Case No: 1304080/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr. J Bould**

Respondent: **Manor Hall Academy Trust**

Heard at: **Midlands West** **On:** **18 and 19 July 2018 and 1 August 2018 (in chambers)**

Before: **Employment Judge Woffenden**
Members: Mr. RS Virdee
: Mrs. N Chavda

Representation
Claimant: In Person
Respondent: Mr. P Roberts, solicitor

RESERVED JUDGMENT

1 The claimant was not dismissed by the respondent within section 95 (1) (a) Employment Rights Act 1996.

2 The claimant was not dismissed by the respondent within section 95 (1) (c) Employment Rights Act 1996.

3 The complaint of unfair dismissal therefore fails and is dismissed.

4 The complaint of direct discrimination under section 13 Equality Act 2010 fails and is dismissed.

REASONS

1The claimant was employed by the respondent from 1999 as a Teaching Assistant and an unqualified PE teacher. On 20 November 2017 he presented a claim to the employment tribunal of unfair dismissal and disability discrimination. At a closed preliminary hearing on 15 February 2018 Employment Judge Battisby identified the claims being made as unfair dismissal and direct disability discrimination under section 13 Equality Act 2010 (EQA). The latter relates to disability discrimination by association. It was accepted by the respondent at the commencement of the hearing that the claimant's son was a disabled person at all material times in accordance with section 1 and schedule 6 of the EQA.

2 In discussions with the parties about the proposed timetable for the hearing which the tribunal had asked the parties to agree, it became apparent that, should any of the claims succeed, any remedy issues could not be concluded in

the remaining time available. It was agreed therefore that the hearing be confined to liability only.

3 The respondent had failed to identify in the response its reason for dismissal should dismissal (either constructive or express) be proved by the claimant. It was therefore necessary for Mr. Roberts to make an amendment application to include in the response that in that event the reason for dismissal related to the claimant's conduct within section 98 (2) (b) Employment Rights Act 1996 ('ERA') and was that the claimant had lied about the reason for 2 days absence. The claimant did not object to that amendment and leave was granted.

4 It became apparent from the tribunal's pre-reading that the respondent might have in its possession documents relevant to the agreed list of issues which had not been disclosed and having made enquiries Mr. Roberts disclosed the claimant's main statement of employment particulars, written statement of employment particulars discipline policy and procedure, equality policy, staff absence policy and time off policy which were then included in the agreed bundle. It took until 2.30 p.m. on 18 July 2018 for all outstanding preliminary matters to be addressed and for the tribunal to complete its reading and the parties to agree a list of issues. There was insufficient time on the second day for tribunal deliberations so the judgment was reserved and another day listed for discussions in chambers.

5 There was an agreed bundle of documents of 85 pages. The above additional documents were included at pages 86 to 129 inclusive. We have considered only those documents to which the parties referred us under cross –examination or in their witness statements.

6 The tribunal heard from the claimant who gave evidence by way of witness statement supplemented by oral evidence.

7 On behalf of the respondent the tribunal heard from Mr Spreadbury (the respondent's Head of School) who also gave evidence by way of witness statement but this was very substantially supplemented by oral evidence, in particular (but by no means limited to) the omission of any information about the respondent other than to confirm the school at which the claimant worked was a special school. The tribunal permitted Mr. Roberts to ask Mr Spreadbury a number of supplementary questions concerning the respondent's size and administrative resources.

8 The agreed list of issues for the tribunal to determine were:

<u>Unfair Dismissal</u>

8.1Did the claimant's employment come to an end as a result of resignation or express dismissal by the respondent in refusing to allow the claimant to retract his resignation?

8.2 If the claimant resigned, was he constructively dismissed by the respondent i.e.

a) was there a fundamental breach of the implied term of trust and confidence contract of employment i.e. did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

b) did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation-it need not be the reason for the resignation)?

8.3 The conduct the claimant relies on is breaching the trust and confidence term is in essence:

a) suspending the claimant and starting disciplinary proceedings too long after the event in question, direct discrimination on account of disability by association as set out in 8.6 a) below, and failing to give the claimant appropriate time and consideration to take advice and deal with the allegations;

b) advising the claimant to resign with a short deadline to do so knowing he was upset and emotionally frail at the time.

8.4 If the claimant was constructively or expressly dismissed by the respondent, what was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98 (1) and (2) of the Employment Rights Act 1996 ("ERA") NB the respondent says the potentially fair reason related to the claimant's conduct (lying about the reason for his 2 days absence).

8.5 If so, was the dismissal fair or unfair in accordance within ERA section 98 (4), and, in particular, did the respondent in all respects act within the so-called "band of reasonable responses"?

