Appeal No. UKEAT/0033/18/BA
UKEAT/0129/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 September 2018
Judgment handed down on 20 December 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MS K GIBSON APPELLANT

(1) LONDON BOROUGH OF HOUNSLOW
(2) CRANE PARK PRIMARY SCHOOL RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR CHANGEZ KHAN (of Counsel) Direct Public Access
For the Respondents	MR LANCE HARRIS (of Counsel) Instructed by: HB Public Law P O Box 2 Civic Centre Station Road Harrow Middlesex HA1 2UH

SUMMARY

VICTIMISATION DISCRMINATION

UNFAIR DISMISSAL – Automatically unfair reasons

UNFAIR DISMISSAL - Polkey deduction

UNFAIR DISMISSAL – Compensation

The Claimant before the Tribunal had brought proceedings principally for protected interest disclosure and dismissal, and also so-called ordinary unfair dismissal, wrongful dismissal and holiday pay.

The allegations were wide ranging and concerned the Claimant's employment as a Special Needs Primary School Teacher in a specialist autistic unit attached to a primary school. The Claimant, who is an American citizen, came to the UK on a three year contract of employment as a sponsored Tier 2 Migrant Visa. The post had been identified nationally as a skilled job which could not be filled by a settled worker.

The Claimant made a number of complaints and allegations during the course of her employment. She did not ask the Respondents to apply to renew her visa and the Respondents decided that it would not take any steps to do so of its own volition and decided not to ask her if she would like them to apply on her behalf.

She was dismissed on the date her fixed term contract ended which was the date her Tier 2 Migrant Visa was due to expire. At the Employment Tribunal hearing, the Tribunal conceded that the dismissal had been unfair as they had since learnt that the Claimant's visa had been

temporarily renewed when she had applied independently to the Home Office for a visa which would not tie her to a particular employer, through a different route – the FLR(O) procedure.

The Tribunal rejected the Claimant's claims of whistleblowing detriment and dismissal and limited her compensatory award for unfair dismissal to the 6 week period her visa was extended before her application was rejected with no right of appeal.

On appeal the Tribunal's Judgements of both Liability and Remedy were largely upheld.

Although the Tribunal had not had the benefit of **Kilraine v London Borough of Wandsworth** [2016] IRLR in analysing whether the disclosures amounted to information, and wrongly concluded that some of the disclosures were not protected or qualifying disclosures, the Tribunal had nonetheless made findings about the reason why the alleged detriments had occurred. They found that the reasons for the treatment were not materially influenced by the matters relied on by the Claimant as disclosures and dismissed the claim. Even though it's reasoning could have been clearer, the Tribunal was entitled to reach its conclusions on the dismissal and the detriments it considered.

The Tribunal was also entitled to conclude that the Claimant's compensatory award should be limited to the period of her entitlement to work in the UK. Since the Claimant did not ask the Respondent to apply for an extension of her visa on her behalf, it was just and equitable to limit compensation to the date the Claimant could work legally in the UK in all the facts and circumstances of the case.

However, the Tribunal had failed to make findings on 2 of the detriments relied on and the case is remitted back on limited terms to the same Tribunal to make findings and determine those two matters.

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HER HONOUR JUDGE STACEY

1. This appeal is brought by Ms Gibson, the Claimant before the Employment Tribunal ("ET") against both the School where she worked Crane Park Primary School (the Second Respondent before the ET) and her Local Authority employer, the London Borough of Hounslow, as the First Respondent. Consistent with **Practice Direction** 16.4, I shall continue to refer to the parties as they were before the ET. The Claimant seeks to challenge both the Liability findings and conclusions in her claim, principally for public interest disclosure detriment and dismissal in the ET's Judgment on Liability ("the Liability Judgment"), and the Tribunal's findings and conclusions in its Remedy Judgment in its approach to **Polkey** and section123 **Employment Rights Act 1996** in the calculation of her compensation in her successful claim of ordinary unfair dismissal ("the Remedy Judgment").

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2. The two Judgments under appeal were heard in the Watford ET before EJ Henry and members (Mrs S Low and Mrs I Sood). The Liability Judgment was heard over 11 days on 12-21 and 28-30th September 2016 and the Reserved Judgment with Reasons was sent to the parties on 7 April 2017. At the Claimant's request, the Tribunal corrected a number of matters in its Liability Judgment under the slip rule and issued a Certificate of Correction sent to the parties on 30 June 2017 together with the Corrected Liability Judgment.

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3. A Remedy Hearing was held before the same panel (although is incorrectly recorded as being before EJ Henry sitting alone) on 6 and 7 February 2018 and the Remedy Judgment and Reasons were sent to the parties on 13 March 2018.

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4. The Claimant's case was for public interest disclosure detriment and dismissal, unfair and wrongful dismissal and holiday pay. The Respondent conceded that the Claimant's dismissal had been unfair and the Tribunal rejected the Claimant's other complaints. At the Remedy Hearing, the Tribunal ordered the Respondent (the Remedy Judgment does not specify which, but the Respondents were clear as between themselves where responsibility lay) to pay the Claimant £5,314.

