EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Martin James Scott	**AND**	**Kenton Schools Academy Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **North Shields** **On:** **21, 22, 23, 24 and 25 May 2018**
Deliberations: 6 August 2018

Before: **Employment Judge Shepherd**

Members: Ms L Jackson
Mr J Adams

Appearances

For the Claimant: **Mr R Gibson**
For the Respondent: **Mr P Sangha**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of disability discrimination are not well-founded and are dismissed.
2. The claims of unfair dismissal are not well founded and are dismissed.

REASONS

1. Regrettably, it has not been possible, for a variety of reasons, for the Tribunal to reconvene until 6 August 2018. This has meant that this judgment and reasons has taken substantially longer than usual to be completed and sent to the parties.

2. The claimant was represented by Mr Gibson and the respondent was represented by Mr Sangha.

3. The Tribunal heard evidence from:

Martin Scott, the claimant;
Richard Devlin, Senior Vice Principal;
Andrew Clark, Vice Principal;
Cynthia Korovessis, Second in MFL Department;
Anna Coey (now Thomson) Senior Support Assistant Higher Level;
Claire Smith, Head of MFL;
Sarah Holmes-Carne, Principal;
Shirley Davison, Governor;
Joanne Jackowiak, Human Resources Manager.

4. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 677. The Tribunal considered the documents to which it was referred by the parties.

5. The claims brought by the claimant were claims for disability discrimination by failing to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010, discrimination arising from disability pursuant to section 15. A claim of automatic unfair dismissal pursuant to section 103 A of the Employment Rights Act 1996 and, in the alternative, a claim of unfair dismissal pursuant to section 98.

6. The issues that the Tribunal had to determine had been identified in a Preliminary Hearing before Employment Judge Buchanan on 31 January 2018 and were as follows:

The issues were identified as:

Disability

1. Did the claimant suffer from the mental impairment of mixed anxiety and depression at the material time?

2. If so, did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities at the material time?

3. If so, was that effect long term? In particular when did it start and had the impairment lasted for at least 12 months or was it likely to last at least 12 months or for the rest of the claimant's life, if less than 12 months?

4. Were any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

5. It was noted and recorded that the material time for the disability claim was from December 2016 until October 2017. This issue was discussed at the

commencement of the hearing and it was agreed that the material time in question was in two parts, June 2016 and then December 2016 onwards.

Failure to make reasonable adjustments

6. Did the respondent apply a PCP to the claimant of its Disciplinary Procedure and teaching standards in respect of conduct as detailed in its Teaching Code?

7. If so, did that PCP of the respondent put the claimant at a substantial disadvantage in relation to his employment in comparison with persons who were not disabled?

8. If so, what steps would it have been reasonable for the respondent to have taken to avoid those disadvantages? It was noted and recorded that the claimant contended that a reasonable adjustment would have been to support the claimant from December 2016 onwards by closer monitoring of his performance in the school environment and to have referred him to Occupational Health. In addition, a reasonable adjustment would have been a lesser sanction in July 2017 rather than the sanction of dismissal.

9. Did the respondent fail to take those steps?

10. Did the respondent know that the claimant was a disabled person at the material time and likely to be placed at the disadvantage? If not, should the respondent reasonably have been expected to know those matters?

Discrimination arising from disability

11. Did the respondent dismiss the claimant and did that amount to unfavourable treatment of the claimant?

12. If so, was that unfavourable treatment because of something which arose in consequence of the claimant's disability?

13. Was that "something" the impairment in the claimant's decision-making ability and his judgement?

14. If so, was the dismissal because of that impairment?

15. Did the respondent know that the claimant was a disabled person at the time of the dismissal? If not, should the respondent reasonably have been expected to know that the claimant had the disability?

16. Was the dismissal a proportionate means of achieving the aim of upholding teaching standards in the Academy? Was that aim a legitimate aim?

Automatic Unfair dismissal

17. Did the claimant disclose information to the respondent in his statement submitted on 8 May 2017 to the chair of the governors and in his interview with David Pearmain on 23 May 2017 and in his interview with Andy Clarke on 24 May 2017?

18. In any or all of those was information disclosed which in the claimant's reasonable belief tended to show that the respondent had failed to comply with a legal obligation to which it was subject, namely that of upholding acceptable teaching standards as set out in the Teaching Code?

19. If so, did the claimant reasonably believe that the disclosure was made in the public interest?

20. If so, was the disclosure made to the claimant's employer namely the chairman of the governors and/or the chief executive officer and/or the vice principal?

21. Was any disclosure made in good faith? It is noted and recorded that this matter is matter relevant only to remedy.

22. Was the making of any proven protected disclosure the principal reason for the dismissal?

23. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

24. If so, has the respondent proved its reason for dismissal namely as being related to the conduct of the claimant, or for some other substantial reason?

25. If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal? Was the dismissal of the claimant automatically unfair?

Ordinary Unfair Dismissal

26. Does the respondent prove that the claimant was dismissed for a potentially fair reason namely a reason related to the conduct of the claimant or some other substantial reason?

27. If so, did the respondent carry out as much investigation into that matter as was reasonable? Did the respondent interview relevant members of its staff?

28. Did the respondent follow a reasonable procedure? Was the failure of the respondent to call witnesses at the disciplinary hearing unreasonable? Should the claimant have been allowed to question witnesses?

29. Was the penalty of dismissal within the band of a reasonable responses? Should the claimant have been allowed credit for having admitted his wrongdoing?

30. If the dismissal is unfair, did the claimant contribute to that dismissal by culpable blameworthy conduct?

31. If the dismissal was procedurally unfair, would the claimant have been dismissed in any event?

32. Has the claimant taken all reasonable steps to mitigate his loss?

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

7.1. The claimant was employed by the respondent from 1 September 2009. He was employed as Head of Modern Foreign Languages at Kenton School.