Section 13 EQA

8.6 Has the respondent subjected the claimant to the following treatment:

a) commencing disciplinary proceedings against the claimant and/or conducting them unreasonably;

b) refusing unreasonably to allow the claimant to retract his resignation?

8.7 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

8.8 If so, was this because of the claimant's son's disability?

9 From the evidence it saw and heard the tribunal made the following findings of fact:

9.1 The claimant was employed by the respondent as a teaching assistant and an unqualified PE teacher from15 June 1999 until 20 October 2017. He worked at Cecily Haughton Special School ("the School"). Mr Spreadbury and the claimant had worked together at the School (particularly in relation to football) for some 17 or 18 years during which time Mr Spreadbury's career developed and (about 3 or 4 years ago) he was appointed Head of School. The claimant had no prior reprimands concerning absence or its genuineness. He suffers from gout and takes allopurinol for this condition.

9.2 The School has about 40 to 45 employees and 50 residential pupils. It is one of 6 schools comprised within the respondent, all of which are special schools. The respondent has outsourced its HR function to Insight HR under a service level agreement. There is no on-site HR resource available. Mr Spreadbury has not received any training in the operation of the respondent's

Equality Policy or in relation to disability discrimination. The tribunal finds this omission surprising, given the nature of the School.

9.3 At the time his employment ended the claimant was contracted to work 32 1/2 hours per week. By agreement he was to have reverted to a full-time role as teaching assistant with effect from 1 September 2017 due to issues with his health. This was confirmed in writing to the claimant by Mr Spreadbury in his letter of 26 June 2017.

9.4 In 2009 the claimant was suspended from work (along with other members of staff) in connection with an allegation of inappropriately handling a child. In February 2013 the claimant's eldest child (aged 6) was diagnosed with a Wilms' tumour and had to undergo a gruelling and prolonged regime of treatment. Thus began an extremely distressing and stressful time for the claimant and his family. He underwent a relapse in June 2014.Although his treatment finished in July 2015 the child continued to have regular appointments and scans.

9.5 We carefully considered the credibility of the claimant and Mr Spreadbury. We had concerns about the credibility of Mr Spreadbury's evidence. So much of it was not contained in his witness statement at all .The identity of the real decision makers and how decisions were taken only emerged in a piecemeal fashion during oral evidence under cross examination and in reply to questions asked by the tribunal .No satisfactory explanation was given for this. Nonetheless we are satisfied having considered all of the evidence before us that the calm and measured account of events which he gave was a truthful one. As far as the claimant is concerned we do not doubt the genuineness of his belief in the evidence he put before us but in a number of respects we found him to be vague and inconsistent and in the event of a conflict between his evidence and that of Mr Spreadbury we have preferred the latter.

9.6 The claimant was absent from work on sick leave occasioned by his disabled son's illness from 25 February 2013 to 21 June 2013. From 25 February 2013 until to 28 April 2017 he was absent from work during the whole or part of approximately 187 days occasioned by either his disabled son's illness or (from time to time) in relation to his other child. All such absence was with full pay. The claimant's requests for absence were dealt with on an ad hoc basis often by telephone in discussion and agreement with Mr Spreadbury. No proof of appointments was called for. Approved absence included a period of 7 days from 30 November to 8 December 2015 so that the claimant's family could go on a holiday in Florida provided by a charity.

9.7 The claimant has alleged that the School (in the person of Mr Spreadbury) was not happy with the fact he needed to take time off to take his disabled son for appointments. His evidence was that in June 2014 when the child suffered a relapse which required admission for chemotherapy three days every three weeks he contacted Mr Spreadbury about needing time off to care for his son and Mr Spreadbury suggested he did not take time off and they would see how it went as the claimant's wife was there for him. This had made him feel unsupported. However he was unable to explain in reply to questions from the tribunal what Mr Spreadbury had said or done which made him feel unsupported and he was given leave for three days on 25 26 and 27 June 2014 (when his disabled son had chemotherapy) . In 2015 the School

became one of 6 schools comprised within the respondent .It was the claimant's evidence that thereafter he was made to feel uncomfortable by Mr Spreadbury because of the disruption for his disabled son's appointments. However he was unable to explain in reply to questions from the tribunal what Mr Spreadbury had said or done which had made him feel uncomfortable. The claimant's evidence was that on two specific occasions (14 October 2014 and 28 January 2015) Mr Spreadbury refused his request for time off to attend appointments. On the latter occasion the claimant's evidence was that Mr Spreadbury asked if it (the appointment) needed both the claimant and his wife. That was the last time he felt there was a lack of support. He accepted under cross examination that Mr Spreadbury had been supportive *'at times'*.