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5. The grounds of appeal in the case had been helpfully fine tuned and clarified following a Rule 3(10) Hearing that in the Liability Judgment (1) the Tribunal erred in law in determining that the protected disclosures relied on did not qualify for protection under sections 43B, 43C, 43F and/or 43g **Employment Rights Act 1996** ("ERA") ("the Qualifying Disclosures Issue"); (2) that the Tribunal had failed to determine and/or give reasons for its determination of some of the Claimant's claims; (3) that the Tribunal had failed in its assessment of causation and whether the protected disclosures were causative in accordance with the statutory wording of the detriments alleged; and, in relation to the Remedy Judgment (4) the Tribunal's approach to the compensatory award and section 123 **ERA 1996**, **Polkey** and the Tribunal's decision to limit the Claimant's loss of earnings to 6 weeks from date of dismissal.

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The Facts and Background

6. The Claimant is a US citizen who was employed by the First Respondent as a Class Teacher in the Second Respondent's School with its Autistic Children's Education (ACE) unit on a sponsored tier 2 migrant visa since the post could not be filled by a settled worker. She was employed on a fixed term contract for just under 3 years to run alongside her work visa which was due to expire on 30 September 2015. She commenced employment on 12 November 2012.

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7. The Employment Tribunal Judgment is 62 pages long and recounts events in very considerable detail in a way which is not always easy to follow, and is more by way of recitation of the evidence than succinct findings of fact. It includes lengthy extracts from various emails and minutes of meetings.

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8. In a very brief summary, the outline facts are these. There was conflict between the Claimant and her managers in a number of areas from early on in the Claimant's employment – for example, we see notes of a meeting in January 2013 where the Claimant "feels there are problems with the current Head Teacher, Alison Small, Deputy Head, her Line Manager and the Early Years' Coordinator" (paragraph 24).

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9. The Tribunal carefully avoided making a judgment concerning the conflict choosing instead to describe it as "a difference of expectations between the senior leadership of the school and the Claimant" which gave rise to confrontations (paragraphs 22 & 3).

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10. The Claimant was an outspoken critic of her Line Managers, Senior Management, the acting Head Teacher and her successor and the Chair of Governors and had strong, and well documented views on various matters, which she raised frequently, some of which form the basis of what she relied on as protected disclosures in the litigation.

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11. There were also concerns expressed about the Claimant. For example, in September 2014 a visiting Paediatric Occupational Therapist, provided a distressing account of possibly inappropriate handling of a pupil (paragraph 70) and an unusual and inappropriately defensive response by the Claimant to the Occupational Therapist's concerns about a sensory diet sheet. Other examples include a lesson observation which marked the Claimant's performance as

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"requiring improvement" which was very poorly received and rejected by the Claimant, and concerns expressed by Hounslow and Richmond Community Healthcare NHS Trust about the education and support that the children were receiving in the Claimant's classroom.

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12. It is evident and implicit from the Tribunal's narrative account that the School's perception was that the Claimant was colluding with the parents of the pupils, and whether intentionally or inadvertently was stirring up trouble which generated complaints against the School and its management. Examples include the parents of Child A, C and K.

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13. Matters came to something of a head in January 2015 when the Claimant told the parent of Child C that their child had been kicked and mock strangled by Child B. The Claimant informed the parent that another Teacher, Ms Gosia Szczepankowska, had witnessed the incident and informed the Claimant of it. The revelation led to a strong complaint by the parent of Child C. On investigation by the School, Ms Szczepankowska categorically denied informing the Claimant that she had witnessed a mock strangulation and that she knew of no such thing having occurred. There had been a kicking incident that she had dealt with appropriately and informed the parents of Child C, but nothing else untoward had occurred. The Claimant was equally adamant that Ms Szczepankowska had informed her of the strangulation.

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14. Disciplinary proceedings were commenced against both Teachers – both were investigated for having told a lie against a work colleague (presumably the School had reasoned that one or other of the Claimant and Ms Szczepankowska was lying and they would find out which through an investigation). The Claimant additionally faced allegations that she had acted in an unprofessional manner and not followed School protocol by informing the parent of what

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was a hearsay allegation of the strangulation of their child in a way which created anxiety and panic for the parents, and related matters (paragraph 128).

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15. At around this time, 29 January 2015, the Claimant also instituted a grievance against a Teaching Assistant in the Special Education Needs ("SEN") unit, Ms Walker, after the Claimant discovered a statement on a school printer of Ms Walker recounting a conversation or encounter that she had witnessed between the Claimant and the parent of Child C. The Claimant explained

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that she presumed that the statement was part of the disciplinary investigation process but considered it was a "clear example that staff were against her and attempting to target her and [sic] unpleasant way" (paragraph 133).

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16. On 3 March 2015, the Claimant was signed off sick with work related stress which continued until the end of June 2015 when Occupational Health recommended a phased return to

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work. The Claimant failed to attend a disciplinary investigation meeting arranged in April 2015 and the investigation panel decided not to hold up the preparation of their investigation report. There was a meeting on 20 July when a return to work meeting was arranged for 3 September, when the Claimant's Union Representative would be available. The Claimant advised that she

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would not deal with school matters over the summer holiday.

17. At that time, there were changes being made to the structure of the ACE unit and the

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provision for autistic spectrum disorders that potentially impacted on the Claimant's job. She was informed in writing that notwithstanding these changes she would be accommodated until the expiry of her fixed term contract, but not necessarily in the same role.

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18. On 3 September, a stress assessment was conducted for the Claimant, an absence management meeting and the return to work meeting, with a phased return to work arranged to commence on 8 September.