7.2. In or around October 2013 concerns were raised with the claimant by Richard Devlin, Senior Vice Principal, in respect of the claimant's performance. Objectives were agreed to improve the claimant's performance during his appraisal. In September 2014, the claimant was placed on a support plan to address concerns regarding his leadership. This was an informal process and an action plan was set with objectives set and regular monitoring.

7.3. On 15 May 2015 the claimant sent an email to Sarah Holmes-Carne, the school's Principal indicating that he had decided that it would be better if he were to cease his role as Head of Department. The claimant had accepted that he had requested to stand down but said that it was at Richard Devlin's prompting.

7.4. After he stepped down as Head of Department, the claimant was provided with extra teaching hours at the respondent's second school, Studio West. Another teacher whose identity it is appropriate to anonymize (CL) was appointed as acting Head of Spanish.

7.5. In October 2015 concerns were noted with regard to the claimant's marking of books. They had not been marked for some time. He was placed on a further support plan to improve his marking. This support plan was extended to cover controlled assessments in December 2015.

7.6. On 28 January 2016 the claimant had a meeting with Richard Devlin the claimant was told that capability procedures may be invoked if improvement did not occur.

7.7 On 12 May 2016 a meeting took place between the claimant, Richard Devlin and Joanne Jackowiak, HR manager. The claimant was accompanied by his

Trade Union representative. The claimant said that the workload at Studio West was having an impact on his performance and his workload was becoming unmanageable. It was agreed that the claimant would withdraw from his work at Studio West and from study room duties. The claimant's salary was protected as a temporary adjustment. The respondent also offered to remove the claimant from taking a form class for the rest of the year, and for the claimant to be removed from an upcoming Barcelona trip with students, but the claimant did not wish to do this. The appraisal review action plan was extended for four weeks. The claimant had met with Joanne Jackowiack shortly before this meeting on an informal basis and he had informed her of his very difficult marriage breakup and financial difficulties.

7.8. On 25 May 2016 Richard Devlin sent an email to the claimant following a classroom observation. It was indicated that the teaching was good and progress was too. It was stated that Richard Devlin was pleased that the claimant "pulling back from commitments at Studio West is already reaping benefits."

7.9. Joanne Jackowiak referred the claimant to Newcastle City Council's Occupational Health Department and a report was provided. In this report it was stated that:

> "Mr Scott reports work-related and personal stressors leading to his anxiety at the moment. He indicates he is finding the appraisal process stressful and this appears to be having an effect on his mental and physical health. Assessment of his mood today shows that he is experiencing moderate symptoms of depression and severe symptoms of anxiety. He is taking appropriate medication. We have discussed counselling support Mr Scott feels this would be helpful. I will refer him to our services today"

7.10. Occupational Health referred the claimant to the counselling service to discuss further issues in relation to the claimant's marriage having ended, financial difficulties and that he had been taking Citalopram since April 2015 and had input from the acute mental health team the previous summer. The respondent did not have sight of this referral.

7.11. Further review meetings took place between May 2016 and the end of the school year in July 2016. The claimant showed signs of improvement and management of the concerns was transferred to Claire Smith, the new head of MFL on 22 July 2016. The claimant said that the action plan disappeared as did the threat of formal capability proceedings.

7.12 The claimant said that on Saturday, 25 June 2016 CL informed the claimant that she would be working with his students in her classroom. Only one pupil arrived and she took that pupil into the classroom. An hour later CL returned to the claimant with that pupils completed work and a series of manuscripts for the other students in her handwriting. She told the claimant to

hand them out to the students and to have the students write it up. These were Spanish GCSE controlled assessments. The claimant said that he did as he was told. He felt overwhelmed and rather battered. He was suffering with depression and severe anxiety. He said that he was under extreme pressure from Richard Devlin to improve and had been told by Richard Devlin to see CL on the issue of controlled assessments and that she had then told the claimant what he was to do. He accepted that what he did was wrong but said that he felt unable to object. He said that he accepted that he had "crossed a moral line"

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7.13. In November 2016 during a "walk through" of the Modern Foreign Languages (MFL) Department by Claire Smith, Head of MFL and Richard Devlin, it was noticed that some students were working on their controlled assessments and it appeared that they were copying verbatim handwritten notes.

7.14. CL was suspended following which she resigned and was not seen at the school again. The claimant went to see Claire Smith and provided her with a file which included information in respect of the controlled assessments for pupils which had been swapped from the claimant to CL. The claimant said that he told Claire Smith exactly what had happened and that what was missing from the file was the controlled assessments which the pupils had copied out from CL's handwritten manuscripts.

7.15. Claire Smith said that the claimant came to see her and provided a folder of controlled assessments that CL was to improve. These were for students in his class as the claimant and CL had swapped a year 11 class at the start of the year. Claire Smith said that the claimant was shaking and made a point of telling her that he was. He told her that there were bits of controlled assessments for his class that CL had been given to improve. Claire Smith said that the claimant was shaking and made a comment about hardly sleeping and being given his marching orders. However, she said that she had no reason to think that the claimant was involved in any way and she thought he was concerned that he should have given her the file earlier. She did not discuss it any further with the claimant as it was not appropriate to discuss another colleague who was under investigation with him.

7.16. On 12 December 2016 the claimant met with Richard Devlin as part of the investigation into C. In that meeting the claimant told Richard Devlin that CL had given him work to give to the students in her writing to ask the students to copy and write in their own handwriting as their controlled assessments. The claimant confirmed that he had done this and that he later marked and inputted the results onto the department tracker where students' progress is logged. Richard Devlin said that it became evident from this discussion that the claimant may have been complicit in malpractice and suspended him pending an investigation.

7.17. On 14 December 2016 Sarah Holmes-Carne wrote to the claimant confirming the decision to place him on paid leave and that Richard Devlin had

been assigned to conduct an investigation. It was also indicated that the claimant was asked not to discuss these concerns with other members of staff or pupils.

