Case Number: 3300544/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Ms A Szymaniak v (1) The Elliott Foundation Academies Trust
(2) Mr H Greenway

Heard at: Watford (via CVP) **On**: 6-8, 12-16 and 19 April and (in private) 20 April and 20 May 2021

Before: Employment Judge Hyams **Members:** Mr N Boustred
Mrs I Sood

Appearances:

For the claimant: Mr Andrew Allen QC, of counsel
For the respondents: Mr Nicholas Siddall QC, of counsel

UNANIMOUS RESERVED JUDGMENT

The claimant's claims of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 and of automatically unfair dismissal within the meaning of sections 95(1)(c) and 103A of that Act do not succeed and are therefore dismissed.

REASONS

The claims and the issues

1 In these proceedings, the claimant claims that she was dismissed by the respondent within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") and that that dismissal was unfair within the meaning of section 103A of that Act, namely on the basis that the reason, or if not the reason then the principal reason, for her dismissal was that she had made one or more protected disclosures within the meaning of section 43A of the that Act.

2 The claimant also claims that she was, contrary to section 47B of the ERA 1996, subjected to detriments after she resigned by the respondents doing or omitting to do things on the ground that she had made one or more such disclosures.

The parties

3 The claimant was employed by the first respondent as a head teacher of one of the schools for which the respondent is responsible as what is known and referred to by the first respondent itself as a multi-academy trust, or "MAT". That term does not appear in the principal Act governing the establishment and funding of what are called by section 1A of that Act "Academy schools". That Act is the Academies Act 2010, as amended ("the AA 2010"). A MAT is a company which is limited by guarantee and whose purposes are exclusively charitable. Its principal function is to receive and be responsible for the use of funding given by the Secretary of State for the purposes of the Academy schools of which the MAT is the proprietor within the meaning of section 579(1) of the Education Act 1996. The first respondent, as a MAT, received its funding from the Secretary of State via an agency of the Secretary of State called the Education and Schools Funding Agency ("ESFA"). That funding was given pursuant to what are called by section 1 of the AA 2010 "Academy arrangements". Such arrangements in the academic years 2017-2018 and 2018-2019 included a document called the Academies Financial Handbook, to which we refer below as "the AFH". That document is amended every year, and contains a number of detailed conditions governing the funding given by the Secretary of State via the ESFA to the proprietors of Academy schools.

4 The second respondent is the Chief Executive Officer ("CEO") of the first respondent. The claimant was employed by the first respondent to be the head teacher of one of the Academy schools of which the first respondent is the proprietor. That school was Pinkwell Primary School, which is situated within the area of the London Borough of Hillingdon. We refer to that school below as "Pinkwell" or, where it is more convenient to do so, simply as "the school".

5 As the CEO of the first respondent, the second respondent (to whom we refer below as "Mr Greenway") was the first respondent's accounting officer as defined by the AFH. That definition was in the AFH of which there was a copy in the main bundle before us. In what follows, where we refer simply to a page, we refer to a page of that bundle. There was in addition a supplemental bundle before us, and where we refer to a page of that bundle we do so by referring to it as a page number with the prefix "S" before the page number (so that for example a reference below to page S1 is to the first page of the supplemental bundle). The definition of the accounting officer was at page 2520 and was in these terms:

> "The senior executive leader of the academy trust, designated as accountable for value for money, regularity and propriety. In single academy trusts this should be the principal. In multi-academy trusts it should be the chief executive, or equivalent, of the overall trust."

<u>The approach which we take in these reasons</u>

6 There were many conflicts of evidence between the parties on material factual issues. The first of the claimant's claimed public interest disclosures was made on 11 June 2018, and it was in writing. Her subsequent claimed such disclosures were in many ways no more than a repeat of what was said in that written communication. Because of the extent of the conflict of evidence about what the claimant said on the occasions when, it was her case, she had stated things that amounted to protected disclosures within the meaning of section 43A of the ERA 1996, rather than state the claimed public interest disclosures in detail, we say here no more than that the claimed disclosures were about the authorisation by the claimant herself of the payment to the person whose job title was School Business Manager ("SBM") and who was assigned by the first respondent to work solely at Pinkwell, of overtime payments in circumstances in which the claimant alleged that she had been, or may have been, tricked by that person into such authorisation. We did not hear any evidence from that person, and we therefore refer to that person below simply as "the SBM". One of the claimant's stated concerns, at least subsequently, was that the first respondent did not have in place a procedure which would have limited her ability to give approval of the sort that she gave for the payment to the SBM of the payments which were then subsequently, for a number of months, made.