19. A disciplinary meeting following the outcome of the disciplinary investigation was scheduled for 15 September 2015, although later re-arranged to 25 September.

20. The normal process for tier 2 visa employees would be for the School or Local Authority to discuss with the employee whether they would like the Local Authority to apply for an extension of the visa and remain as a sponsored employee. An extension would only be granted if the School or Local Authority supported the application and could state that the employee was required. The School had decided that they did not want to continue employing the Claimant after the expiry of her contract or assist her if she asked them to renew her visa. The School therefore chose not to raise the matter with her.

21. The Claimant had also decided not to ask the School or Local Authority about the possibility of their applying on her behalf for an extension. Instead the Claimant applied for a visa extension herself, under a different procedure – the FLR(O) process - and informed the Respondents on 15 September that her visa had been extended (paragraph 202). In fact, it was only extended for the short period while it was considered and it was refused on 19 November 2015 with no right of appeal. Without the support of her current employer, her application to extend her Tier 2 visa was bound to fail as the Respondents knew. Since she did not provide any evidence that her visa had been extended, the Respondent does not appear to have believed the Claimant.

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22. The Claimant had been sent notice of, but did not attend, a disciplinary hearing held on 25 September 2015 which proceeded in her absence. She was given a two year final written warning for actions and lack of regard for school procedures which had placed the School in a vulnerable position and which had caused unnecessary anxiety and fear for the parents of the children involved. It was also found that her actions amounted to a breach of the professional standards required by Teachers.

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23. Meanwhile on 11 September, Ms Szczepankowska was advised that no further action would be taken against her – it is not entirely clear, but presumably meaning that it had been decided there was no case to answer and she would not face a disciplinary hearing.

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24. The Tribunal records (paragraph 222) that on 30 September 2015, "the Claimant's employment was terminated on the tier 2 sponsored visa expiring without apparent renewal." Unpicking that sentence, it is apparent from the Tribunal's Judgment that the Claimant did not provide proof to the School that her visa had been extended and the enquiries made by the School and the Local Authority of the UK Border Agency, confirmed that without a valid certificate of sponsorship from the Respondent or letter confirming her continuation in employment, she could not succeed in renewing her tier 2 visa. The Claimant had not explained to them that she had applied under a different procedure FLR(O). The School also became aware that primary teaching posts were no longer considered to be shortage posts by UK Visa and Immigration and there were now restrictions placed on sponsorship for non-shortage posts. It would seem that the Tribunal inferred that the Respondent had a genuine, but mistaken belief that the Claimant's visa had expired on 30 September 2015. As they were unaware that she had attempted to use the FLR(O) procedure, they were unaware that there would have been a short temporary extension while the application was considered.

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25. The Claimant left the School on 30 September and the employment of the Second Respondent with a leaving card and bunch of flowers that had been presented to her at the School Assembly. She was also given the outcome of the disciplinary hearing that she had not attended 5 days previously before she left. The same day, solicitors on behalf of the Claimant wrote a letter seeking two months wages in lieu of notice.

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26. Thereafter, the Claimant unsuccessfully appealed the final written warning and her grievance was rejected on 19 January 2016.

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27. Two sets of Employment Tribunal proceedings had been lodged by the Claimant: the first, on 2 June 2015 and the second, on 11 January 2016.

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The Tribunal's Liability Judgment

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28. Having set out the facts as summarised above, the Tribunal gave itself legal directions, drawing heavily on **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, a Judgment of this Tribunal that sought to identify the dividing line between a mere allegation and information capable of forming the basis of a protected disclosure in accordance with the statutory language. The Tribunal was correct to seek to follow and apply what was then good law and would not have been able to anticipate the Court of Appeal's Judgment in **Kilraine v London Borough of Wandsworth** [2018] IRLR 846 which found that the concept of "information" as used in section 43B(1), is capable of covering statements which might also be characterised as allegations and that there was no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does meet the standard of being "information", is a matter of evaluative judgment by a Tribunal in light of all the facts of the case.

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29. The Tribunal did not specifically set out the burden of proof in the detriment provisions of section 47B, but accurately cited the dicta of Elias LJ in **Fecitt and Others and Public Concern at Work v NHS Manchester** [2012] IRLR 64 CA "that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower" and Davis LJ "….the test to be applied under section 47B as not simply an objective 'but for' test: there was required an enquiry into the reasons why the Employer acted as it did…" (paragraph 248 ET Judgment).

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30. The Tribunal correctly identified the relevant section numbers of the ERA and the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL on the definition of detriment, that a reasonable worker would or might take the view that s/he had thereby been disadvantaged in the circumstances in which s/he had thereafter to work.

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31. The issues in the case had been set out at an earlier Case Management Hearing and were set out at the beginning of the Judgment. The protected disclosures and the detriments relied on were not listed in the Liability Judgment but reference was made to the source documents – to the additional information provided by the Claimant on 23 November 2015 for both the disclosures and detriments alleged.

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The Disclosures relied on and the Tribunal's analysis

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32. The Claimant had relied on 12 separate matters as protected disclosures ("PDs") dating from 7 February 2014 to 10 February 2015 and the Tribunal considered 11 detriments as well as dismissal. The Tribunal accepted the Claimant's submission that PDs 2, 5 and 6, qualified as protected and qualifying disclosures entitling the Claimant to protection from detriment and dismissal as a consequence, but rejected the remainder. It is necessary to consider each

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(excluding those that the Tribunal accepted as qualifying disclosures) in some detail to understand the parties' respective submissions on the Tribunal's conclusions.