7.18. Joanne Jackowiak, Human Resources Manager contacted the claimant's Trade Union representative, John Hall, in order to arrange a time for an investigation meeting. Mr Hall requested, on the claimant's behalf, that the meeting be postponed until after the New Year. The meeting was further postponed at Mr Hall's request as the claimant had an interview for a role at another school on 27 January 2017.

7.19. On 10 February 2017 John Hall contacted Joanne Jackowiak and asked for another postponement and the meeting was rearranged for 9 March 2017.

7.20. On 28 February 2017 John Hall requested a further postponement and also change of investigatory officer due to Richard Devlin's previous involvement as the claimant's line manager, Andrew Clark, Vice Principal was asked to conduct the investigation.

7.21. On 28 February 2017 Andrew Clark wrote to the claimant inviting him to an investigatory meeting on 13 March 2017. In that letter it was stated that the purpose of the meeting was to give the claimant the opportunity to respond fully to the allegations which were set out as:

- "That you have provided help to students in relation to year 11 Spanish controlled assessments by allowing pupils to copy the work produced by another teacher knowing this was not permitted by the exam board.

- That you failed to follow the instructions of the principal when on Monday, 5 September 2017, she instructed all members of staff to ensure that they fully understood the requirements of the course specifications and adhered to them.

- That by your actions you have breached the mutual trust required between employer and employee.

7.22. On 13 March 2017 the claimant attended an investigatory meeting with Andrew Clark and Joanne Jacoviak. The claimant was accompanied by his Trade Union representative, John Hall. During the meeting the claimant confirmed that CL had handed him a file of manuscripts with her notes and said to give them to the pupils to copy and then update the tracker. The claimant confirmed that he knew that what he was doing was wrong and in breach of the specification. He referred to pressures inside and outside of school and said that he felt he could not say no. He felt it was a decision that was being imposed on him but his mistake was not reporting it.

7.23. The claimant said that he handed over a file of manuscripts to Claire Smith when he discovered that CL was not at work. He referred to having suffered

from anxiety long-term with pressures at work and at home. He said that his judgment had gone.

7.24. Andrew Clark carried out further investigations and met with Claire Smith and Richard Devlin.

7.25. On 3 April 2017 Andrew Clark wrote to the claimant indicating that he had now concluded his investigation and considered that there was a case to answer and that a disciplinary hearing would be held and that consideration would be given as to whether the claimant should be dismissed on the grounds of gross misconduct. It was stated that the claimant would remain suspended on full pay. The claimant was reminded that he must not discuss these concerns with other members of staff or pupils at the school, past or present.

7.26. On 5 May 2017 Sarah Holmes-Carne wrote to the claimant confirming that a hearing would take place on 24 May 2017. It was indicated that the claimant had the right to present witnesses and written statements to support his case.

7.27. On Sunday, 7 May 2017 the claimant telephoned two of his colleagues, Cynthia Korovessis and Anna Coey (now Thomson). He informed these colleagues that he would be blowing the whistle on the MFL department and that he would be calling them as witnesses.

7.28. On 8 May 2017 Anna Coey went to see Joanne Jacoviak and informed her that the claimant had telephoned her and Ms Korovessis. She thought that the claimant had been drunk and was accusing her of doing something wrong. Ms Coey also referred to the claimant making comments about his sex life which made her feel uncomfortable. Anna Coey provided a statement in which she said that the claimant had informed her that he was going to say that Richard Devlin had told them all that they had to get the coursework from the pupils whatever it takes and, therefore, Richard was telling the claimant to tell them all to cheat. Cynthia Korovessis also provided an email in which he had informed her that he would be blowing the whistle on the MFL department.

7.29. On 8 May 2017 the claimant presented a ‘statement under the whistleblowing policy’. In that statement he said:

> “Over the last few years I have witnessed many incidents of support offered to students that contravene regulations governing the completion of controlled assessments.”

The claimant referred to students being offered intervention support and opportunities to practice their assessments by a teacher or Intervention Support Assistant in school, collapsed timetables or weekend study days. He referred to students being supported with detailed annotations supplied on their prepared drafts and that these actions had been led by

> "direct instructions from Richard Devlin with arrangements coordinated by Cynthia Korovessis and CL as Head of Department of MFL and Anna Coey as SAHL in MFL managing the intervention on the daily basis."

7.30. On 10 May 2017 Andrew Clark wrote to the claimant indicating that it had been brought to his attention that the claimant contacted two colleagues and made allegations against either them or other colleagues in relation to malpractice. It was indicated that the current disciplinary process had been suspended to investigate further allegations.

7.31. On 23 May 2017 a fact-finding meeting took place with David Pearmain, Chief Executive of the respondent. The claimant referred to support interventions given to students against the regulations. He provided copies of emails and these were considered at the meeting.

7.32. On 24 May 2017 the claimant attended a meeting with Andrew Clark. At that meeting the claimant's representative, John Hall, requested that questions be put in writing. Those questions were provided to Mr Hall on 25 May 2017.

7.33. On 22 June 2017 Sarah Holmes-Carne wrote to the claimant indicating that the investigation was complete and the stage 4 disciplinary hearing would take place on 7 July 2017. It was stated:

> "The allegations under consideration at the hearing are:
>
> - That you have provided help to students in relation to Spanish controlled assessments by allowing pupils to copy the work produced by another teacher knowing this was not permitted by the exam board.
> - That you failed to follow the instructions of the principal when on Monday, 5 September 2016, she instructed all members of staff to ensure that they fully understood the requirements of the core specifications and adhere to them.
> - That you have failed to follow a reasonable management instruction through discussing the disciplinary case against you with colleagues when expressly instructed not to on two occasions (14 December 2016 and 3 April 2017).
> - That during these discussions you made serious allegations against other colleagues either directly or indirectly in contravention of the schools Dignity at Work policy.
> - That you attempted to coerce colleagues into providing false statements/evidence to support your case and therefore influence the outcome of the disciplinary process.
> - That by your actions you have breached the mutual trust required between employer and employee."
>
> The date of the disciplinary hearing was changed to 13 July 2017 following a request from the claimant's Trade Union representative.

