the law stands cost alone cannot amount to a legitimate aim – see ***Woodcock v Cumbria Primary Care Trust*** **[2012] EWCA Civ 330**. However, the School is not relying on cost but the proper management of budgets. We find that there is a difference between being concerned about the cost of something and wanting certainty when setting a budget. We would accept that it was important for the School to be reasonably certain of its staffing costs year. We accept that this could be a legitimate aim.

444. We must consider whether the measure is rationally connected to the objective. We accept in each case that it is. It is the reduction in pay that provides an incentive to participate in the internal processes. The application of the scheme to the Claimant is rationally connected with the aim of promoting a consistent scheme. Finally having a finite exposure to sick pay has a rational connection with the aim of being able to plan a budget for staffing.

445. We must assess proportionality for ourselves. We are not bound by the view of the Respondents. We consider that the matters identified in ***O'Hanlon*** are relevant considerations. The sick pay scheme is generous. There is some flexibility in the scheme for workplace injuries but we have found that this does not apply here. We need to ask whether any less discriminatory measure would achieve the same legitimate aims. We find that there is a real benefit in terms of certainty for all parties in having a cut-off date for full pay.

446. Having considered all the evidence we find that the application of the ordinary provisions of the sick pay scheme to the Claimant and reducing his pay was a proportionate means of achieving a legitimate aim.

447. At the time of the reduction in pay there was in effect a stalemate situation. The Claimant was unwell because he was facing a disciplinary investigation he perceived as unreasonable. To get better the medical advice was that the disciplinary and grievance procedures need to be resolved. To resolve those matters meetings were necessary. Until April 2018 the Claimant said he could not attend disciplinary meetings because he said he was too unwell to do so.

448. The School, in common with all other schools where the Burgundy book covers terms and conditions, had adopted a sick pay scheme which was of universal application and provided certainty. The scheme would commonly benefit those with disabilities as those people are more likely to need the scheme. The Claimant's position would be to make the scheme more advantageous. The School needed to cover the Claimant's duties and that entailed a cost. It needed some certainty as to what that cost might be.

449. As we have said above the context of the decision was not unimportant. There was at least a realistic possibility that the Claimant would never come back to work. From an early stage when he made serious allegations against almost everybody who dealt with him it seemed unlikely that he would ever work with those individuals again. This was a matter that could reasonably be taken into account when assessing the proportionality of the decision not to extend the sick pay.

450. We must consider the effect of the general rule on the Claimant himself. He would of course suffer a substantial drop in his income. However, this would not have assisted him in returning to the workplace. It would simply have made life more comfortable while he was off work.

451. We are satisfied that it was a proportionate means of achieving a legitimate aim to refuse to depart form the standard policy on sick pay.

<u>The claims in paragraphs 4(d) and (e)</u>

452. Paragraph 4(d) corresponds with paragraph 57 of the Claimant's pleaded case. It alleges that the Claimant had a heightened emotional response as a consequence of his disability. We accept that there is evidence that the Claimant was anxious and that he overacted to things where, had not had PTSD, he would not have done. As such we accept that his propensity to display anxiousness, be unduly suspicious and to overact were all matters which arose as a consequence of his disability. We accept that despite the fact that there was some evidence of a tendency to over-react that occurred when the Claimant was well. His response to Sara Haynes questioning his progression to the Upper Pay Scale 3 is the matter we have in mind. What we accept is that his disability made these tendencies worse.

453. The allegations of unfavourable treatment are found in paragraph 58. The way it is put is as follows:

> *'The Claimant contends that it was because of the symptoms that the First and/or Second Respondent chose to take minimal interest in his medical condition, including a failure to meaningfully acknowledges PTSD which led to a lack of understanding of his condition and a reluctance to engage with him in terms of matters related to disability including considering possible reasonable adjustments'*

454. We treat this paragraph as making two separate complaints. The first is the suggestion that the Respondents took a minimal interest in the Claimant's medical condition and secondly that they had a reluctance to engage with him in terms of matters related to disability. We must ask whether those allegations are made out factually and if they were whether the reason for any such treatment was the Claimant's heightened emotional response. These two claims have been fragmented further in the agreed list of issues. We put to one side the question of whether the Claimant ought to have sought permission to amend his claim. In the list of issues, the 'minimal interest' is expanded to 4 points. These are:

454.1. the failure to acknowledge his disability in correspondence or meetings (paragraph (4)(e)(i))

454.2. failure or delay is in implementing reasonable adjustments (paragraph (4)(e)(ii))

454.3. the failure to inform or educate the disciplinary panel (paragraph (4)(e)(iii))

454.4. failure to recognise the Claimant reaction to meetings and disciplinary's is not the same as other employees (paragraph (4)(e)(iv))

455. We do not consider that the Respondents did take minimal interest in the Claimant's health. The School promptly approached its occupational health provider and then made further referrals to obtain updates and, in particular, to seek information about whether reasonable adjustments were necessary. As such the first factual allegation is simply not made out and there was no such unfavourable treatment. We would add that, contrary to the Claimants perception, he was treated sympathetically and respectfully by Rukia Begum, Zakia Khartun and, in respect of his health, by Sara Haynes.

456. It is simply incorrect to say that the School did not acknowledge the Claimant's diagnosis of PTSD. The Claimant informed Zakia Khatun of his diagnosis on 7 December 2017. She responded three hours later. She said; 'I am sorry to hear you are experiencing post-traumatic stress disorder'. On 15 December 2017 Zakia Khatun made an occupational health referral which enclosed a letter from the Claimant's GP and which referred to the diagnosis of post-traumatic stress disorder. On 4 January 2018 she sent an email to the Claimant telling him that she had made an occupational health referral and saying: *'it was made to ascertain what further support the school could offer you after your diagnosis of PTSD which is noted in the reason you are being referred again and how best the school could support you with new information provided'*.

457. We have concluded that there were no reasonable adjustments that the School needed to make. However, we understand that the Claimant is asking us to consider whether the manner in which reasonable adjustments were considered was discriminatory. Under this heading the Claimant seeks to incorporate the entirety of his complaints that there has been a failure to make reasonable adjustments. There are numerous acts and omissions spanning the whole academic year and numerous actors involved in those decisions. Rather than setting out our conclusions again we simply import our findings of fact and our conclusions as to the reasonable adjustments claims into this section of our decision. We find that there was no unfavourable treatment.

458. It is correct that the disciplinary panel were not provided with the occupational health reports in advance of the disciplinary meeting. It was acknowledged by Shane Parker that the panel had not been made aware of the extent of the Claimant's disability. Such reasonable adjustments as were necessary had been agreed in advance of the hearing. In those circumstances it was unnecessary to 'educate' the panel and we find that there was no unfavourable treatment.

459. We do not think that there was any failure to recognise that the Claimant's reaction to meetings and disciplinaries was not the same as other employees. It would have been immediately obvious to anybody either reading the Claimant's correspondence or meeting with him that his reaction was not the same as 'other employees' (by which we understand the Claimant to mean employees without his disability). This appears to be a complaint that given that the Claimant had heightened anxiety steps should have been taken to deal with that at, and in advance of, meetings. If that is the case then it overlaps entirely with the allegation found at paragraph (4)(e)(ii).

<u>The claims described in the issues at paragraph 4(d) & (f)</u>

460. At paragraph 59 of the ET1 the Claimant sets out additional acts said to be unfavourable treatment. They are even broader than those set out at paragraph 58. Paragraph 59 reads as follows:

> *'In addition and/or in the alternative, the Claimant contends that it was because of the symptoms and his anxious and heightened emotional response to the disciplinary process and/or grievance process that the First and/or Second Respondent chose not to engage with him in terms of process(es) and his concerns regarding the process(es), including but not limited to sending hostile correspondence with short deadlines; delaying and not hearing or responding to his grievances; not allowing the Claimant a proper opportunity to explain his position (in the investigation; grievance hearings and/or disciplinary hearing); not genuinely engaging with the Claimants during the processes regarding his position; not reviewing the clearly disproportionate gross misconduct allegation which was causing the Claimant so much fear and distress; and not properly considering the claimants request a reasonable adjustments.*