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33. PD 1, was an email of 7 February 2014 to the Head Teacher, copied to 4 others headed "Parent concerns/Meeting for Cosmos student" (Cosmos being the name of the Claimant's class). It detailed the Claimant's views about the relationship between 2 children in her class including that Child B had repeatedly hit Child A in the head with a soft toy which did not cause any injury.

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The email contained concerns of the Claimant that Child B had become more aggressive and attempted to control and physically dominate situations. The Tribunal found that the email "did not disclose information" which the Claimant says is obviously incorrect.

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34. PD 3, was an email to the Head Teacher again copied to a number of individuals on 15 September 2014 entitled "Cosmos parent raises safety comments" referring to the parent of Child

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D who the Claimant said had "raised the issue of Child D being or feeling safe at school" after the parent had been informed that Child D had exposed himself. The Tribunal found that the email "did not disclose information" which the Claimant says is obviously incorrect.

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35. PD 4, was an email sent 4 days later on 19 September 2015, again to the Head Teacher and two others with the heading "follow up and second documentation for home safety concern" about Child D's mother's concerns about bruises on Child D and whether staff should be

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providing more supervision. The Claimant suggested in her email, that the parent should come into school to address her safety concerns as a high priority (paragraph 52). The Tribunal found that "no safety concern [was] raised" in this disclosure (paragraph 252.4) which the Claimant considers to be artificially narrow and ignores the context.

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36. PD 7, concerned the issue of Child C and the Claimant informing the parent that s/he had been mock strangled by Child B, as detailed above. The Tribunal found that section 43C did not apply (paragraph 252.8). The Claimant's criticism is that the Tribunal has confused the Claimant's concern that the pupil plan is not being followed with concern over Child C's health, and that when properly understood, the disclosure raises a Health and Safety matter.

37. PDs 8, 9 and 10 refer to the letter the Claimant sent to Ofsted, NSPCC and the Children's Commission (the same letter was sent to each) which reported her "growing concerns over the welfare of children in my school and the integrity of the system in place to protect them. I have attempted to address these issues at the school, governors' board and local authority level but have been unsuccessful" and set out her account of matters concerning Child A and that bullying was being ignored and set out the Claimant's concerns and allegations about Child C being strangled. She also catalogued a number of her complaints that she was subject to anger, combative tone and accusations as retaliation for having raised a safeguarding issue. The Tribunal considered that each letter ostensibly amounted to a qualifying disclosure but stated it would not pursue the matter further since the Respondents were unaware of the disclosure. Whilst the Claimant accepts that may be an accurate finding in relation to the letters to the NSPCC and the Children's Commissioner, it was demonstrably inaccurate insofar as the Ofsted complaint went since the Tribunal finds that the correspondence to Ofsted was forwarded to the First Respondent on 28 January 2015 (paragraph 124) and the School was told 2 days later (paragraph 127).

38. PD 11, was the Claimant's grievance of 30 January 2015 against Ms Walker – the Teaching Assistant who's statement the Claimant had found on the printer (the statement forming part of the disciplinary investigation about what Ms Szczepankowska did or didn't tell the

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Claimant about the mock strangulation and the way the Claimant dealt with it). The Tribunal concluded that "the grievance was self-serving that a false statement had been made against her, it does not address any issue coming within section 43B(1) so as to amount to a qualifying disclosure" (paragraph 252.12). The Claimant submitted that a disclosure can be self-serving and in the public interest and are not mutually exclusive and the Tribunal dealt with the matter in too cursorily.

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39. PD 12, was a letter from the Claimant's solicitors of 10 February 2015 asserting that the Claimant had raised child safety failures and been subjected to retaliation and unfair treatment as a result. The Tribunal found that the letter did not contain information, which is disputed by the Claimant.

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Detriment and Causation

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40. Although the Tribunal had found that many of the matters relied on did not amount to qualifying disclosures, they nonetheless considered the detriments relied on and as alleged for completeness (see for example paragraph 256.1).

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41. Next, the Tribunal considered 11 detriments the Claimant relied on as having occurred because of her qualifying disclosures. The criticism here is two fold – firstly that the Tribunal failed to reach any determination about a number of matters (ground 2 of the grounds of appeal): two alleged detriments raised by the Claimant that of a threat to her teaching licence and also a false allegation, and its initial failure to reach a determination of the automatic unfair dismissal complaint (section103A) and the desultory way in which it was dealt with in its corrected Judgment. In the Corrected Judgment – what I have called the Liability Judgment - the Tribunal found (at paragraph 267) "On the Tribunals [sic] findings as above stated the Claimants [sic]

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claim for unfair dismissal pursuant to section103A ERA is without merit and is accordingly dismissed."

42. Secondly, that the Tribunal had erred in its approach to the question of whether the detriments were done on the grounds that the Claimant had made the protected disclosures. The Tribunal found that in relation to the detriments it considered, that the claim failed on causation. It is submitted by the Claimant that the Tribunal did not direct itself as to the appropriate burden of proof in section 48(2) which provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

43. It is also said that the Tribunal erred in the standard of proof. Although the Tribunal had correctly identified the guidance in **Fecitt** that the question is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence), the employer's treatment of the whistleblower" and required an enquiry into the reason why the detriment occurred.