7 In what follows, we first state the applicable legal tests. We then state our findings of fact, after which we state our conclusions on the claims as they were pressed in final submissions. In doing so, we state the manner in which the claims were formally stated and, where applicable, particularised.

<u>The relevant law</u>

Protection against detrimental treatment, and dismissal, for "Whistleblowing"

<u>What is protected</u>

8 In order to succeed in claiming detrimental treatment for whistleblowing, an employee must show that he or she made a disclosure falling within section 43A of the ERA 1996. That means a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act. A disclosure made

by an employee directly to his or her employer falls within section 43C. Section 43B provides so far as relevant:

> ‘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,
>
> ...
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.’

<u>The right not to be treated detrimentally for whistleblowing</u>

9 Section 47B(1) of the ERA 1996 provides:

> “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.”

<u>Detrimental treatment and proving that it was done “on the ground that the worker has made a protected disclosure”</u>

10 In a claim made under section 47B of the ERA 1996 of detrimental treatment for making a protected disclosure within the meaning of section 43A of that Act, which is made under section 48 of that Act, it is for the employer to prove the reason for the conduct which it is claimed was detrimental. That is the effect of section 48(2), which provides that “it is for the employer to show the ground on which any act, or deliberate failure to act, was done”.

11 A claim of detrimental treatment for the making of a public interest disclosure is akin to a claim of direct discrimination because of a protected characteristic within the meaning of the Equality Act 2010 (“EqA 2010”). There is in section 136 of that Act a provision which is of the same sort as section 48(2) of the ERA 1996, but which is in terms which could be regarded as a codification of the effect of the case law concerning proof of discrimination because of a protected characteristic, which was developed when the text of the prohibitions on direct

discrimination because of a protected characteristic was the same as that of section 47B(1) of the ERA 1996 ("on the ground of", or "on grounds of", rather than, as now
"because of"). Section 136 is in these terms:

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

12 The approach taken in claims of direct discrimination is applicable here: see paragraphs 43 and 45 of the judgment of Elias LJ, with which Davis LJ and Mummery LJ agreed, in *Fecitt v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372. Nevertheless, as the discussion in paragraphs 5.525.54 of volume 14 of the IDS Handbooks shows, as stated in paragraph 5.53:

> "the employer can act lawfully if it relies only on the non-protected aspects of a whistleblower's conduct, even where that conduct is closely connected with the protected disclosures themselves".

13 However, great caution must be exercised when considering whether that has happened, for the reasons stated in paragraph 5.54, which is in these terms:

> "In some cases, however, it will be impossible to draw a line between the disclosure and the manner of that disclosure, even where the manner of the disclosure exacerbates an already difficult working relationship. In *Chapman v Basildon and Thurrock University Hospitals NHS Foundation Trust* ET Case No.3202410/12, for example, C made a protected disclosure to the Health and Safety Executive (HSE) about the handling of toxic waste at her workplace. She complained of detriments, including not being permitted to return to her workplace following a temporary redeployment until a bullying and harassment investigation had been completed. The employment tribunal accepted that there had been problems in C's working relationships prior to her making the protected disclosure and that there had been occasional friction with other colleagues. However, the tribunal found that the relationship worsened following the protected disclosure, with C's manager, M, losing all trust in C. The tribunal found that the reason for this loss of trust was that C had raised her concerns with HSE rather than with M directly. Thus, the protected disclosure and the renewed friction

materially worsened whatever concern had already existed to a point where C would not be permitted to return to her usual workplace. The tribunal considered whether this was a case where it would be permissible to draw a distinction between the manner of C's disclosure and the disclosure itself, and concluded that it was not. It noted that C had previously tried to resolve matters in the department and had gone to HR, and it was not a situation in which she had committed any act of misconduct, as in *Bolton School v Evans* [2007 ICR 641, CA], whether by raising the complaint with HR or the HSE. The tribunal noted that to permit a manager to subject a worker to detriment because she chose to raise her concerns with the appropriate bodies, rather than the manager believed to have created the health and safety risk, would be to defeat the purpose of the protection afforded by the legislation."