9.8 Mr Spreadbury's evidence was that the School was happy to allow the claimant time off due to his son's disability. He had granted every request which the claimant made. He said he and the claimant had a good working relationship and he had enquired regularly about his wellbeing. The claimant had shared with him things he wanted to be kept private. In giving his oral evidence he was visibly moved by his recollection of the claimant's plight. We found that evidence powerfully persuasive.

9.9 The claimant did not take time off work on 14 October 2014 and 28 January 2015 but made no complaint about any refusal to permit him to do so.

9.10 We find on the balance of probabilities that the claimant made no requests for time off on the above dates .Mr Spreadbury adopted a sympathetic pragmatic and flexible approach throughout to the claimant's absences from work occasioned by his son's disability and granted those requests which were made. In our judgment even if we had found Mr Spreadbury had enquired on occasion whether the attendance of both parents was required in discussion about a request for absence that would not (without more) indicate any lack of support or hostility.

9.11 In November 2013 the claimant (who had returned to work full-time) was suspended on 13 November 2013 due to an allegation of inappropriately handling a child. He received a final written warning.

9.12 On 28 June 2017 the claimant was asked to work and worked for 2 ½ hours to make up for time off for an appointment for his other child.

9.13 On 10 July 2017 there was to be a sports day at the School. It was cancelled because of rain.

9.14 On 11 and 12 July 2017 the claimant was absent from work. He informed the respondent that he was sick on the morning of each day. He returned to work on 13 July 2017.

9.15 On 14 July 2017 a member of staff ('the staff member') told Mr Spreadbury that the claimant had previously told her he would be taking those days off to decorate his hall stairs and landing. This raised concerns about the genuineness of the reason for the claimant's absence. Mr Spreadbury contacted the chair of the governors of the School who decided after consultation with Mr. Spreadbury that a disciplinary investigation be commenced. Mr. Spreadbury did not know the basis on which the chair of

governors decision was made. Mr Spreadbury asked the staff member to put the matter in writing and asked 3 other staff members (including Jayne Rockey the assistant head teacher of the school) to make statements.

9.16 On 19 July 2017 the claimant attended a return to work interview with Mr Spreadbury and the form which was completed states that the reason given for absence was "sickness". We accept Mr. Spreadbury's evidence that at that point he did not know whether this would or would not be part of the investigation which could go 'either way'.

9.17 The claimant continued to work until the end of the summer term on 21 July 2017. He was not told of the allegation against him nor was he suspended. Mr Spreadbury decided having taken advice that rather than attempt to progress the disciplinary procedure during the summer holidays it was in the claimant's best interests to address it with him in September. His view was this was preferable to the stress which would be caused to the claimant by having it hanging over him during the summer holiday and because there was no safe guarding issue the question of suspension could wait until September. In the meantime however on 1 August 2017 Insight HR was commissioned to investigate the matter.

9.18 Term began on 4 September 2017 and the claimant attended the School. Mr Spreadbury suspended him .It was his decision and within his power as head of School and he did so because Mr Spreadbury felt a fair investigation might be compromised if it took place while the claimant was in school and he did not want the service to the pupils to be disrupted in anyway.

9.19 By a letter of 4 September 2017 the claimant was informed the allegations against him were that he had falsified the reason for his sickness absence on 11 and 12 July 2017 and continued this in his return to work interview. He was told that "*in the light of the circumstances and seriousness of the allegations*" which were considered potentially to amount to gross misconduct he had to be suspended with immediate effect. He was told that an independent HR consultant had been commissioned to investigate the matter. The claimant accepted under cross examination that to lie about the reason for absence and claim that you were sick would justify dismissal for gross misconduct.

9.20 By letter dated 4 September 2017 the claimant was invited to attend a disciplinary interview on 8 September 2017 with Juliet Shaw of Insight HR. On 6 September 2017 the claimant obtained a letter from his GP which confirmed the diagnosis of gout .It was said that allopurinol '*can sometimes have the side-effect of abdominal pain and diarrhoea and also nausea*. The GP said he believed the claimant had had a few days off with symptoms which could be attributable to his medication. He had also obtained a statement dated 6 September 2017 from a neighbour which said he had seen the claimant on 11 July 2017 and he had looked ill and had told him he had sickness and diarrhea.