44. The Claimant however criticises the Tribunal for using phrases such as the detriment not being "predicated on", "made on the basis of", "premised on", or "on the ground of" the protected disclosures, which denote a higher threshold. In relation to one of the complaints, it erroneously assessed matters by reference to what a reasonable employer would do (paragraph 260.3) it was submitted.

The Tribunal's conclusions on each detriment

45. The first detriment relied on was about a meeting on 22 January 2015. The Tribunal comprehensively find against the Claimant – and make a positive finding that to the extent the

Respondent's Ms Small raised her voice at the meeting was not because the Claimant had made a disclosure, but because of the Claimant's reaction to enquiries made of her. The Tribunal also disbelieves, or does not accept, the Claimant's evidence that there was aggressive behaviour by Ms Small beyond her matching the Claimant's raised voice.

46. Similarly, the next matter considered – a letter from Ms Small the next day following the meeting - was found not to be premised on any disclosure, but the Claimant's behaviour at the meeting and her refusal to take direction from the Head Teacher. The contents of the letter, said by the Claimant to be a threat of disciplinary action was not premised on any discussions having been had by the Claimant with Child C's parent. The Tribunal makes a positive finding of the Respondent's reason for the letter which is not whistleblowing.

47. The next two matters considered were found not to have occurred on the facts: there was no less favourable treatment or detriment, and there can be no challenge to those findings. The Claimant had not established that she had been given different instructions to any other staff members as regards the holding of meetings with parents, or that she was singled out in her making and receiving of phone calls whilst at work. When a mobile phone was seen out on the Claimant's desk after all staff had been instructed not to have their phones out, the Tribunal had clearly accepted the positive case advanced by the Respondent who had proved to the satisfaction of the Tribunal that the criticism of the Claimant for having her phone on her desk was not to do with any disclosure she might have made.

48. The disciplinary investigation was a detriment relied on and the Tribunal found that the investigation commenced because misinformation had been given to a parent in circumstances that were less than clear, and since both the Claimant and Ms Szczepankowska were subject to

the investigation (and Ms Szczepankowska had not made a disclosure), the Tribunal was satisfied that the investigation was instituted to get to the bottom of the matter and establish the truth (paragraph 259). An actual apt comparator had been treated in the same way proving that the reason for the treatment was not the disclosures.

49. The next detriment alleged was the decision to proceed with the investigation and conclude the report after the Claimant did not attend the meeting arranged for her on 22 April 2015. The Claimant's allegation that the Respondent had failed to take sufficient steps to contact her were rejected on the facts: the Tribunal understandably, did not consider the circumstances warranted the Respondent trying to contact the Claimant through her solicitors and a registered letter with the date of the meeting had been sent with an email the day before.

50. The Respondent decided that the investigation process should not be further delayed because the Claimant would have the opportunity to present her case to an independent panel in due course. Here the Tribunal is criticised for mentioning that it considered that a reasonable employer would have done the same thing. But it seems that the Tribunal is merely using the yardstick of a reasonable employer to reassure itself and as a second check in deciding to accept the Respondent's explanation as true and accurate. Of course, it could have been much more clearly expressed.

51. The next allegation - that the delay in addressing the Claimant's grievance was not a whistleblowing detriment was found not to be a deliberate act. I accept that the reasoning is problematic and has failed to consider the possibility of a deliberate failure to act as provided for in section 48(2) of the Act. But here the Tribunal has rescued itself by making a positive finding that the reason for the delay was the Claimant raising further concerns and the Respondent being

recommended that the grievance be heard by the same panel as the disciplinary panel: in other words, a finding that the Respondent had proved that the reason for the treatment was not the disclosures relied on. It would also be possible to interpret the paragraph as concluding that the delay was not a deliberate failure to act but something more inadvertent.

52. The Claimant had alleged that there were plans to make her redundant that amounted to a detriment, but the Tribunal rejected the claim on the facts (paragraph 262). She had been reassured that whatever structural plans were implemented, her employment would be safe until the end of her fixed term contract.

53. In considering the alleged detriment that the Respondent had failed to follow the Claimant's return to work plan in the autumn of 2015, the Tribunal engaged head on with what it described as the "degree of antipathy" towards the Claimant by then and thought carefully about the reasons for it. In a significant paragraph at 263.3, the Tribunal conclude that the antipathy towards the Claimant was caused by the difficulty the Respondent had in managing her which had been evident long before any protected disclosures had been made and before Ms Small became head teacher. In a slightly confusing sentence the Tribunal goes on to state "which circumstance this Tribunal finds has not been enhanced by any disclosures thereafter made, but on the difficulties encountered with the Claimant in managing circumstances following the disclosures." Having puzzled over this sentence for some while, I conclude the word "enhanced" must have been intended to mean the opposite – as in not made worse or exacerbated. What I believe that Tribunal was trying to say, although I accept it has been infelicitously worded, but which is supported by their findings of fact, is that the Claimant was extremely difficult to manage from the very beginning and quite independently from any disclosures: she refused to be managed or take direction and would not comply with the Respondent's policies or procedures right from

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the beginning of her employment. It was her ungovernability that led to the treatment complained of and the antipathy towards her, not the disclosures. The Tribunal applied the same reasoning to the complaint that the Respondent had taken no steps to renew the Claimant's visa. Although buried in paragraph 263 it is a crucial finding that goes to the heart of the Tribunal's reasoning and analysis.