14 Paragraph 5.52 of volume 14 of the IDS Handbook contains this helpful passage, which we also took into account:

"Although the Court of Appeal's decision in *Bolton School* focused on unfair dismissal, the EAT (*Bolton School v Evans* 2006 IRLR 500, EAT) was concerned with both whether the disciplinary sanction to which E was subjected was imposed 'on the ground that' he had made a protected disclosure for the purpose of S.47B and whether the 'reason or principal reason' for the eventual dismissal was the protected disclosure for the purpose of S.103A. The case is therefore authority for the proposition that a whistleblower's conduct and his or her protected disclosure may be properly separable in the context of a detriment claim as it is in the context of an unfair dismissal claim. There is also authority for this proposition in the analogous context of victimisation discrimination under S.27 EqA. In *Martin v Devonshires Solicitors* 2011 ICR 352, EAT, the EAT held that there can be cases where an employer subjects a person to a detriment in response to the doing of a protected act but where the employer could say that the reason for the detriment was not the complaint as such but some feature of it which could properly be treated as separable, such as the manner in which the complaint was made. The EAT gave the example of a worker who makes a genuine complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible, accompanies it with threats of violence, or insists on making it by ringing the managing director at home in the middle of the night. In such cases it would be neither artificial nor contrary to the policy of the victimisation provisions (and by extension the whistleblowing provisions) for the employer to say: 'I am taking action against you not because you have complained of discrimination but because of the way in which you did it'. The EAT noted that it would be extraordinary if the victimisation provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. The EAT recognised that such a line

of argument was capable of abuse but did not consider that this meant it was wrong in principle.'

15 In paragraph CIII[99.01] of *Harvey on Industrial Relations and Employment Law*, this is said:

> "One effect of this causation requirement, potentially important in a case of an involved and litigious dispute between the parties, can be seen in *Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73, [2020] IRLR 374 (considered above at para [95] in relation to the definition of 'detriment'). In the course of just such a longstanding dispute, the employer had stated that all the claimant surgeon's allegations against the hospital had been dismissed by the relevant professional bodies, whereas in fact some had not been. He argued that this in itself constituted a detriment imposed on him. The employer argued that in law this could not be a detriment because it was done by the employer in the course of the dispute and to protect the reputation of the hospital. The ET and EAT accepted this, but the Court of Appeal reversed this part of the case and held that this sort of half-truth is capable of qualifying. However, the claimant still lost his appeal because the court held that this motivation then became relevant as to why the employer had made these statements. On the facts, the court held [in paragraph 73 of the judgment of Sir Patrick Elias, with whose judgment Baker and Henderson LJJ agreed] that the communications were made to defend the hospital and had not been because of the whistleblowing:
>
> > ''In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.''"

16 That case has now been reported also at [2020] ICR 1226.

17 In *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, the Court of Appeal held that the protected disclosure provisions in the ERA 1998 must be construed in conformity with the general principles of "victimisation" (the word used in paragraph 68 of the judgment of Ward LJ, with which Kay and Wilson LJJ agreed) which apply in (now) the EqA 2010. However, that case concerned what could be regarded as direct discrimination occurring after the employment had ended rather than victimisation within the meaning of section 27 of the EqA 2010. In any event (and as far as we were concerned, this was conclusive), there is no

equivalent in the ERA 1996 of section 27 of the EqA 2010, and we could not see any basis on which we could interpret section 47B of the ERA 1996 as protecting a claimant from detriment resulting from a threat to sue for a breach of that section, i.e. a breach of section 47B.

<u>Submissions on behalf of the claimant relating to what amounts to a detriment within the meaning of section 47B</u>

18 Mr Allen made the following submissions on the law applying to the question whether or not a worker has been subjected to a detriment done on the ground that the worker has made a protected disclosure:

> "25. In *Ministry of Defence v Jeremiah* 1980 ICR 13, CA, at 26B-C, Brandon LJ said that 'detriment' meant simply 'putting under a disadvantage', while at 31A, Brightman LJ stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL at 349B-C.
>
> 26. Where an employer fails to investigate, or excessively delays investigating a protected disclosure, this is capable of amounting to a detriment – *Deer v University of Oxford* 2015 ICR 1213, CA para 4748.
>
> 27. A worker may suffer a detriment if she is subjected to greater scrutiny or criticism of her performance than other workers.
>
> 28. An attempt to cast a worker who made a protected disclosure in a bad light is capable of amounting to a detriment."