7.34. On 30 June 2017 David Pearmain wrote to the claimant in respect of the concerns the claimant had raised under the whistleblowing policy. In that letter was stated:

"In looking through the emails you provided me in-depth and considering discussions with colleagues, there is no evidence to confirm that any help or support was given to students over and above asking questions in English…. As we discussed, many of the emails you shared with us could be interpreted in different ways… I am clear from our discussions and my follow up that there is no evidence of any form of malpractice in relation to controlled assessments."

7.35. On 5 July 2017 the respondent was provided with a copy of a report from Professor Turkington. This had been prepared on the instructions of the claimant's solicitor. The report referred to the claimant's previous psychiatric history. It indicated that the claimant had been diagnosed with anxiety in 2003 and suffered from depression in 2007 following the death of his brother. It stated that the claimant was disabled at the relevant time at which the error was reported to have taken place. It said that the claimant's

> "judgment and decision-making were impaired by his high levels of anxiety and ongoing symptoms of depression at the time of this error."
> "The support or adjustment which might have alleviated his mixed anxiety and depressive disorder would have included an increased dose of an anxiety reducing antidepressant medication… He would have required a full course of structured evidence-based psychotherapy i.e. cognitive behavioural therapy. He would have required 20 sessions and he would have required ongoing support from Occupational Health and monitoring of his performance in the school environment."

7.36. The disciplinary hearing took place on 13 July 2017, it was chaired by Sarah Holmes-Carne, Alan Taylor, senior HR adviser from Newcastle City Council was also present, the claimant attended together with his Trade Union representative, John Hall. Andrew Clark presented the management case and he was accompanied by Joanne Jacoviak. The hearing was adjourned and reconvened on 20 July 2017.

7.37 On 26 July 2017 Sarah Holmes-Carne wrote to the claimant informing him that her decision was that he was dismissed on grounds of gross misconduct. This was a detailed letter and it is appropriate to provide some extracts at this stage:

> "Regarding the six allegations:

a) that you provided help to students in relation to Spanish controlled assessments in June 2016 by allowing pupils to copy the work produced by another teacher knowing this was not permitted by the exam board.

- It was clear that you knew that this was “wrong” and was professional malpractice, not only when you were interviewed about it by Richard Devlin on 12 December 2016, but also more importantly at the time you committed this act about six months earlier i.e. 28 June 2016;
- when interviewed by Richard Devlin on 12 December, 2016 you stated “I felt I was being asked to be complicit, it was done behind closed doors, other discussions were in the workroom” and “I said it to myself, I felt I had to follow instructions but I know I crossed a moral line”. All this indicates that there were a series of judgements and decisions in committing this professional malpractice and it could not be regarded as an “one-off” decision or single isolated error of judgment.
- Not only were you aware that it was wrong but you also said when interviewed by Richard Devlin on 12 December 2016 that you “didn’t whistle blow”. This indicates you were aware at the time that you could have whistle blown (or just report it to Richard Devlin who you were seeing on a weekly basis around that time – as he was supporting you with the support plan that you were on at the time);
- Although you did not whistle blow (or just report it to the attention of school management) around the end of June 2016 when you committed the misconduct you appear to have had no difficulty with whistleblowing later on. When you contacted the two work colleagues… Indicating that you were going to whistle blow in relation to what you perceive was cheating going on in the modern foreign languages department. (This matter was subsequently investigated under the schools whistleblowing policy and no evidence was found to substantiate these allegations.)
- There was no evidence that you were pressurised or bullied into carrying out this professional malpractice by your line manager (CL) at the time…
- It was very clear, being an experienced languages teacher and former head of modern foreign languages department at the school, that you completely understood the exam board regulations for the controlled assessments and how they should be carried out….
- That carrying out this professional malpractice involve a conscious and deliberate series of actions and activities. This included identifying the students and them to copy the prepared work for the controlled assessments produced by

CL and telling them to write it in their own handwriting and also updating the tracker.

- When questioned about this matter by Richard Devlin on 12 December 2016 you were asked whether there are any other staff in the modern languages department who were put in a similar position by CL i.e. to participate in this professional malpractice you responded by saying “I don’t think so”. However, in May 2017 you subsequently indicated that other people in the Department were involved.
- That your conduct fell short of the teachers’ standards and particularly those set out in part two; personal and professional conduct.
- Your explanation for your actions in relation to this allegation is primarily based on your medical circumstances and your disability, and pressure you felt you were under at the time whilst on a support programme to address some concerns about your performance, which I shall address below.

This, the most serious allegation, was substantiated by your own admission

b) Failed to follow the instructions of the Principal when on Monday, 5 September 2017 she instructed all members of staff to ensure that they fully understood the requirements of the course specification and adhered to them….

This allegation was substantiated by your own admission.

c) Failed to follow a reasonable management instructions through discussing the disciplinary case against you with colleagues when expressly instructed not to on two occasions (14 December 2016 and 3 April 2017)…

This allegation was substantiated by your own admission.

d) During these discussions you made serious allegations against other colleagues either directly or indirectly in contravention of the schools Dignity at Work policy….

As an explanation, you said you only wished to alert your colleagues to the fact you were going to whistle blow. In addition, you indicated that you had been drinking some alcohol that evening. Nevertheless, I think it was inappropriate and unprofessional of you to contact the two colleagues about this matter and they were obviously uncomfortable with the discussions that took place and there was some clear differences about exactly what was said in these discussions.

I think there is sufficient evidence to substantiate this allegation.

e) Attempted to coerce colleagues into providing false statements/evidence to support your case and therefore influence the outcome of the disciplinary process…

It is difficult to come to a clear conclusion regarding this particular allegation. Nevertheless, as stated above, I think it was inappropriate and unprofessional of you to contact the two colleagues about this matter. If you need to speak to these colleagues about the matters under investigation or about whistleblowing you should have contacted the school first.

f) By your actions you have breached the mutual trust required between employer and employee…

I feel that this allegation has been substantiated.