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54. The Tribunal repeat the point and their finding in analysing whether the Respondent's failure to take steps to renew the Claimant's visa was a whistleblowing detriment when they find that it was not. Similarly, with the delivering of the written warning on 30th September as the Claimant's last day of employment, the Tribunal finds was not predicated on the grounds of her having made a protected disclosure, nor the fact of the final written warning itself.

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Remedy Judgment

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55. At the Remedy Hearing of 6 and 7 February 2018 (the delay from the Liability Judgment of 10 months is not explained), the Remedy Judgment again fails to record correctly the composition of the Tribunal (it was before the same panel, but only the Judge is named). The Claimant was awarded a basic award of £950 and a compensatory award of £4,364. The Tribunal dismissed the complaint of wrongful dismissal concluding that since she had been employed on a fixed term contract, the notice expired in accordance with the fixed term date of 30 September 2015 which had been given in the contract itself. It did not say so, but the inevitable consequence of that decision was that the holiday pay claim which was parasitic to the wrongful dismissal claim, was also dismissed.

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56. In its Liability Judgment the Tribunal had noted at paragraph 251 that the Respondents had conceded unfair dismissal "on the premise that her visa had expired and she was then not

entitled to continue to be employed as a SEN Teacher without contravention of a duty or restriction imposed by statute." It perhaps means that notwithstanding the potentially fair reason for dismissal having been established (section 98(2)(d) contravention of a duty) the Respondent accepted that it was nonetheless unfair in accordance with section 98(4), but no further mention is made of it in the Liability Judgment.

57. In fact, it is now common ground that the effect of the Claimant's unsuccessful attempt to renew her visa extended her right to work and remain in the UK until 19 November when the Home Office rejected her application, but the Respondent did not know.

58. The Tribunal therefore reasoned in its Remedy Judgment that the Claimant should receive her wages from 30 September to 19 November 2015 as a compensatory award and made the appropriate calculation. It found that the Claimant's conduct had not contributed to her dismissal, but did not explain why it reached that conclusion. It was perhaps a surprising finding given some of the facts set out in the Liability Judgment, especially paragraph 263, but there is no appeal by the Respondent from that, or any part of the Remedy Judgment.

59. Mr Khan's criticism of their decision is of a failure to engage with the **Polkey** question and the overriding question under section 123 ERA of justice and equity in the circumstances of the case. He submitted that it was positively unjust and inequitable on the one hand to block an employee's visa renewal and then dismiss her on grounds of visa expiry on the other. It enabled a Respondent to profit from its own wrongdoing, which is inconsistent with equitable principles.

60. Mr Harris's response was that the concession made at the Liability Hearing was that the dismissal was unfair because the Respondent had not checked her visa status prior to 30

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September although they had sufficient information to be able to check the position (which is not however recorded in terms in the Tribunal's findings in the Liability Judgment). The Respondents did not concede that they should have taken proactive steps to renew the Claimant's visa.

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Discussion and Conclusion

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61. The Respondents accepted that there were a number of difficulties with the Tribunal's Judgments but submitted they were mere minor details that did not affect the overall conclusions. Acknowledged problems were the 7 month delay in the promulgation of the Tribunal's Judgment and the scale and extent of the mistakes that necessitated a Certificate of Correction. Mistakes ranged from omitting to mention and name the Lay Members, or that the Judgment was unanimous to failing to deal with a number of causes of action such as the protected disclosure dismissal complaint (section103A **ERA 1996**) and the wrongful dismissal complaint, which had been important aspects of the Claimant's case.

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62. The Tribunal's Liability Judgment is rambling and in places the meaning is obscure, whilst the Remedy Judgment is extremely short with minimal reasoning. The delay in promulgating the Liability Judgment does not inspire confidence and whilst not amounting of itself to an error of law, gives rise to the risk that evidence has been overlooked or forgotten or its significance under (or over) estimated with the passage of time. Inevitably, events will have been fresher in the Tribunal's mind immediately after the hearing than 7 months later. However, the Liability Judgment is extremely detailed and despite the superlative efforts of Mr Khan, it was hard for him to make many inroads into the narrative or the facts, once the meaning was ascertained. But it involved considerable reading between the lines when issues should have been articulated head on.

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63. The failure to set out a conclusion on the section103A protected interest dismissal claim and the wrongful dismissal claim initially was troubling, as was the failure to mention the holiday pay claim. Although the Liability Judgment was lengthy, it was short on analysis or a drawing together of the threads by reference to the statutory tests of a protected and qualifying disclosure in section 47, the causation test in section 48 and the provisions of section 103A.

64. With those general concerns in mind, which give the Claimant a considerable advantage, I turn to the specific grounds.