19 We accepted what Mr Allen said in those regards with the exception of his submission based on paragraphs 47-48 of the judgment of Elias LJ in *Deer v University of Oxford*. The other members of that court (Floyd and Sullivan LJJ) agreed with Elias LJ's judgment, so it was of undoubted authority, but the question was, for what? The case concerned a claim of victimisation made under section 27 of the EqA 2010, after the claimant had made and compromised a claim of sex discrimination. The claimant was a former (successful) PhD student at the university. She was employed as a contractual research fellow from October 2000 to March 2008. In 2007 she made a claim of sex discrimination against the university. The claim was compromised in June 2008 for £25,000 and on the basis that the university would provide an agreed reference. The claimant then applied for a fellowship, and asked her doctoral supervisor to give her a

reference for the post. According to paragraph 5 of Elias LJ's judgment, the supervisor "refused to provide one, giving cogent reasons why he would not, and he advised her not to pursue the post". The claimant then lodged an internal grievance in that regard, and made a claim to the employment tribunal against both the supervisor and the university, alleging that the refusal to give a reference was victimisation within the meaning of section 27 of the EqA 2010. The grievance was rejected. The claimant then claimed in a further claim to the employment tribunal that the investigation of her grievance had been (in the words of paragraph 8 of Elias LJ's judgment) "defective in several respects and that certain avenues had not been properly explored". A similar claim was made subsequently about the manner in which the claimant's appeal against the rejection of her grievance had been conducted. Those two claims were struck out after a preliminary hearing on the basis that there had been no detriment caused to the claimant by any failure that there might have been in the conduct of the claimant's grievance and her appeal against the rejection of that grievance. That conclusion that there was no such detriment was arrived at on the basis that the first of the claims to the tribunal had been determined on the merits after a hearing by a full tribunal, which had found that there was (as stated in paragraph 12 of Elias LJ's judgment) "no basis at all to link [the supervisor's] refusal to provide a reference with the fact that [the claimant] had brought the settled claim".

20 It is against that background that paragraphs 47 and 48 of Elias LJ's judgment must be read. Those paragraphs are in these terms:

> "47 Ms McCafferty [counsel for the university] accepted that there will be cases where procedural failings may give rise to a detriment even although it is plain that they had no effect on the substantive outcome of the investigation, but she submits that this is not such a case.
>
> 48 In principle I do not see why not: if the claimant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim. It seems to me that Ms McCafferty's case must depend on a consideration of the merits which, for reasons I have given, I do not think is justified in this appeal."

21 We concluded that those paragraphs were of very little assistance here. That is because the effect of a failure to investigate properly an employee's grievance about the manner in which he or she has been treated is likely to be rather

different from the effect of a failure to investigate properly an allegation of wrongdoing by someone else. We nevertheless bore in mind the possibility that in some circumstances, it might be reasonable for a claimant to regard a failure to investigate properly an allegation of wrongdoing by someone else as a detriment within the meaning of section 47B of the ERA 1996.

Dismissal within the meaning of section 103A

22 Where an employee is dismissed for whistleblowing, i.e. the making of a public interest disclosure within the meaning of section 43A of the ERA 1996, the dismissal will be automatically unfair within the meaning of section 103A of that Act “if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

23 Section 47B(2) of the ERA 1996 provides:

> “(2) ... This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).”

24 Where an employee claims to have been dismissed “constructively”, i.e. within the meaning of section 95(1)(c) of the ERA 1996, and that the dismissal was unfair within the meaning of section 103A of that Act, the following analysis in the recent judgment of Cavanagh J in *De Lacey v Wechseln Ltd* UKEAT/0038/20/VP, which was handed down on 1 April 2021, is of assistance:

> ‘68. ... [I]n principle, a “last straw” constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. There is very limited authority on this point. However, in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory “if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach.” At paragraph 90, HHJ Auerbach said that the question was whether “the discrimination thus far found **sufficiently influenced** the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory.” (my emphasis)
>
> 69. I respectfully agree with the test as it is set out in paragraph 90 of the *Williams* judgment. Where there is a range of matters that, taken

together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.'

The evidence before us

25 We heard oral evidence from the claimant, and, on her behalf, from

25.1 Mr Bob Charlton, Chief Executive of The Schools HR Co-operative,

25.2 Mr Nick Kay, a former teacher at Pinkwell, and

25.3 Ms Ann Bowen-Breslin, the Principal of Hillingdon Primary School.

26 We heard oral evidence from the second respondent on his own behalf and on behalf of the first respondent. On behalf of the first respondent, we heard oral evidence from the following witnesses:

26.1 Mr Michael Fisher, who was employed by the first respondent as a Senior HR Business Partner;

26.2 Mr James Devaney, who was until July 2019 the Chair of the Local Governing Body ("LGB") for Pinkwell;

26.3 Mr Simon Adams, who is and was at all material times employed by the first respondent as its London Regional Director;

26.4 Ms Ruth Dickens, who was from the end of February 2018 onwards employed by the first respondent as its HR (i.e. Human Resources) Director;

26.5 Mr Bob Anderson, who was the first respondent's HR and Governance Director and then, when he ceased to hold that post, became what he and the first respondent called a Trustee of the first respondent (i.e. a director of the first respondent); and

26.6 Ms Jem Shuttleworth, who was at all material times employed by the first respondent as its Head of Governance and Policy.