Most of the explanations for your behaviour, conduct and actions in relation to the allegations concern certain mitigating factors. In summary, the main areas were:

- That your decision-making and judgment was impaired by your medical condition and disability;
- That issues relating to your mental well-being should have been addressed at an earlier stage and you were not supported by the school with regard to your medical condition;
- That you were at or around the time subject to significant pressure by Richard Devlin whilst in support plan;
- That professional malpractice for controlled assessments for students was at the time widespread in the modern foreign languages department…

In conclusion, I felt that there was limited evidence to indicate that your decision-making and judgment was at the time around the end of June 2016 impaired to any significant degree as you continued to perform your professional duties and responsibilities, which involved making decisions and judgements as a teacher on a daily basis, and this was done to a generally, satisfactory level. However, I do accept that where a member of staff is having to be supported through a support plan/appraisal process this can be stressful to the teacher concerned…

> The school only became aware of disability related to your mental health following the medical support from the consultant psychiatrist in May 2017…
>
> Also, I think it is appropriate to point out that you have not helped the school support you with your mental health and well-being issues. Indeed, you have been less than honest with the school about your mental health issues and circumstances as it became clear at the hearing that you had made a false declaration on your application form regarding a sickness absence in 2007. It was clear that your sickness absence in 2007 was due to depression and anxiety as you said at the hearing and not a "virus" as stated on the application form…
>
> No evidence was submitted in relation to being subject to significant pressure by Richard Devlin…
> As stated at the hearing I take allegations of professional malpractice extremely seriously and stated that three referrals – concerning teachers that have now left the school – had been made to the appropriate bodies whilst I have been Principal of the school.
>
> Having carefully considered the mitigating factors put forward by you and your trade union representative, and weight and validity of them, I felt a proportionate response – taking into account the extremely serious nature of the misconduct and that your behaviour was in breach of the Teachers' Standards – was that you should be dismissed on grounds of gross misconduct. I did not feel that the issuing of a final written warning would have adequately reflected the extremely serious nature and magnitude of your misconduct.
> Therefore, I am writing to notify you that your employment has been terminated without notice by reasons of your conduct on grounds of gross misconduct."

7.38. The claimant appealed against his dismissal and the appeal hearing took place on 10 October 2017 before the Staffing Appeals Committee which consisted of Shirley Davison, Principal of Hilton Primary Academy and Governor of the respondent Academy, Jan Corlett, Governor, and Brenda Turnbull, Governor. Angela Wilkinson, HR consultant was also present. The claimant attended together with his Trade Union representative, Stephen Guy. The management case was presented by Sarah Holmes-Carne with Alan Taylor, Senior HR adviser. Joanne Jacoviak and Richard Devlin were called to give evidence and attended for part of the hearing.

7.39. The Tribunal had sight of the appeal hearing minutes which were extensive and ran to 22 pages. These show that the points raised in the claimant's appeal were discussed in detail and the claimant and his representative had the opportunity to raise questions of the witnesses.

7.40. On 13 October 2017 Shirley Davison wrote to the claimant providing the decision of the Staffing Appeals committee. In that letter it was stated:

> "Having considered all the available evidence, the Staffing Appeals Committee has decided to reject your appeal. In arriving at this decision, the Committee took into account the following factors:
>
> The Committee considered the psychiatric report compiled by Professor Turkington at length. Whilst not challenging the credentials of the author of the report the Committee found it notable that the only apparent examples of your impaired judgment was in connection to your active malpractice.
>
> At the appeal meeting conversations were held regarding the support offered to you by Kenton School at around the time of the act of malpractice. It was accepted by all parties that you had been assessed as suffering from moderate depression and severe anxiety during an appointment with OHU on 19 May 2016. Following this assessment Richard Devlin met with you on the 23 May 2016 whereby workload and support was discussed; you went on to attend 3 counselling sessions on 27 May 2016, 3 June 2016 and 17 June 2016. After the sessions, OHU confirmed that you had reported an improvement in mood at the end of the sessions.
>
> Stephen explored what the employer could have reasonably known in terms of your health/identifying disability. By your own admission you manage to 'function ok' at work and claim that you assumed a 'mode' when teaching; appearing as a positive role model to students. Following that the school would not have noticed any changes in behaviour – no lack of concentration, poor relationships or irritability. Therefore, the Committee had to conclude that it would not have been possible for the students or colleagues to identify any challenges you were experiencing in coping with your mental health. Further, that the school had done as much as they were able given the information you felt able to share.
>
> Therefore, it appeared to the Committee that it was at the time of the dedicated support to you that the act of malpractice occurred. Further at this meeting you told the Committee that at the time the support plan was in place you felt weak professionally, that you

were given detailed guidelines to work within so did not feel it was you that was deciding what the students were doing and that your judgment had been removed.

Stephen conceded that by in large the emails sent to you by Richard were reminders, balanced and, at times, positive, Stephen highlighted only 3 out of the 46 that had to be sent to you over a number of months that could have possibly been worded differently. Whilst the committee accepted that, at times, the emails were direct they did not find any emails they would consider as inappropriate or that the internal performance management measures put in place to support you at work were overbearing.

During the meeting, the Committee explored the manner at which you had approached the children carry out the 'instruction' given to you by CL. The Committee were significantly concerned your coercion of children into acts of cheating; further were alarmed to hear that you had instructed the students to carry out your direction without question.

At the hearing Stephen asserted that Sarah's correlation between exam malpractice and the sexual abuse of students was unreasonable. Sarah responded by saying exam malpractice could be considered as gross misconduct in the same way as the sexual and emotional abuse of students would be considered in the same way. Whilst the Committee accept Sarah's statement could have been expressed differently; the Committee were clear that coercing students into acts of cheating was an act of emotional abuse.