9.21 Ms Shaw prepared an investigatory report which included the statements from members of staff. The staff member described a conversation she said she had with the claimant on 29 June 2017 in which he told her he was going to have three days off after the sports day on 10 July 2017 to redecorate his

hall stairs and landing. She had ensured these dates were marked in Ms Rockey's diary though she had not explained why to Ms Rockey .She was then herself unwell and returned to work on 14 July 2017 when the claimant had asked her if she was feeling better and when she said yes he said that he was too because he had got his decorating done. She then passed on this information to Ms Rockey. That statement was corroborated by that of Ms Rockey. Ms Rockey also said in her statement that the claimant had told staff members that the proposed colour scheme for his hall stairs and landing was orange.

9.22 In the typed (non -verbatim) notes of the interview Ms Shaw conducted with the claimant on 8 September 2017 (which after amending in manuscript the claimant signed and dated on 17 September 2017) he told Ms Shaw that he had been absent from work on 11 and 12 July 2017 with a reaction to an increase in his medication causing the same symptoms as a stomach bug. He was asked whether he had told anyone that after the sports day on 10 July 2017 he would take 11 and 12 July off to decorate his hallway. He said that he was having a laugh and that *"I could have said something, decorating, I could have but this was July 11th and 12 th. I can understand that you are saying to me that if Im saying I'm doing whatever someone is shit stirring, but I would rather tell them that than that I have an illness. I won't tell them the truth .I can't remember, perhaps I did, doing my bathroom or something*.' The claimant sought to resile from the contents of that part of the note under cross-examination but his evidence was tentative and lacked any conviction; we reject it.

9.23 It was put to him by Ms Shaw that when he returned to work he had been asked if he had done his decorating and the note records he had replied yes thanks in a sarcastic dismissive way and that it had been a joke. He confirmed his explanation for saying he was off decorating was to avoid having to explain his illness. He gave Ms Shaw the letter from his GP and from his neighbour. The claimant contends in his witness statement that he offered her the opportunity to attend his home to prove no room was orange and no room had been decorated and she refused to do so. The undisputed section of the notes record the claimant asked Ms Shaw if she had any proof he had been decorating. She said she did not and he said he was not a decorator and she could come to his house and see his decorating. At this point the claimant was becoming irate; the note records Ms Shaw asked him to calm down and said she was only doing her job. We find on the balance of probabilities that the claimant did not make an offer which Ms Shaw refused as alleged; he made an angry retort.

9.24 Ms. Shaw said (among other matters) in her findings that the claimant had said he did not spend '*the days decorating his hall way .There is no evidence to support or challenge this statement*.' She concluded that "*On the balance of probabilities, based completely on the conversation held on 29th of June, it is concluded that this absence was planned and therefore it is concluded that the reason for the absence was falsified at the stage of reporting and the return to work meeting*." She went on to say however that "*it is evident that Jason has a chronic illness and this is not disputed*."

9.25 The chair of governors of the School saw the investigation report and took the decision to ask the claimant to attend a disciplinary meeting .By a letter dated 21 September 2017 the claimant was invited to attend such a

meeting on 9 October 2017. He was told that the hearing was to consider the allegation that "*on the 11th and 12th of July you falsified the reason for your sickness absence and continued this falsification in your return to work interview of 19 July*." He was told that the allegations if proven would amount to gross misconduct and could result in his dismissal. A copy of the disciplinary procedure was enclosed together with a copy of Ms Shaw's investigatory report and statements. He was also asked to contact Mr Spreadbury by Monday, 25 September 2017 to propose an alternative date and time for the disciplinary hearing if he or his representative were unable to attend on the date confirmed.

9.26 The claimant rang Mr Spreadbury on Saturday 23 September 2017. This type of contact was not unusual; in the past they had often communicated by phone. In his witness statement the claimant said he had been upset he had only been given a day to confirm his attendance and the purpose of his call was to voice his concerns about the contents of the investigation report. However, if that was the purpose of the call, on his own account of the conversation he raised no such concerns with Mr Spreadbury. His evidence was that he expressed distress to Mr Spreadbury during the call and felt backed into a corner. However his oral evidence was that Mr Spreadbury was not angry or upset and he was not pressurised at all by him during that conversation. Under cross-examination he said that Mr Spreadbury told him that his resignation had to be on his desk by Monday morning but this important detail was not in his witness statement or claim form.

9.27 The claimant's witness statement (which stated Mr Spreadbury had suggested he resign) was inconsistent with the claim form in which he said Mr Spreadbury had advised him to resign and under cross examination he was not able to recall which was correct. We found the claimant's lack of detail and consistency about what he said to Mr Spreadbury made his account of their conversation less credible.