461. We consider it regrettable that the phrase 'including but not limited to' ever found its way into a pleading. A party is required to set out their case in a manner that permits the other party to fairly respond. Each allegation of unfavourable

treatment is a separate cause of action and could succeed or fail. In the agreed list of issues these allegations are summarised at paragraph (4)(f). The unfavourable treatment is said to be all the facts relied upon to argue that there has been a constructive dismissal (although emphasis is placed on some) and all the matters said to be a failure to make reasonable adjustments. So one short paragraph of the ET1 has now expanded to 62 separate allegations. Whilst we have already made findings of fact whether these allegations amounted to a breach of contract and/or a failure to make reasonable adjustments we now need to identify whether each allegation amounted to unfavourable treatment and whether the treatment was because of something arising in consequence of disability. If we conclude that it was, we need to deal with the Respondent's position which is that any unfavourable treatment was justified.

462. Rather than set out our conclusions on all 62 claims that are brought under this paragraph we shall repeat our findings of fact set out above and our conclusions on the constructive dismissal claim and the claims that there was a failure to make reasonable adjustments. We include the following short summary that deals with the case as put at paragraph 59 of the ET1:

462.1. We do not accept that Zoe Hudson's letter of 8 December 2017 was 'hostile correspondence that gave a short deadline'. The letter and its contents did not amount to unfavourable treatment; and

462.2. The Claimant was given an adequate opportunity to explain his position during the disciplinary investigation. The reasons for curtailing any grievances that directly concerned the disciplinary investigation was in accordance with the School's policy, was sensible and reasonable. The School acted unreasonably in not permitting the Claimant to appeal and/or bring a grievance in respect of the TLR payment.

462.3. The School did engage with the Claimant during the processes it did not agree with the Claimant. This was entirely understandable on the basis of our findings of fact above. It was not unfavourable treatment to be subjected to a disciplinary investigation in circumstances where the Claimant had encouraged others to disable the smoke sensor informally and had endeavoured to conceal the true extent of his involvement.

462.4. The charge of Gross misconduct was not 'grossly disproportionate' and there was a reasonable basis for not reducing that charge prior to the disciplinary hearing.

463. Accordingly only in respect of the TLR payment do we find that there was any unfavourable treatment in respect of these 4 matters.

<u>The claims described in the issues at paragraph 4(d) & (g)</u>

464. The final claim, or set of claims, is described at paragraph (4)(g) of the list of issues. Here it is said that the unfavourable treatment is delaying communications with the Claimant and/or avoiding responding to his correspondence and questions.

That does not appear to add anything to the generality of what is set out at paragraph 4(f). We do not accept that there was any such failure or unfavourable treatment.

465. In turning to the reason for the treatment we shall assume that we are incorrect about there being unfavourable treatment. In order to succeed in respect of any of these claims the Claimant must establish facts from which we could infer that any of the acts and omissions he relies upon as unfavourable treatment were 'because of' his heightened anxiety. In her written and oral submissions Mrs Banerjee argued that the Respondents perceived the Claimant as litigious, threatening and difficult. She says that because of this the Respondents acted as they did towards the Claimant. In her written submissions (paragraph 66) Mrs Banerjee accepts that in some instances the Claimant's correspondence and conduct in meetings his 'frustration may have spilled over'. She says that the Respondent failed to recognise that this was a product of the disability. We consider that in making the submissions summarised above there is a shift from the case that had been pleaded.

466. We have accepted that the Claimant had heightened anxiety and that that was 'something arising in consequence of' his disability. There is a distinction between the Claimant having a heightened emotional response and the things that he said and did during the disciplinary process. It might have been pleaded that the Claimant's heightened emotional response was the reason for his actions and that accordingly his actions themselves arose in consequence of his disability. The fact that there may be a number of links in the chain between the disability and the 'something' arising in consequence of disability is clear - see ***Pnaiser*** and the passages we have quoted above. However, that is not the way that the case has been pleaded. If it had been, then we would have needed to make findings as to whether the things said or done by the Claimant were a consequence of his disability. We would have then had to consider whether the Respondents behaved as they did because of those actions. If they did they would have had to justify that conduct to avoid a finding that they discriminated.