At the hearing you confirmed that you had reflected on your circumstances around January/February time and decided, following conversations with others to challenge the case made against you and compile a bank of evidence demonstrating practice within the modern languages department that went beyond examination regulations. The Committee were concerned that you had not taken the summer break 2016 as an opportunity to reflect on your active malpractice; and while away from any workplace pressures or stressors, to then make your disclosure during the break or on your return from the six-week holiday.

The Committee were further concerned to hear your assertions that the only reason you had contacted Anna Coey and Cynthia Korovessis to inform them you were going to whistle blow (these claims have implications for these colleagues) was out of 'courtesy'. Yet when asked by the Committee why you had not extended this same sense of courtesy to the leadership, parents,

students and Governors either prior to committing or immediately after your active malpractice you could not answer.

The Committee considered your failure to carry out a reasonable management instruction given on 2 occasions (14 December 2016 and 3 April 2017) in contacting 2 work colleagues while suspended from work. The Committee could not accept that you could disregard this instruction while knowing there was a consequence to your actions, when you did not feel you could challenge the instruction given to you by CL despite there being no consequences given to you in failing to follow this instruction.

Whilst accepting Richard Devlin's assessment of your teaching as 'excellent' and that prior to the act of malpractice and subsequent events that you had an unblemished service history. The Committee unanimously agreed that in the circumstances Sarah's decision was fair and reasonable.

The decision of the Staffing Appeals Committee is final and there is no further right of appeal."

7.41. On 5 December 2017 the claimant presented a claim to the Employment Tribunal.

The Law

8 **Discrimination arising from Disability**

Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

9. **Duty to Make Reasonable Adjustments**

Section 20 of the Equality Act 2010 states:

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

(2) The duty comprises the following three requirements,

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Paragraph 20 (1) of Schedule 8 provides:

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

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

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

Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out *in Environment Agency v Rowan [2008] ICR 218*, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

10. **Discrimination arising from the consequence of a disability**

Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in *Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14* at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the

determination of what is unfavourable will generally be a matter for the Employment Tribunal.

The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see *IPC Media Ltd v Millar [2013] IRLR 707*: was it because of such a consequence?

11 The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

12 **Burden of Proof**

Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

13 Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* (a sex discrimination case decided under the old law but which will apply to the new Equality Act) and approved again in *Madarassy v Normura International plc [2007] EWCA 33.*

14. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the

burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

16. In *Project Management Institute v Latif (2007) IRLR 579* The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore the burden is reversed only once potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

17. In *Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664* the EAT said that an employer's failure to make an assessment of a disabled employee is not of itself a failure to make a reasonable adjustment. This was followed by the EAT in *Scottish & Southern Energy v Mackay UKEAT LL75/06.*

18. In *Romec v Rudham (2007) All ER 206* the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In *Cumbria Probation Board v Collingwood (2008) All ER 04* the EAT stated "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

19. In *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ* the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

20. In *Noor v Foreign and Commonwealth Office 2011 ICR 695* Richardson J stated "Although the purpose of a reasonable adjustment is to prevent a disabled

person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

21. in the case of *Gallup the Newport City Council 2013 EWCA Civ 1583* Rimer LJ stated:

> "I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."

Unfair Dismissal

22. Where an employee brings an unfair dismissal claim before an Employment Tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

23. In determining the reasonableness of the dismissal with regard to section 98(4) the Tribunal should have regard to the three-part test set out by the Employment Appeals Tribunal in *British Home Stores Limited v Burchell [1978] IRLR379*. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in *Iceland Foods Limited v Jones [1982] IRLR 439*. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done

for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of ***Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23*** the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In *Ucatt v Brain [1981] IRLR 225* Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

24. Stephenson L J stated in *Weddel v Tepper [1980] IRLR 96*:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

25. In the case of *A v B [2003] IRLR 405* the EAT stated:

> "In determining whether an employer carried out such investigations as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee".

26. In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

27. One of the factors that a Tribunal has to consider when assessing compensation in a case where there is a substantively fair reason for the dismissal but where there had been procedural failings in the dismissal process, is whether the employee would still have been dismissed if a proper procedure had been followed. If the Tribunal concludes that even if a fair procedure had been followed, dismissal would still have occurred then that can sound in the compensation that is awarded. In *Polkey v. AE Dayton Services Limited [1988] ICR 142* the House of Lords approved the remarks of Browne-Wilkinson J in *Siliphant's case [1983] IRLR 91*:

> "There is no need for an 'all or nothing' decision; if the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the nominal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

28. If the Tribunal finds that the claimant caused or contributed to his dismissal, then the basic award may be, and the compensatory award must be reduced by such proportion as it considers just and equitable. If the employee substantially contributed to his own dismissal then this will mean a substantial percentage reduction in the award, even of 100%, leaving the employee with a

finding of unfair dismissal but no compensation. This is usually relevant in respect of misconduct dismissals.

Public Interest Disclosure

Employment Rights Act 1996

29. 47B Protected disclosures

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

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to--

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

30. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

31. In *Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37* Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with

> the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

32. Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

33. In *Kilraine –v- London Borough of Wandsworth UKEAT/0260/15* Langstaff J stated:

> "I would caution some care in the application of the principle arising out of *Cavendish Munro*. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

34. In *Chesterton Global Ltd -v- Nurmohamed [2015] IRLR* Supperstone J stated:

> "I accept Ms Mayhew's submission that applying the *Babula* approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way

> genuine concerns about wrongdoing in the workplace (see *ALM Medical Services Ltd v Bladon* at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to *Pepper (Inspector of Taxes) v Hart [1993] AC 593* that the sole purpose of the amendment to section 43B(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of *Parkins v Sodexho Ltd.* The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above)…… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied*".*

35. The Tribunal has considered the judgment in the recent case of *Parsons v Airplus UKEAT/0111/17/JOJ* in which Eady J considered whether a disclosure was in the public interest in accordance with the Chesterton Global test and said :

> "Crucially, the ET made no finding that the Claimant's disclosure was in anything but her own interest; see paragraph 56. And, although I take Mr Grant's point that a failure to comply with the provisions of the Companies Act in respect of certain minute taking obligations could be a matter in the public interest, I am ,however, not concerned with a hypothetical case: here, neither the evidence nor the ET's findings go so far. On the Claimant's own evidence (having regard to the note provided by the Employment Judge in this respect), she was simply asking about minutes of compliance decisions. On the ET's finding, when she was asked why, she explained it was because she was concerned to make sure she was protected if any suggestion she had given was not followed. I am unable to see the basis for the contention that the ET ought properly to have found that the Claimant's desire to ensure her advice was recorded so she might not herself face criticism in the future was a matter of public interest."