9.28 Mr Spreadbury's account of the conversation in his witness statement was that the claimant rang Mr Spreadbury and asked him if he would stop the disciplinary process if he resigned .The claimant had been calm throughout what was a short phone call; the claimant had not shouted or got emotional or upset. It was common ground that Mr Spreadbury said he would have to speak to the governors and if he wanted to resign he would have to do so in writing. We found Mr Spreadbury's account convincing and prefer it. It is consistent with the tone of the claimant's resignation letter in which the claimant said he did not '*want this hanging on'* (see paragraph 9.29 below*)* and the contents of Mr Spreadbury's reply to that letter (see paragraph 9.32 below*).*

9.29 Immediately after that conversation the claimant took the decision to resign in what he described in his witness statement as the '*heat of the moment*'. He put the phone down prepared his letter of resignation in draft first and then typed it up. On 24 September 2017 he took photographs of his hall way and stairs as potential evidence for the forthcoming hearing. The claimant's father in law also works at the School and he gave the typed letter of resignation to him to hand in.

9.30 On Monday 25 September 2017 the claimant's father-in-law hand-delivered the claimant's letter of resignation dated 23 September 2017 which read as follows:
"Having received my invitation to a disciplinary hearing on Monday 23rd September and being required to respond by Monday 25th September is too short notice for me and my union rep to confirm attendance. However, I don't want this hanging on so. I relate to our telephone conversation on Saturday 23rd of September 2017. I hereby resign from my post of teaching assistant 23/9/2017 and give 4 weeks notice terminating my employment on 20 October 2017.
I live with massive pride of what I have achieved, leading the school in PE, an outstanding ofsted and many sporting successes and achievements. Also my positive impact on the Pupil's (sic) lives for 18 years, as it's about them and they are all I go to work for. This is not an admission of guilt.
After 3 suspensions I feel saddened and emotionally unstable and damaged to carry on with my Teaching Assistant role."

9.31 On receipt Mr Spreadbury telephoned the chair of governors who asked if the process could be stopped if the claimant resigned. As Mr Spreadbury told us resignations do not have the effect of stopping disciplinary processes if safeguarding issues are concerned. Mr Spreadbury confirmed that it could because no safeguarding issues were involved.

9.32 On 25 and 26 September 2017 the claimant tried unsuccessfully to contact his trade union representative. On 27 September 2017 Mr Spreadbury wrote to the claimant acknowledging receipt of his letter of 25 September 2017. He said that given the claimant's resignation and "*as per our recent discussion*" he could confirm that after speaking to governors the disciplinary hearing had been cancelled "*at your request*". He confirmed that the claimant's last date of employment would be 20 October 2017and that he was not required to work in the interim.

9.33 The claimant had sought and obtained legal advice on 27 September 2017 as a result of which on 28 September 2017 at 18. 03 he attempted to send Mr Spreadbury an email in which he said he wished to retract his resignation. He said he had made "*an (sic) knee-jerk reaction in an emotional state*" and wanted to challenge the allegations against him. He would be attending the disciplinary meeting on 9 October 2017.That email bounced back because he had used the wrong email address and he sent it to the correct address on 29 September 2017 at 1.52 .

9.34 By a letter dated 29 September 2017 Mr Spreadbury replied to that email. He reminded him that he had given the respondent written notice of resignation on the 23 September 2017 which was accepted by letter dated 27 September 2017 and told him that he did not accept the retraction of the claimant's notice to resign and 20 October 2017 would therefore be his last day of employment. It was the claimant's evidence that he received Mr Spreadbury's letters of 27 and 29 September 2017 on 30 September 2017 but we did not find that evidence credible.

10 Employment tribunals take the statutory ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code") into account when considering relevant cases. The Code is complemented by the Discipline and

Grievances at Work -The ACAS Guide ("the Guide") which (unlike the Code) has no statutory force but provides detailed guidance on its application.

11 As far as investigation is concerned paragraph 5 of the Code states "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing." Paragraph 8 says "in cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that the suspension is not considered a disciplinary action*."

12 Paragraph 4.12 of the Guide says "*When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against*." It goes on to say "*There may be instances where suspension with pay is necessary while investigations are carried out for example where relationships are broken down, in gross misconduct cases or where there are risks to an employee's or the company's property or responsibility to other parties. Exceptionally you may wish to consider suspension with pay when you have reasonable grounds for concern that evidence has been tampered with, destroyed or witnesses pressurised before the meeting*." The Guide also says in relation to the use of external consultants "*In some instances employers may wish to bring in external consultants to carry out an investigation. Employers will still be responsible for any inappropriate or discriminatory behaviour if the investigation is carried out by consultants. Make arrangements for the investigation to be overseen by a representative of management. Make sure that the consultants follow the organisation's disciplinary policies and procedures and deal with the case fairly in accordance with the ACAS Code of Practice*."