27 As we say in paragraph 5 above, there were before us two bundles of documents: a main one and a supplemental bundle. The main bundle had in it 2537 pages. The supplemental bundle had in it 113 pages. Several additional documents were put before us during the hearing in the circumstances which we describe below.

<u>Our findings of fact</u>

28 In the following paragraphs below, we state our findings of fact about the circumstances as we found them to be after hearing all of the evidence and hearing submissions for all of the parties.

The factual background to the first of the claimant's claimed public interest disclosure, which was made on 11 June 2018

<u>(1) Events up to March 2018</u>

29 Pinkwell is a larger than average primary school. It became (we saw from the page of the Ofsted report at page 200 to which we refer in the next paragraph below), an Academy school in April 2014. The SBM started work for the first respondent as Pinkwell's SBM on 10 August 2015. We came to that conclusion because that starting date was recorded in the contract of employment for the SBM of which there was a copy at pages 424-432. That document was signed by the SBM on 15 September 2015, but there was no copy of it in the school's file for the SBM at all material times until the SBM located the document at home on 15 June 2018 and brought it to the school to be copied, as recorded in the email from Ms Lindsay Thomas to the first respondent's then-current Finance Director at page 422. The contract showed that the SBM's holiday year ran from 1 April to 31 March. We return to the email at page 422 in paragraph 102 below.

30 Pinkwell was inspected by Ofsted on 28 February to 1 March 2017 and given a rating of “Requires Improvement”. (The report of the inspection was at pages 192-203.) At that time, it had a temporary Principal (or head teacher (“HT”)), Ms Helen Okoro. She gave notice at the end of 2016, with the period of notice ending at the end of that first term of 2017 (i.e. the second term of the 2016-17 academic year). Mr Adams and Ms Bowen-Breslin then took over as acting joint HT of the school in the summer term of 2017.

31 On 7 April 2017, the first respondent approved the “Whistleblowing Policy” of which there was a copy at pages 2159-2166. Under the heading “Mechanism for raising concerns” on page 2163, it provided that

> “Where the issue concerns a member of staff, other than the Principal, it should be brought to the attention of the Principal or Director of HR and Governance.”

32 Under the heading “How the disclosure will be dealt with” on page 2164, this was said:

> “The action taken by the Academy will depend on the nature of the concern. The Principal/Line Manager will ensure that the concern is:
> - Taken seriously
> - Investigated internally and an objective assessment of the concern made. Any investigation will be undertaken paying due regard to confidentiality.
> - Reported back to the employee or trade union representative/official as to the progress made by a named person/agency appointed to investigate
> - A clear timeline set out
> - The subject of a written report compiled and shared with the Principal and/or Chair of Governors”

33 On 15 April 2021, Mr Adams put before us by way of an exhibit to his second witness statement a chain of emails that he had found the night before. The exhibit was, however, truncated, and Mr Adams sent us on the day via Mr Siddall the email trail in full. That email trail showed that Mr Adams had on 2 May 2017 approved the payment to the SBM of 30.5 days’ pay for holiday which the SBM had not taken in the previous (2016-17) holiday year, and of a lump sum for 62 hours’ work, which was in fact of overtime paid at the standard rate for the SBM (and therefore not, for example, at time and a half). Mr Adams described the latter lump sum in paragraph 14 of his second witness statement in this way (and we accepted that paragraph):

> 'I believe the payment I authorised is a one-off payment and relates to the agreement of Caroline Whalley and Helen Okoro to pay for additional hours worked as referenced in the bundle at page 1264, paragraph 27 where it states that Caroline Whalley " ... *did agree that [the SBM] should receive recompense for many hours of overtime that [the SBM] had completed for the school during the school year that saw Helen Okoro leave and caretaker leadership take place*" and paragraph 32 where it states: "*It is our view that Helen Okoro and Caroline Whalley agreed the principle that [the SBM] should be rewarded for the hours spent over and above her normal contractual working hours.*"'

34 The reference to "Caroline Whalley" was to Dr Caroline Whalley, who was at that time the "Chair of [the first respondent's] Trustees".

35 The claimant was the HT of Grange Primary School in Harrow from 2012 to 2017. She resigned from that employment to start as the HT of Pinkwell as from 1 September 2017. As she said in paragraph 5 of her witness statement, which we accepted, she had a track record of success as a HT, which included obtaining for Grange Primary School an Ofsted rating of "Good" in 2015, after 15 years of it being rated by Ofsted as a failing school.