Reasonable Belief

36. In *Darnton v University of Surrey* and *Babula v Waltham Forest College 2007 ICR 1026* it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In *Babula* Wall LJ said:-

> "… I agree with the EAT in *Darnton* that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

37. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In *Fincham v HM Prison Service EAT0925/01 and 0991/01* Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying."* In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

38. In the case of *Eiger Securities LLP v Korshunova UKEAT/0149/16/DM* Slade J stated:

> "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

39. In the case of *Goode –v- Marks and Spencer plc UKEAT/0042/09* Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Method of Disclosure

40 .The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

41. The Tribunal had the benefit of written submissions from Mr Gibson and Mr Sangha together with further oral submissions provided by each of the representatives. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

42. The first issue the Tribunal has to consider is whether the claimant was a disabled person at the material time. It was agreed that the material time in question was in two parts; the first being June 2016, when the controlled assessments of the students in question were completed; the second period was from December 2016, when the claimant was placed on paid leave, until his dismissal.

43. Mr Sangha, on behalf of the respondent, disputed that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. He stated:

> "There is no notable impact on daily activities that the impairment has. C's disability impact statement is very limited with regards to impact on daily activities. His oral evidence similarly did not reveal anything that C was unable to do or was restricted in doing. The opposite seems to be the case. The C continued to attend for his work duties (he stated his attendance was excellent), he continued to perform his work duties.
> The effect of the medication that he was taking seems to be that it means that there is no substantial impact of his impairment on his ability to perform daily activities. It is noteworthy that C's use of medication reduced in 2016 significantly in comparison with 2015."

44. Mr Gibson referred to a letter from the claimant's GP referring to the claimant having suffered from depression for many years. He also referred to an Occupational Health report of 19 May 2016 which stated that the claimant had symptoms of moderate depression and high anxiety and the report of Prof Turkington dated 24 May 2017, which stated that the claimant was disabled at the relevant time. An Occupational Health report dated 16 June 2017 indicated that the claimant was likely to be classed as disabled. These reports had all been available to the respondent prior to the claimant's dismissal.

45. The Tribunal has given careful consideration to the question of disability. It is clear from the medical evidence that the claimant had been suffering from anxiety and depression for a number of years. He had been diagnosed in 2007. He was on a significant amount of medication. He gave evidence that his sleep was very poor. He said that he was not eating properly, could no longer read a novel. He said that he had no social life. He also said that he was "projecting normal" to his family and others would not know that there was anything wrong with him. He did not wish to share it with others and was good at putting on a show.

46. The Tribunal is satisfied, on balance, that the claimant had an impairment that had a substantial adverse effect on his ability to carry out normal day-to-day activities. That effect was long-term and the claimant was a disabled person at the material time.

47. With regard to the claim of failure to make reasonable adjustments, The Tribunal is satisfied that the respondent did apply a provision criterion or practice (PCP) to the claimant of a requirement to comply with its discipline procedure and teaching standards. The Tribunal is not satisfied that the PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant could still comply with the teaching standards and perform his role satisfactorily. He continued to carry out his teaching duties to a satisfactory standard.

48. If it had been found that the claimant was placed at a substantial disadvantage then the Tribunal is satisfied that the claimant was provided with a reasonable level of support and assistance and that a sanction less than dismissal would not be a reasonable adjustment in the circumstances.

49. At the time of the claimant's dismissal the respondent had knowledge of the claimant's disability, or should reasonably have been expected to have such knowledge. However, it would not be a reasonable adjustment to allow a teacher to remain in post having established that he was guilty of serious misconduct that was such that it undermined the integrity of the exam system, and the respondent found that it could no longer trust the claimant to perform his professional duties. The Tribunal is satisfied that there was not a failure to make reasonable adjustments.

50. With regard to the claim of discrimination arising from disability, the respondent did dismiss the claimant which was unfavourable treatment. However, this was not established to be because of something which arose in consequence of the claimant's disability.

51.Mr Gibson, on behalf of the respondent referred to the recent Court of Appeal case of *City of York Council v PJ Grossett [2018] EWCA Civ 1105* . He contended that the case was on all fours with the present case. That was a case concerning a claim of discrimination arising from disability under section 15 of the Equality Act 2010. The claimant in that case was a teacher who suffered from a disability in the form of cystic fibrosis. The claimant's case was that he was subjected to an increased workload which he found he could not cope with. He became very stressed and, under increased pressure of work, his health suffered badly. Whilst subject to this high level of stress, the claimant showed a class of 15-year-olds an 18 rated horror film entitled 'Halloween'. He did not obtain approval from the school or consent from the pupils'

parents. When the school found out about this disciplinary charges were brought and the claimant was summarily dismissed for gross misconduct.

52. In the disciplinary proceedings, the claimant accepted that showing the film was inappropriate and maintained it had happened as a result of an error of judgment arising from the high level of stress he was under at the time in consequence of his disability. The Employment Tribunal found that the claimant's claim pursuant to section 15 of the Equality Act 2010 was made out but his claim of unfair dismissal was dismissed on the basis of the findings made by the respondent and the sanction imposed was within the range of reasonable responses open to the respondent.