13 In order to make a complaint of unfair dismissal an employee must have been dismissed by the employer. The burden of proving dismissal falls on the claimant. Section 95 ERA sets out the circumstances in which an employee is dismissed by the employer .Section 95 (1) (a) ERA provides that an employee is dismissed by his employer if '*the contract under which he is employed is terminated by the employer (whether with or without notice*)'. Section 95 (1)(c) ERA provides that an employee is dismissed by his employer if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". The latter is a constructive dismissal.

14 Mr Roberts initially told us he was not going to refer us to any authorities during his oral submission. However having reflected it emerged that he wished to rely on 3 authorities in relation to constructive dismissal (provided copies of which he then provided to the claimant for his assistance).None of them related to the claimant's other claim of disability discrimination.

15 The first authority was the leading case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221,** in which it was held that in order to claim

constructive dismissal, the employee must establish (1) that there was a fundamental breach of contract on the part of the employer (2) that the employer's breach caused the employee to resign (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

16 The second was **Sothern v Frank Charlesley and Co [1981] IRLR 278**. In that case the claimant said at a meeting "I am resigning." It was held that when the words used by a person are unambiguous words of resignation and so understood by the employer, in the normal case the employer is entitled to accept the resignation. The question of what a reasonable employer might have understood does not arise. The natural meaning of the words and the fact that the employer understood them to mean that the employee was resigning cannot be overridden by appeals to what a reasonable employer might have assumed. The non-disclosed intention of the person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is.

17 This case was followed in **Sovereign House Security Services Ltd v Savage [1989] IRLR 115 CA** when it was held that where unambiguous words of resignation are used by an employee to an employer and so understood by the employer, generally the proper conclusion of fact is that the employee has resigned. In some cases, however, there may be something in the context of the exchange between the employer and employee, or in the circumstances of the employee himself, to entitle the tribunal of fact to conclude that there was no real resignation despite what it might appear to be at first sight. For example, if the case concerned decisions taken in the heat of the moment or involving an immature employee, then what otherwise might appear to be a clear resignation should not be so construed.

18 The third case (which Mr Roberts submitted was of particular illustrative value) was that of **Ali v Birmingham City Council [2008] UKEAT /0313/08.** In that case an employee handed in a letter of resignation to the respondent and was given a period of about 30 minutes to reconsider his decision. He confirmed that he wished to resign but later sought to change his mind and claimed he had been unfairly dismissed. He appealed against the tribunal's finding that he had resigned and that there for no claim could be brought for unfair dismissal contending there were special circumstances which existed which showed that he had not validly resigned and that he could bring himself within one of the exceptions to the general rule in **Sothern** as he resigned in the heat of the moment. **Ali** made it clear that it will only be in highly exceptional circumstances that tribunals will be justified in applying the exception to the rule rather than the rule itself.

19 In the case of **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT** it was held that: "It is clearly established that there is implied in a contract of employment that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such

that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

20 It is irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it. It is the impact of the employer's behaviour on the employee that is significant - not the intention of the employer (**Malik**). The impact on the employee must be assessed objectively. In **Niblett v Nationwide Building Society UKEAT/0524/08** His Honour Judge Richardson said, in the context of an employer's conduct of a grievance procedure and whether the implied term of trust and confidence had thereby been broken, that "the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It has never been the law that an employer could summarily terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence, the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

21 The repudiatory breach does not need to be the sole, nor the principle cause but it must have been the "effective" cause; the tipping point for the resignation (**Jones v FR Sirl & Sons (Furnishers) 1997 EAT)**.

22 Under section 13 EqA:
'(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'
Disability is a protected characteristic (section 4 EqA).

23 The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Employment Code').Tribunals and courts must take into account any part of the Code. In Chapter 3 of the Employment Code (Direct Discrimination) paragraph 3.11 states *"'Because of' a protected characteristic has the same meaning as the phrase "on grounds of" (a protected characteristic) in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause*." Under the heading "*Discrimination by association*" paragraph 3.18 states "*It is direct discrimination if an employer treats are work less favourably because of the worker's association with another person who has a protected characteristic*;". Paragraph 3.19 states "*Discrimination by association can occur in various ways-for example, where the worker has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.*
Example: *A lone father caring for a disabled son has to take time off work whenever his son is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for his son and eventually dismisses*

him. The dismissal may amount to direct disability discrimination against the worker by association with his son."

24 Under section 136 EqA (Burden of proof)
("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."

25 If a claimant alleges that that they have experienced an unlawful act they must prove facts from which an Employment tribunal could decide or draw an inference that such an act has occurred.