36 At the start of the claimant's employment at Pinkwell by the first respondent, and at all subsequent material times, the first respondent's "Whole staff pay policy September 2017", of which there was a copy at pages 2167-2191, applied to matters relating to the pay of the staff of (among other schools) Pinkwell. In relation to the school's support staff, the policy applied (as a result of paragraph 10 on page 2181) to the determination of the pay of each member of that staff. That pay was to be determined by reference to the "point" on "the existing local authority job evaluation scheme" which was "evaluated" to be "appropriate" in the light of "the job description" for that member of the staff. Paragraph 10.2 provided:

> "The Principal, in consultation with the Chair of LGB, will determine the appropriate point on the evaluated scale having regard to
>
> i) relevant qualifications and/or competencies
> ii) recruitment/retention needs of the academy in respect of the post. The reasons for any recruitment or retention payment must be objective, justified and transparent and reflect the appropriate market rate".

37 In October 2017, the first respondent adopted the "Scheme of Delegation" of which there was a copy at pages 2192-2200. On its first substantive page, under the heading "Introduction", this was said:

"The different levels of delegated power are listed below but it should be noted that not every task requires all levels of delegated power to be defined:

- Approve (A)
- Recommend (R)
- Propose (P)
- Consulted (C)
- Implement (I)

The Scheme of Delegation should be read in conjunction with the Terms of Reference for the relevant body. While the Scheme is designed to be comprehensive it will not cover every task."

38 At pages 2205-2228 there was a copy of the first respondent's "Finance Manual" for 2017-18 (although it was shown on page 2206 to have been approved only on 25 May 2018). On page 2208, under the heading "Introduction", this was said:

"The purpose of this manual is to set out information about the finance function at the Elliot Foundation and to document The Elliot Foundation Academies Trust (TEFAT) Board's responsibility to maintain and develop systems of financial control which conform to the requirements outlined in the Academies financial handbook 2017 issued by the Education & Skills Funding Agency (ESFA) effective 1st September 2017 (and any updates issued thereafter), supporting the disciplines of propriety and sound financial management. It is essential that the financial systems operate properly to meet the requirements of the funding agreement with the Department for Education (DfE)/ ESFA.

This manual applies to all academies within TEFAT and should be read by all Trust personnel with financial responsibility and control."

39 At page 2210, under the heading "The Principal", there was this passage:

"Within the framework of the academy development plan as approved by TEFAT the Principal has overall executive responsibility for the academy's activities including financial activities. The Principal is responsible to the LGB, TEFAT's CEO and the Regional Trustee. Much of the financial responsibility has been delegated to the School Business Manager / Finance Manager but the Principal still retains responsibility for:

- Approving new staff appointments within the Academy, except for any senior staff posts which the LGB have agreed should be approved by them;

- Authorising orders and contracts between £3000 and £10,000 in conjunction with the School Business Manager / Finance Manager;
- Authorise and ultimately be responsible for the academy payroll process in conjunction with the School Business Manager / Finance Manager;
- Approving and authorising payments in conjunction with the other authorised signatories."

40 The AFH for the school year 2017-2018 was not put before us, but the one for the 2018-2019 school year ("the AFH 2018") was in the bundle, at pages 22542309. It was not suggested that there was any material difference between the relevant terms of those documents. In paragraph 2.2.1 (at pages 2268-2269), the AFH 2018 provided this (the bold text in all of the extracts below from the AFH 2018 being in the original):

> "The academy trust **must** establish a robust control framework that includes:
>
> - ensuring delegated financial authorities are complied with
> - maintaining appropriate segregation of duties
> - co-ordinating the planning and budgeting process
> - applying discipline in financial management, including managing debtors, creditors, cash flow and monthly bank reconciliations
>
> ...
> - regularity, propriety and value for money in the organisation's activities • reducing the risk of fraud and theft
> - independent checking of financial controls, systems, transactions and risks".

41 In paragraph 4.9 of the AFH 2018 (at pages 2292-2293), this was said:

> "4.9.1 Academy trusts **must** be aware of the risk of fraud, theft and irregularity and address this risk by putting in place proportionate controls. Trusts must take appropriate action where fraud, theft or irregularity is suspected or identified.
>
> 4.9.2 The trust **must** notify ESFA, as soon as possible, of any instances of fraud, theft and/or irregularity exceeding £5,000 individually, or £5,000 cumulatively in any academy financial year. Any unusual or systematic fraud, regardless of value, **must** also be reported. The following information is required:
>
> - full details of the event(s) with dates
> - the financial value of the loss

- measures taken by the trust to prevent recurrence
- whether the matter was referred to the police (and if not why)
- whether insurance or the RPA have offset any loss

4.9.3 ESFA may conduct or commission its own investigation into actual or potential fraud, theft or irregularity in any academy trust, either as the result of a notification from the trust itself or from other information received. ESFA may involve other authorities, including the police. ESFA will publish reports about its investigations and about financial management and governance reviews at academy trusts."