53. The claimant had accepted that showing the film had been inappropriate and regrettable but argued that his judgment had been affected by stress, contributed to by his cystic fibrosis.

54. The Tribunal in the *Grossett* case was satisfied that the error of judgment for which the claimant was dismissed arose in consequence of his disability.
It was stated by the Court of Appeal that:

> "On its proper construction, section 15 (1) (a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arising consequence of B's disability."

55. The relevant "something" in that case was said to be that the respondent dismissed the claimant because he showed the film. That is the relevant "something" for the purposes of analysis. The second issue was an objective matter, whether there was a causal link between B's disability and the relevant "something". The Tribunal had found that there was such a causal link. The claimant had shown the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability. The Tribunal's assessment that there was no good justification under section 15 (1) (b) the claimant's dismissal contained no error of law. The Tribunal correctly identified the legitimate aims of the respondent employer and took them properly into account. It was entitled to find that the step of dismissal was disproportionate in the circumstances. The Tribunal made its own assessment, on the evidence it had heard, whether the claimant's remorse and acceptance that he had acted wrongly in showing the film were genuine. It was entitled to do so and was well placed to make its own judgment about it. It was not obliged to proceed on the basis of the respondent's subjective perception that the claimant's remorse was not sincere.

56. The Tribunal finds that there were significant differences between the Grossett case and this one. In the Grossett case there was an error of judgment by the claimant in carrying out an inappropriate showing of the film. It was a single error of judgment caused by stress. This case is distinguishable from the Grossett case as it was not a single error of judgment in respect of carrying out an inappropriate act in the classroom, it was a serious act of, or being complicit in, what the principal described as 'cheating' the exam system and goes to the very root of the duties and responsibilities of a teacher. In this case, there was a series of occasions on which the claimant made decisions, the first being when he had handed the work in question to the students for them to copy for their controlled assessments. He then collected the

work, marked it, and he then entered the results on the departmental tracker. The claimant continued to carry out his teaching duties. He agreed to go on a school trip to Barcelona with the attendant safeguarding responsibilities. There was no credible evidence that the conduct in question was caused by the claimant's medical condition.

57. The Tribunal finds that the something which would need to be shown to have arisen in consequence of the claimant's disability was the malpractice for which the claimant was dismissed and this was not established to have been caused by the claimant's disability. The report from Professor Turkington refers to the claimant's judgment and decision-making being impaired by his high levels of anxiety and ongoing symptoms of depression at the time of the 'error'. However, it does not establish causation. It does not show that the claimant's misconduct, for which he was dismissed, was caused by his impairment. It does not state that his mental condition was such that he was unable to carry out the requirements of the exam regulations and, as the principal said "cheat" and continue to hide that cheating until he was concerned that it might come to light.

58. The claimant continued to perform his professional duties and responsibilities at the relevant time and this was not a single error of judgment, it involves a number of actions over a period of 3 to 4 days. The claimant was aware that he had crossed a "moral line".

59. If it had been established that the dismissal was unfavourable treatment because of something which arose in consequence of the claimant's disability then the Tribunal would have gone on to consider whether the dismissal was a proportionate means of achieving a legitimate aim. The aim was that of upholding teaching standards and the Tribunal is satisfied that that is a legitimate aim. It is necessary to maintain the integrity of the exam system, the school's reputation and the interests of the children. Balancing this against the effect on the claimant, the Tribunal is satisfied that it was a proportionate means of achieving that aim. It is clear that dismissal would have a devastating effect on the claimant however, in view of the importance of upholding teaching standards in that the integrity of the exam system is fundamental to the reputation and maintenance of the education system, the Tribunal is satisfied that the dismissal was proportionate.

60. With regard to the claim of automatic unfair dismissal for making a public interest disclosure, the disclosures relied upon were the claimant's statement submitted to the chair of governors on 8 May 2017 and made in his interviews with David Permain and Andy Clarke on 23 and 24 May 2017. The Tribunal is not satisfied that this was the disclosure of information which, in the claimant's reasonable belief tended to show that the respondent had failed to comply with its legal obligation to uphold teaching standards. The allegations made by the claimant were only raised following the initiation of the disciplinary process against him in respect of his own malpractice. The allegations made by the claimant were generalised allegations referring to incidents of support offered to students which he said had occurred over the preceding few years. He referred to students being offered intervention support and detailed annotations on drafts having been prepared by teachers. The Tribunal is not satisfied that that the claimant has established that he made protected disclosures. These were not disclosures of information. They were only generalised allegations of malpractice.

61. Had it been established that the claimant had made protected disclosures then the Tribunal is satisfied that the respondent has established that the reason for the dismissal was not by reason of any protected disclosure. It was by reason of the claimant's misconduct as set out above.

62. In respect of "ordinary unfair dismissal". The Tribunal is satisfied that the claimant was dismissed for the potentially fair reason of conduct. The letter of dismissal sets out the allegations and the conclusions clearly and that these were the reasons for the dismissal. It was made clear by the Principal that the conclusion was that the claimant should be dismissed as a result of the serious misconduct which the respondent found to have been committed by the claimant.

62. The Tribunal is satisfied that there was a thorough and reasonable investigation. The respondent found the claimant guilty of serious professional malpractice. There had been consideration by the respondent of the mitigating factors put forward by the claimant and it was determined that it was a proportionate response to dismiss the claimant. The claimant had been found to have failed to carry out his professional duties and responsibilities. The claimant had said that he was only following instructions, however, the respondent concluded that the claimant had undertaken a series of deliberate and thought-through actions. The claimant's long service and disciplinary record was taken into account and it was concluded that the claimant should be dismissed. The Tribunal has taken care not to substitute its own view for that of the respondent and is satisfied that this decision was within the band of reasonable responses available to the respondent.

62. In the circumstances, these claims are dismissed.

Employment Judge Shepherd

10 August 2018