467. The Claimant has not identified any particular thing that he said or did that he says arose as a consequence of his disability as opposed to how he felt. Mrs Banerjee has referred to the Claimant's frustration flowing over at times in correspondence and in meetings. If the Claimant wanted to rely on his acts and omissions as being matters arising in consequence of his disability he needed to have set them out in his pleaded case. This is not an arid pleadings point as the failure to do so means that the Tribunal has not been asked to adjudicate on whether those actions were a consequence of disability or not. It is not for the Tribunal to look at what the Claimant said or did and decide for itself whether those actions arose as a consequence of disability. We must deal with the case as it was put in the ET1. The list of issues sets out the 'something arising' in the same terms as the ET1. That is limited to a 'heightened emotional response' and not what the Claimant said or did.

468. We illustrate this difficulty with an example. The Claimant's first grievance contained references to previous tribunal proceedings which we have found were prompted by a desire to achieve a settlement from the School. It included a misguided argument that Zoe Hudson had a conflict of interest and it sought to rely

on previous instances where there had been a risk of injury as a reason why the disciplinary case should not have been brought. It included a baseless theory that Sara Haynes had disciplined him to avoid giving him a pay rise. What, if any, of the content of that letter was a consequence of disability? The Claimant had not identified anything or even pointed to the letter as containing matters because of something arising in consequence of his disability.

469. The difficulty the Claimant has with this part of his case may explicable by a reluctance to accept that his actions as opposed to his feelings might have caused the Respondent to react differently. That is a choice that he has made.

470. We would accept that those individuals who had to deal with the Claimant during this period found the task difficult because the Claimant conducted himself in a demanding manner and, through his actions, intimated that if his demands were not met then litigation was a likely consequence. We accept that as a consequence more time than might otherwise have been the case was spent seeking advice (it appears that seeking some advice was the norm). It is not the Claimant's case that he intimated litigation from an early stage or that if he did so it arose in consequence of disability.

471. We do not accept that any of the individuals who dealt with the Claimant allowed their justifiable perception that the Claimant was difficult to deal with to influence the manner in which they dealt with him. In particular, Rukia Begum and Zakia Khatun both showed a determination to continue to treat the Claimant kindly and fairly despite, rather than because of, the manner in which he behaved. Whilst we single those two individuals out the same is true for all of the people the Claimant has alleged discriminated against him.

472. We shall deal with the Claimant's claim as he has pleaded it. He says that the 'something arising' was his heightened emotional response and anxiety. We find that the Claimant has failed to show facts from which we could, in the absence of any explanation from the Respondents, infer that the reason for any treatment whatsoever of the Claimant was the fact that he had a heightened emotional response and anxiety. There was no evidence that that was the case. That is sufficient to dispose of the pleaded claims.

<u>The claim for the TLR payment</u>

473. The Claimant brings his claim for the TLR2 payment under either the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 or as a claim for unlawful deduction from wages under Part II of the Employment Rights Act 1996. In either cause of action, it is a necessary first step to determine what the Claimant was contractually entitled to be paid. In other words, whether he was contractually entitled to the TLR.

474. The parties acknowledged that the terms and conditions relating to the payment of salary and allowances was set nationally in England. The source of this is Section 122 of the Education Act 2002 which empowers the Secretary of State for Education to make provision for the determination of the remuneration of teachers. Since 2003 there has been statutory guidance issued by the Secretary of State. All local authorities and all maintained schools (such as Arnhem Whaff) are required to

have regard to the guidance. What this means in effect is that they must follow the guidance unless there is a good reason not to. The guidance requires each school to adopt a Pay Policy and establish procedures for addressing teacher's grievances that complies with the ACAS Code of Practice. The code of guidance at paragraph 20 sets out the circumstances where an additional payment may be made in respect of additional 'Teaching and Learning Responsibilities' (TLR payments). TLR3 payments may be made to classroom teachers for time limited improvement projects. TLR2 payments may be made where the teacher's duties include a significant responsibility that is not required of all teachers. TLR 1 payments may be made if the TLR2 requirements are made but there is in addition management responsibilities. The Guidance requires the pay of any teacher to be determined each year on 1 September and a record of the pay decision and reasons for it to be given to the teacher.