The Qualifying Disclosure Issue

65. Mr Khan has correctly identified that through no fault of the Tribunal, legal thinking has moved on from **Cavendish Munro** and the Tribunal's conclusions that PD 1, 3, 4, and 12 do not amount to disclosures of information cannot stand. In light of **Kilraine,** the disclosures contained in the emails relied on in each of PD 1, 3, 4 and 12 is sufficiently specific and precise to amount to a disclosure of information that falls into one or more of the specified categories in section 43B(1) as identified by Mr Khan and Ms McCann at the Rule 3(10) Hearing. The Tribunal has also clearly erred in concluding that the Respondents did not know of the Ofsted letter (PD 8) when the findings of fact recite in detail how the Ofsted complaint was referred back to the Local Authority – the First Respondent – who in turn informed the School – the Second Respondent – in a matter of days. I also agree that a more nuanced approach to public and self interest is required than perhaps was adopted in considering PD 11 and the Claimant's grievance, although the facts were not attractive for the Claimant in that incident. A Teaching Assistant had witnessed an encounter between the Claimant and a parent and was asked to provide a statement about it for the disciplinary investigation and the Claimant found a copy of the statement on a school printer. It presents as overbearing, if not bullying behaviour by the Claimant to bring a grievance

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against the Teaching Assistant for having provided the statement. But even more problematic for the Claimant, although not analysed by the Tribunal, is how it can be said that the disclosure tends to show a reasonable belief in any of the matters listed in section 43B(1) – all it tends to show is that the Respondent quite properly took statements from relevant witnesses as part of its investigation.

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66. But the real difficulty for the Claimant is that of the alleged detriments it considered, the Tribunal diligently considered them in the alternative – both on the basis of their having found that only 3 of the protected and qualifying disclosures had been made out, and on the assumption that all had been found to qualify. Thus, the legal errors in the Tribunal's approach to the qualifying disclosure issue are not, per se, fatal.

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Failure to determine claims

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67. The Claimant is correct to observe that the Tribunal omitted to deal with the Claimant's whistleblowing dismissal claim in its first Liability Judgment and also neglected to address the wrongful dismissal complaint and holiday pay complaint. The question is whether the position was sufficiently rectified in the Reconsideration Judgment and the Remedy Judgment.

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68. The two alleged detriments that the Claimant stated have not been dealt with by the Tribunal are listed as detriments 1 and 2 in the Claimant's additional information. The first was an allegation that because the Claimant did not have a Teacher's licence in the States (she has US nationality), she did not have the right to teach in the UK. The objection is that it was done with an implicit threat that she might be removed from her job and is inaccurate – in that the Claimant asserted that it was not necessary for her to have a Teaching license in the US in order to teach

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in the UK and the Claimant stated that it was linked to her being told to mislead the parent of child A and be untruthful about difficulties with the child and the school.

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69. The second detriment (detriment 2) concerned Ms Small passing on the allegation made by the visiting Occupational Therapist ("OT") that the Claimant had "inappropriately handled a child."

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70. I agree with Mr Harris' submissions that the Tribunal had set out in the body of its Reasons all the relevant facts necessary to decide the section 103A claim and that all that was needed was its additional paragraph 267 explaining that for the above reasons, the section 103A

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claim was not made out. It is to be remembered that the approach in a whistleblowing dismissal case is a little different to that of a detriment claim, with the Tribunal needing to consider whether the whistleblowing was the principal reason for the dismissal, rather than the material influence

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test in detriment claims. The Tribunal had correctly identified the issues in paragraphs 3.14-3.17 of the Liability Judgment. The Tribunal could have been more expansive and tied its conclusion to its specific findings and set out in more detail why that was the case but it's findings of fact are sufficient to explain and support the Tribunal's conclusion, even if it requires some reading

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between the lines. It is, just, **Meek** compliant.

71. The essence of the rationale for the Tribunal's Decision is in its finding that the source of

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the Claimant's difficulties with her employer were rooted in the problems they had managing her and her refusal to take instruction or follow the School's procedures which is central to an employment relationship. It can be extrapolated from the Tribunal's Judgment that the proximate

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reason for the Claimant's dismissal was the Respondent's belief that she no longer had the right lawfully to work in the UK. But even if Mr Khan is right that that is too simplistic an approach

and overlooks the power of the Respondent in relation to the visa renewal, the Tribunal found that the reason why the Respondent kept quiet about asking the Claimant if she wanted them to apply to renew her visa was caused by her inability to follow instructions and accept direction or comply with and follow School procedures and protocols. It was those failings that caused the Respondent's antipathy towards her - the problems they had trying to manage her - which were separate to and independent from the whistleblowing issues, the Tribunal had found. It would of course have been more helpful if the Tribunal had articulated its reasoning directly, but it is discernible from their Judgment.

72. The Tribunal's failure to mention the wrongful dismissal claim or holiday pay claim in its Liability Judgment, was rectified at the Remedy Hearing. A pedant might argue that it is not an issue of remedy, but the point was the Tribunal gave notice that the issue would be considered further at the forthcoming hearing when the parties could make submissions in accordance with a fair hearing. Furthermore, the point was unarguable in any event: the Claimant was on a fixed term contract that expired on 30 September. As a matter of contract law, no further notice was required. Since the holiday pay claim was parasitic on the notice claim – she was seeking to argue that holiday pay accrued during her notice – it died with the contract claim. Again however, it would have been helpful if the Tribunal had expressly said so.

73. Mr Khan has identified 2 alleged detriments which are not dealt with in the Liability Judgment and I agree that they appear not to have been dealt with. If the Tribunal had numbered the detriments as they were identified in the additional information, it would have been more obvious to them that they had omitted to deal with the two points. The points are clearly identified in Ms McCann's argument before the Rule 3(10) Hearing (paragraph 9.1). Mr Harris suggests that the answer can be divined from paragraph 263 where the Tribunal identify the root source of

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the Claimant's tribulations, but Mr Khan is right that the Tribunal did not deal with the points which were clearly identified as specific complaints. It would be tempting, but wrong, to guess what the Tribunal's answer might be, and would involve finding facts, which is not the role of this Tribunal. Whilst they are just two of a considerable number of detriments relied on, the parties are entitled to know the Tribunal's findings and conclusions on the two issues, and the oversight by the Tribunal is more than de minimus.