26 The courts in approaching discrimination claims have taken account of the fact that it is difficult for a Claimant to establish discrimination. It is accepted that primary evidence that directly indicates discrimination may often not be available and that it is usually necessary for the Tribunal to draw appropriate inferences from the primary findings of fact they make.

27 Section 136 EqA reverses the burden of proof if there is a prima facie case of discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses1 but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. The two-stage test reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

28 Section 23 (1) EqA states that "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

29 Under section 4 (1) ERA if there is a material change in any of the matters particulars of which are required to be included in the written particulars of employment to be given to an employee under section1 (1) ERA (which include hours worked and job title) a statement of change has to be given to the employee at the earliest opportunity and in any event no later than one month after the change in question.

30 Under section 38 Employment Act 2002 if an employment tribunal finds in favour of an employee in relation to claims set out in schedule 5 (which include unfair dismissal) and no award is made a tribunal must make an award of two

[1] Barton v Investec [2003] IRIR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

weeks' pay and may if it thinks it just and equitable in all the circumstances make an award of 4 weeks' pay if at the time the proceedings began the employer was in breach of section 1 (1) or Section 4 (1) ERA.

31 We have considered the oral submissions of the parties.

32 In our judgment the claimant's employment came to an end as a result of his resignation. The words of resignation used by the claimant in his resignation letter or 23 September 2017 were wholly unambiguous. Indeed they could not have been clearer. Further there was nothing in the context of the exchange between Mr. Spreadbury and the claimant in their telephone conversation on 23 September 2017, or in his circumstances, which would entitle us to conclude that there was no real resignation. Mr Spreadbury put no pressure on him to resign during that telephone conversation; he was not angry or upset ;the claimant was calm and had not shouted or got upset either ;the proposition that he resign came from him ,not Mr Spreadbury; Mr. Spreadbury told him he would have to put his resignation in writing and he did . Mr. Spreadbury imposed no time limit within which to do so. The decision to resign may have been taken immediately afterwards but he had time after that conversation to reflect and change his mind if he so wished. Instead he took steps to implement it by preparing the letter of resignation and giving it to his father in law. No doubt he found it a difficult and painful decision to make and after wards regretted it but the resignation was not done 'in the heat of the moment'. There were no special circumstances and the respondent was entitled to accept his resignation. The respondent's subsequent refusal to allow him to retract the resignation did not amount to an express dismissal.

33 We now turn to whether there was a fundamental breach of the implied duty of mutual trust and confidence by the respondent such that the claimant was entitled to terminate his contract of employment by resigning.

34 The conduct relied on by the claimant was firstly suspending him and starting disciplinary proceedings too long after the event in question. The claimant contends he should have been suspended immediately on 14 July 2017. He made it clear in oral submissions that he felt it was underhand for an investigation to have commenced into an allegation which numerous staff were aware of but without informing him. However he accepted under cross-examination that if he had been suspended immediately and the investigation had been concluded before the end of term and a disciplinary meeting arranged that meeting could not have taken place until after the summer holidays and that it could have been worse to have it hanging over him during the holiday. In his oral submissions he also submitted it was unfair and unreasonable of Mr. Spreadbury to have conducted a return to work interview on 19 July 2017 when he knew of the allegation against him and the claimant did not. Notwithstanding his contention he should have been suspended immediately he also contended in his oral submissions that the reasons the respondent gave in its letter of 4 September 2017 were not valid.

35 In our judgment the respondent had reasonable and proper cause for delaying the claimant's suspension and the initiation of disciplinary proceedings after the allegation came to light for the reasons set out in paragraph 9.17 above. There was no immediate need to suspend the claimant in the absence of a safeguarding issue .Mr Spreadbury took some witness statements prior to the end of term and commissioned an independent investigation but there was no

evidence before us upon which we could conclude the 6 week delay in suspension and commencing the proceedings was so long as to be unreasonable. There is no evidence that it affected the claimant in preparing for his investigatory interview or the cogency of evidence. The approach the respondent took ensured the suspension was not unnecessarily protracted over the summer holidays in line with paragraph 8 of the Code. As far as the suspension itself is concerned in our judgment the respondent had reasonable and proper cause to decide to suspend him. The allegation against the claimant was falsification of the reason for his absence which the respondent considered gross misconduct. The claimant accepted this classification. It was not unreasonable of Mr Spreadbury to decide the suspension was necessary having regard to the nature of the offence and his wish to minimise disruption to the pupils and ensure the fairness of the investigation.