475. The School has adopted a pay policy that we find is intended to mirror the statutory guidance. That pay policy is included in our bundle. The criteria in that pay policy for the award of a TLR 1 or 2 payment mirror exactly the criteria in the statutory guidance. The requirements are:

> *Before awarding any TLR one or two payment, the Governing Body must be satisfied that the teacher's duties include a significant responsibility that is not required of all classroom teachers and that:*
>
> *a. is focused on teaching and learning;*
>
> *b. requires the exercise of a teacher's professional skills and judgment;*
>
> *c. requires the teacher to lead, manage and develop a subject or curriculum area; or to lead and manage pupil development across the curriculum; and*
>
> *d. has an impact on the educational progress of pupils other than the teacher's assigned classes or groups of pupils; and*
>
> *e. involves leading, developing and enhancing the teaching practice of other staff.*

476. The policy also points out that teachers will not be required to undertake permanent additional responsibilities without payment of an appropriate permanent TLR one or TLR two payment. As we have set out above the pay policy had an appeals process. We consider that that appeals procedure was wide enough to include the pay decision that was communicated to the Claimant by Sarah Haynes letter of 15 November 2017 and or the subsequent written confirmation of his pay included in the pay determination sent to him on 20 November 2017.

477. It is common ground that between January 2014 and the end of the summer term in 2015 the Claimant was entitled to and was paid a TLR2. During this period the terms and conditions that had been agreed were properly recorded in written contracts. The first contract was fixed term. That was extended on the same terms. Then on 30 July 2014 the Claimant was offered a further contract which was temporary in the sense that he was covering another teacher's maternity leave and could be terminated upon her return. The Claimant expressly accepted those terms

on 2 September 2014 at the start of the new academic year. The appraisal that took place at the start of the 2015-2015 academic year included objectives which entailed undertaking duties across year groups and developing curriculum resources. As all the parties accept this entitled the Claimant to the TLY payment. Sara Haynes letter of 15 November 2017 incorrectly refers only to the contract of 2013 and suggests wrongly that the TLR payment should have been removed after 1 year.

478. Sara Haynes then goes on to say that the Claimant will be put on a permanent contract from 1 December 2017. That analysis is in our view entirely flawed. It neglects to recognise that there was a discussion between Katherine Diaper and the Claimant in March 2015 about the Claimant undertaking an entirely different role at the School from the start of the academic year in 2015. The proposal that was made to the Claimant was set out in Katherine Diaper's e-mail of 2 March 2015. The essential parts of that e-mail record that the Claimant is happy to undertake a new role where he would be the DT teacher. A timetable is agreed which covers a number of year groups including 'Peer coaching' and KS1 interventions. It is expressly stated 'we would plan his TLR role'.

479. We find that there was an agreement to vary the existing terms. Such an agreement must have an offer acceptance and consideration. All those elements are present here. The offer was recorded in the e-mail of 2 March 2015. The Claimant accepted that role and started working as the DT teacher from the start of the academic year 2015. It is quite clear that the temporary contract agreed in 2014 no longer governed the relationship. The Claimant was no longer covering maternity leave and it is implicit in what was agreed that his employment was on a permanent footing. The failure to record this in writing, which was the School's responsibility, cannot disguise the reality of the situation.

480. We find there was an express agreement that the Claimant would move permanently to do the DT role and that he would be allocated duties that would entitle him to a TLR payment. We find that Katherine Diaper has ostensible authority to negotiate with the Claimant on behalf of the School. Our reasons for this include her seniority and the fact that she copied both the Claimant and Sara Haynes into her e-mail recording the offer made to the Claimant.

481. Given the Claimant's seniority and experience it is extraordinary to think that he unconsciously accepted a role that would have reduced his pay by about 8%. The promise that he would be allocated TLR duties, viewed objectively, would have been expected to have a significant bearing on his decision to take the role.

482. On 21 October 2015 the Claimant met with Rukia Begum to undertake his annual appraisal. At this meeting it was necessary that the Claimant's objectives were set for the academic year. Those set were as follows:

482.1. (whole school focus) through interventions develop open-ended, investigative learning opportunities, especially in mathematics.

482.2. (Pupil progress/teaching and learning) Develop DT projects (including cooking) throughout the school with focus on embedding opportunities for practical maths skills.