42 There was at Pinkwell a Bursar. In September and October 2017, and apparently at all material times, the person who held that post was a Ms Lindsay Thomas. She reported to the SBM, who in turn reported to the claimant. The first respondent had a contract with a payroll and human resources specialist by the name of EPM, which is short for "Education Personnel Management", for the provision of payroll and advisory services to Pinkwell. EPM had an electronic (i.e. internet) portal by means of which access could be gained to the school's payroll information by any person who was nominated for the purpose by the first respondent. The SBM was so nominated, as were Ms Thomas and Mr Adams.

43 The claimant benefited from some induction when she started at the school in September 2017, including from the person who was then the first respondent's Finance Director ("FD"), Ms Julie Lombardo, but she did not receive any induction about the use of, and access to, the EPM portal. However, she did not ask for such access. Instead, she trusted the SBM to manage the payroll process for the staff of the school.

44 Ms Thomas used that portal to request EPM to pay to the SBM sums in the SBM's pay for the months of September and October 2017 in respect of two daily hours of overtime at the school. On 29 November 2017, at 07:07, the SBM wrote to Ms Carolyn Kimpton of EPM (page 274):

> "Dear Carolyn, I will be speaking to the new Principal Annette Sant regarding my additional 2 hours (each day) but before I do so can you let me know what you need from her and I will ask her to send to you. Simon Adams also agreed this. It would be along the same lines as Shelly Williams; however there [h]as also been other staff that this was agreed by the head teacher i.e Michelle Harris. I have copied Annette in."

45 In reply, Ms Kimpton wrote this (pages 273-274):

"Hi [SBM] If you are to be paid regular contractual overtime, I just need the HT to e-mail me her authorisation to set this up – number of hours per week and date of effect. Contractual overtime is normally calculated at flat rate (as with Shelly Williams) but if it is to be paid at, for example, time & half due to being worked late evening, this will also need confirming."

46 At 16:07 on the same day (29 November 2017), the SBM wrote to the claimant (page 273):

"Dear Annette,

Please see email from Carolyn Kimpton in response to my email this morning.

It would be 10 hours per week effective from 1/12/2017 at flat rate.

Please can you email her to confirm."

47 The claimant had not responded to that email request by 10:17 on 1 December 2017, which led to the SBM sending a further email to the claimant (also on page 273) in these terms:

"Dear Annette,
Please can you response [sic] to this email confirming my contractual overtime as payroll is due in today."

48 At 18:23 on that day, the claimant sent a reply to that email, sending it both the SBM and Ms Kimpton, in the following terms (page 273):

"Hi Carolyn,

Please can I confirm that [the SBM] does an extra 2 hours a day. This is for ensuring absences are addressed immediately.

Annette"

49 Pinkwell was a challenging school to manage, and all persons concerned, including the parties to this claim, well knew that. The first respondent was responsible for 29 schools (as Academy schools) in the 2017-18 school year. The first respondent arranged for what it called a Team Around The Academy ("TATA") to assist any of those schools that required improvement. In the 201718 school year, the first respondent had a TATA for five or six of its schools. Pinkwell was one of those schools. Pinkwell's TATA met for the first time during the claimant's tenure of the post of Principal of the school on 12 December 2017.

There were minutes of that meeting in the bundle at pages 276-281. The purpose of the meeting was stated (on page 276) to be “To support Pinkwell with dealing with a number of key issues which are providing considerable challenge.” In addition to the claimant, Ms Lombardo, Mr Adams, Mr Anderson, Mr Devaney and Ms Shuttleworth were present at the meeting.

50 Shortly afterwards, Ms Lombardo ceased to be the first respondent’s FD. She was replaced by a lady on an interim basis, i.e. to whom we will refer only as “the IFD”.

51 On 5 February 2018, Mr Fisher sent the email at page 306 to the SBM, the claimant and Ms Thomas, enclosing what he described as a “terms of reference document for the staff who do not currently have a contract on file.” At that time, there was no contract of employment in the file for the SBM. That factor, coupled with the email from Mr Fisher at page 306, led to the creation and signature by Ms Thomas and the SBM of the document entitled “Written Statement of Employment Particulars” at pages 330-331, which was signed by the SBM on 18 March 2018 and Ms Thomas on 20 March 2018. The document recorded that the SBM’s “Basic Annual Salary (as at 1st January 2018)” was £43,815, and that she received as an “additional allowance” “Contracted Overtime - £12,107.83”.