36 The claimant also contends that in commencing the disciplinary proceedings and /or conducting them unreasonably the respondent subjected the claimant to direct discrimination on account of disability by association and that was conduct on which he relies in breaching the implied term of trust and confidence. As far as the unreasonable conduct of the proceedings is concerned we have already addressed the question of delay and suspension in paragraph 35 above and found there was no breach. However the claimant also complained in his claim form that the investigation was unfair because independent medical evidence had been ignored and in his witness statement that Ms Shaw did not look for any evidence to support his case. The allegation that his medical evidence was ignored in the investigation is plainly wrong; the investigation report contains and refers to the evidence the claimant obtained from his GP (and for that matter his neighbour). The allegation in relation to the failure of Ms Shaw to look for any evidence to support his case in fact comes down to her alleged failure to take up his invitation. We have made our findings about this under paragraph 9.23 above. Ms Shaw made no findings about whether he had or had not decorated his hallway; she merely records there was no evidence either way to support his denial that he had done so. We do not find the investigation was unfair as alleged. He also complained that it was unreasonable for him to have been given only one day to respond to the letter of 21 September 2017. However all he had to do by that date was propose an alternative date and time for the disciplinary hearing if he or his representative were unable to attend on 9 October 2017.In our judgment the timeframe provided for a response did not amount to a breach of the implied duty of trust and confidence. For the avoidance of doubt we also conclude that the respondent had reasonable and proper cause to conduct a return to work interview after a period of absence attributed to sickness; Mr. Spreadbury knew of the allegation made but did not know how the investigation would go . In our judgment the respondent did not conduct the disciplinary proceedings unreasonably.

37 As far as the allegation that the respondent failed to give the claimant appropriate time and consideration to take advice and deal with the allegations is concerned the claimant was aware of the allegations from 4 September 3017. He has not alleged that he was not in a position to prepare for the investigation interview with Ms Shaw on 8 September 2018 when he gave his version of events. He received the investigatory report under cover of the respondent's letter of 21 September 2017 but the disciplinary hearing would not have taken place until 9 October 2017.He was given more than ample time to take advice and deal with the allegations. As far as advising the claimant to resign with a short deadline to do so is concerned at a time it knew he was upset and

emotionally frail, we have found no such advice was given and Mr Spreadbury did not know that the claimant was upset and emotionally frail as alleged since on 23 September 2017 he gave no indication to him that that was his state of mind.

38 As far as the remaining allegations which are said to amount to direct discrimination are concerned (the commencement of the disciplinary proceedings and unreasonable refusal to allow the claimant to retract his resignation) we have applied the statutory burden of proof .The first question we considered was whether the claimant had proved facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had acted as alleged above because of his son's disability. In the claim form the claimant alleged Mr Spreadbury had been unsupportive and had put high levels of pressure on him to attend and force him to make his hours up when he had to attend appointments for his disabled son (in particular in June 2017 when he was told out of the blue to make up his hours which he did) ;and that the respondent had been looking to get rid of him because the respondent was a business and they were not happy with the fact he needed time off for appointments with his son. Had they been proven these matters could have amounted to facts from which we could have concluded or inferred that the respondent acted as alleged above but he has failed to do so (see our findings paragraphs 9.6 to 9.10 and 9.12 above). In our view therefore the answer to the question posed above is no. The burden of proof did not shift to the respondent. The complaint of direct discrimination under section 13 Equality Act 2010 fails and is dismissed.

39 Although the commencement of the proceedings was not an act of direct discrimination, was this nonetheless conduct which amounted or contributed to a breach of the implied duty of trust and confidence? In our judgement the respondent had reasonable and proper cause to commence proceedings. The member of staff had made a serious allegation of gross misconduct against the claimant .That and the statements Mr Spreadbury obtained merited initiation of the disciplinary investigation. The comments the claimant made at the investigation interview with Ms Shaw on 8 September 2017 (paragraph 9.22 above) and the staff member's account of the conversation with the claimant on 29 June 2017 (well before and consistent with the later absences on 11 and 12 July 2017) amply warrant the decision to ask the claimant to attend a disciplinary hearing to answer the allegations set out in the letter of 21 September 2017.

40 In our judgment there was therefore no conduct of the respondent which individually or collectively amounted to a fundamental breach of the implied duty of trust and confidence.

40 Further we find that the claimant did not resign in response to the respondent's conduct as alleged .In our judgment he resigned because as he said in his resignation letter he did not want the disciplinary proceedings to be 'hanging on' – in other words prolonged. He wanted them brought to an end against a background of three suspensions (two of which he does not dispute were justified) which had taken their toll on him emotionally. The claimant's complaint of unfair dismissal therefore also fails and is dismissed.

41 It follows that since all the claimant's claims are dismissed we do not need to consider an award under section 38 Employment Act 2002.

Employment Judge Woffenden
6 September 2018