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Causation and the Reason Why

74. A close reading of the Tribunal's Judgment shows that notwithstanding that the Tribunal did not refer to section 48(2), by finding in relation to each detriment that it considered the reason for the treatment complained of where the Tribunal had identified a detriment and there is no error in law in its approach. I have set out the Tribunal's approach in its findings to the reason why events unfolded as they did for the Claimant at the School in relation to the detriments they have considered. It is apparent from their approach that they made the findings of fact required (other than for the two detriments they overlooked) and were entitled to find that the reason for the Claimant's treatment was not the disclosures.

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Remedy Appeal

75. The Remedy Judgment cannot be read in isolation: it is a companion piece to the Liability Judgment. The Remedy Judgment is short and Mr Khan is correct to observe that its reasoning on section123 is contained in one sentence in paragraph 3. It is clear that the Tribunal decided that the Claimant's compensatory award should be limited to the period of time that she was entitled to work in the UK, which took her unti1 19 November 2015. They reasoned that at that

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point the Respondent had a potentially fair reason to dismiss her (section 98(2)(d)[1] and that it would have been reasonable for them, in other words fair or not unfair, if they had dismissed the Claimant at that point.

76. Mr Khan is right to observe that the Tribunal does not set out its reasoning for reaching this conclusion in the Remedy Judgment, but all the facts necessary to support their conclusion are contained in the Liability Judgment and their conclusion is logical and consistent.

77. The Claimant's argument that the Respondent had prayed in aid its own wrong - the wrong being not renewing the Claimant's visa – to justify dismissal cannot be acting fairly under section 98(4), was premised on the Respondent having blocked the Claimant's visa renewal. The difficulty however for the Claimant is that she not only never asked the Respondent to renew her visa, she deliberately and consciously chose not to ask them. The Respondent did not concede that the dismissal was unfair because they should have taken more proactive steps to renew the Claimant's visa but because they were unaware that her right to work in the UK had been temporarily extended from 30 September 2015.

78. It might have been different if the Claimant had asked the Respondent to sponsor a visa renewal for her, but she chose not to do so, and we cannot speculate as to how the Respondent would have responded. Nor does it help the Claimant that she had a full understanding of the visa scheme and how it worked, she rightly guessed that the Respondent would not initiate a visa renewal application for her without her raising it, and she made a conscious decision not to raise

[1] It is clear that the Tribunal intended to refer to this subsection – contravention of a duty, rather than section 98(2)(c).

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it with them. Had she asked them – as they feared she would – depending on how they dealt with her request, she might have had an argument.

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79. The Tribunal had the benefit of 11 days of evidence and submissions and hearing about the events at first hand. Given the history of the Claimant's employment and all the Tribunal's findings in the Liability Judgment, the Tribunal was entitled to conclude that the Claimant's loss

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of earnings should be limited to the period when she was entitled to work in the UK and that it was not incumbent on the Respondent to be more proactive to renew her visa when she had not asked them to do so.

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80. Ground 4 of the appeal is dismissed.

Disposal

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81. In conclusion, the Tribunal's Judgments are upheld and the Claimant's appeal is dismissed in all but 2 respects.

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82. However, the two alleged detriments that the Tribunal failed to consider must be remitted back under this Tribunal's power under section 35(1)(b) **Employment Tribunals Act 1996.** Applying the criteria in **Sinclair Roche and Temperley v Heard & Anor** [2004] IRLR 763, there is no question of bias or partiality – the Tribunal was scrupulously fair and even handed to

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both parties; although some time has passed from the original hearing, it will still shorten matters for the case to be heard by the same Tribunal and I suspect that this case will have stayed in the Tribunal's mind. Given that the matters for remission back are so narrow, it is appropriate and

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proportionate for remission back to the same Tribunal.

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83. The Tribunal will be bound by its existing findings, and shall not hear any evidence afresh but shall consider the submissions of both parties and the evidence that was previously before it at the Liability Hearing to make findings and decide the following:

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Detriment 1

a. Did Ms Small threaten the Claimant's Teaching licence as alleged in Detriment 1 of the Additional information served on 23 November 2016. What are the facts of what occurred at that meeting?

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b. If so, did it constitute a detriment - would, or might a reasonable worker take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work?

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c. If so, has the Respondent shown the ground on which any act, or deliberate failure to act was done was not materially influenced by her disclosures? The Tribunal to set out its findings of the reason why the treatment occurred.

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d. If not, what remedy is the Claimant entitled to?

Detriment 2

a. Did the Respondent make a false allegation as alleged in Detriment 2 of the additional information served on 23 November 2016? What are the facts of what occurred?

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b. If so, did it constitute a detriment - would, or might a reasonable worker take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work?

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c. If so, has the Respondent shown the ground on which any act, or deliberate failure to act was done was not materially influenced by her disclosures? The Tribunal to set out its findings of the reason why the treatment occurred.

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d. If not, what remedy is the Claimant entitled to?

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In considering the protected disclosures under (d) above, the Tribunal is to presume that PD**s** 1, 3, 4, 8 and 12 amount to protected and qualifying disclosures under the **Act** (although those which postdate the alleged detriment are irrelevant).

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