482.3. (Professional development/leadership and management) to continue to develop the outside space as a learning resource with an emphasis on environmental education.

483. When the Claimant was notified formally of his salary on 5 January 2016 the reason for him receiving a TLR payment is noted as D & T. The same process was followed in 2017. That is said by Sara Haynes to have been a mistake. We do not think there was any mistake. At the time somebody has made a conscious decision to justify the payment of the TLR supplement by reference to the Claimant undertaking the role effectively as head of subject for DT. That is one of the criteria in the pay policy. We consider that the objectives that the Claimant was set are capable of fulfilling the criteria in the pay policy. The Claimant was a subject lead, he taught children outside of his class, he acted across the curriculum, he retained duties related to promoting the teaching of mathematics. Whether these duties were sufficient to fulfil the criteria is not black-and-white but a question of judgment. We find that at the time a judgment was made that they did fulfil the criteria. We would accept that, later on, Sara Haynes reached an honest conclusion that they did not. That did not entitle her to withdraw a payment which had been agreed on the basis of a different assessment.

484. We were not addressed on the basis that the payment to the Claimant was ultra vires. Had that submission been made we would have rejected it. There was a discretion to make a TLR2 payment provided that the criteria were met. The judgment that was made in 2015 was that the criteria were met. We find that that judgment was probably right but was in any event in no sense unlawful or irrational.

485. Sara Haynes placed great emphasis on the fact that the Claimant's TLR payment had not shown up on the 'school plan'. The statutory guidance does require the School to keep the number of TLR payment under review and record those payments that are made. We were not shown the school plan for the years 2015 to 2017 but accept what Sarah Haynes tells us. That does not alter the contractual position. If there was an omission by the School then it was the School's responsibility. It does not mean that the Claimant was not entitled to payment. It does not add any great weight to the suggestion there was a mistake.

486. We have understood the use of the phrase mistake by the School to mean that the Claimant never had any contractual entitlement to the TLR payment. We disagree. We were not expressly addressed on the question of whether if the agreement had been reached on the basis of a mistake of fact or law it could be set aside at common law. Had that submission being made we would have rejected it. The Claimant had no reason whatsoever to suspect that the School had made a mistake. The express agreement referred to the TLR payment and the allocation of appropriate duties and the subsequent pay confirmation gave a rationale for making the payment. We shall not set out at length the common law principles but would have concluded that there was no basis for setting aside the agreement that was reached.

487. We find that there was an express agreement to pay the Claimant the TLR payment that was reached in March 2015. If the School later considered that it had failed to allocate the Claimant sufficient duties to justify the payment then that did not

entitle it to unilaterally decide to cease making the payment. It would have needed to terminate the contract. It did not do so but sought to unilaterally vary it which it was not entitled to do.

488. As such we concluded that the Claimant was entitled to his TLR payment from December 2017 when it was unilaterally withdrawn.

489. Whether brought as a claim for unlawful deduction from wages or as a claim for breach of contract that claim succeeds. Clearly the Claimant can only claim the TLR payments under one of those jurisdictions.

Time points

490. The only claims that have succeeded is the claim of unfair dismissal and the claim for the TLR payment. The unfair dismissal claim arose on 5 July 2018. The Claimant presented his ET1 on 21 September 2018. The Claimant had contacted ACAS for the purposes of early conciliation on 4 January 2018, 16 March 2018 and 1 August 2018 (with a certificate issued on 10 August 2018). It would not matter which certificate the Claimant relied upon his claim of unfair dismissal was presented in time. The same is true of the claim for the TLR payment (however it is put). As an unlawful deduction from wages the claim was presented within three months from the final deduction.

491. It is unnecessary for us to deal with the question of whether we had any jurisdiction to determine the Equality Act claims.

492. The employment judge apologises for the time taken to prepare these reasons. There have been pressures on the Tribunal system due to the Covid pandemic that have contributed to the delay but there were a large number of issues and decisions that needed to be recorded and this inevitably took a large amount of time.

493. We would thank the advocates for their written submissions and the assistance they both gave the Tribunal.

Employment Judge Crosfill
Date: 9 September 2020