52 There were many issues arising in relation to the staffing of Pinkwell from the moment that the claimant started as its Principal onwards. Some were ongoing at the time that the claimant started to be the school’s Principal and others developed during the course of the school year. One of those issues concerned one of the two Assistant Principals, to whom we will refer as SS, who started a period of sickness absence and raised a grievance about the manner in which she was treated. She was then approached on behalf of the first respondent with a view to entering into a compromise agreement under which she would leave the first respondent’s employment in return for a sum of money. The claimant felt that she had not been involved in the decision to make that approach, and wrote in these terms to Mr Fisher on 6 February 2018 (page 308):

> “As I’ve already shared I’m disappointed that I’m not included on the decision making. This could have enormous implications for me as the Principal.”

53 Mr Greenway then, 10 minutes later, wrote to the claimant the email at page 307, to which the claimant responded 33 minutes later in the email above it on the same page. Among other things the claimant wrote that the Assistant Principal was not being “held accountable for her responsibilities as H of S [i.e. Head of School]” and that she (the claimant) had “born the brunt of this.” The email concluded:

"When we met you also were clear it's Pinkwell who will carry the cost. It's [a] decision which I have to accept but it's your decision making and not in consultation with me."

54 That led to Mr Greenway reflecting and sending an emollient email to the claimant on 8 February 2018 (pages 319-320), apologising to the claimant for "snapping at [her] in [his] email response" and among other things pointing out that

54.1 the first respondent could not pay for the proposed settlement as the first respondent "has no central surplus, we keep our money in our schools",

54.2 Pinkwell had "the biggest carry forward in the Trust at almost £450k at the beginning of this school year", and

54.3 there was "no rationale to take money from other schools to meet this obligation".

55 Mr Greenway also wrote this (the bold text being in the original):

'I am trying to think of the best way to give you a "Get out of jail free" card over the inherited issues at Pinkwell. So that you don't need to spend precious time and energy shoring up defences. But here are a few things that don't suffer from being repeated.

Elliot is a high trust, collective responsibility, distributed leadership organisation. We are all working on the basis that the [Assistant Principal] situation is irretrievable and likely to be expensive and diverting from the core purpose of the school. Given that you had effectively said to Mike [Fisher] and Simon [Adams], "Who will rid me of this turbulent Assistant Principal?", we were getting on with the job in the quickest, and most efficient manner.

The fact that you were not involved in every detail of that work did not remove you from the decision making process because the destination was agreed and in any case it is my neck on the line not yours. However, I fully understand that you felt marginalised. And perception creates reality.

And **I am sorry if you felt isolated or vulnerable**. I hope you will learn to trust that everything we do is designed to make you feel the opposite - included and supported.

...
Can we learn from this and move on?"

56 The claimant said in oral evidence that she saw those final words as an instruction, but we saw them as being an exhortation and that Mr Greenway's approach was typical of him in that he was seeking simply to find a practical solution to a problem and that he had done so in a helpful manner.

<u>(2) The claimant's relationship with the SBM</u>

The evidence

57 It was the claimant's evidence that she had a good working relationship with the SBM at all times. It was the evidence of Mr Fisher (in paragraphs 12-29 of his witness statement) that the relationship between the claimant and the SBM was good until a point in about March 2018, after which "something happened to change their relationship for the worse". In paragraph 21 of his witness statement, he said this:

> 'I remember picking up on the issues during an email exchange with the Claimant in April. I was communicating with her about the HR caseload at Pinkwell and one of the points under discussion concerned [the SBM]. I had encouraged the Claimant to meet with [the SBM] for a 'clear the air' conversation and I referred to this is in an email at 22.24 on 24th April [332], I said: "*Conscious that there was a conversation about [the SBM] at the TATA, and just want to check whether things have settled? Did you decide to have a coffee in the end?*" In an email at 22.49 [333], the Claimant replied: "*We went for coffee and I remain concerned!!!! Let's discuss on Friday*." I think this rather speaks for itself.'

58 The claimant's evidence was that the "conversation about [the SBM] at the TATA" was not about her having a "clear the air" conversation with the SBM but was, rather, about the SBM's mental well-being, and she pointed to the text exchange at page 463 in the course of which the SBM wrote:

> "I have achieved my targets barring one now! I am happy for life to end now to be honest. I am tired but I know I must go on."

59 The claimant had written back:

"I'm so sorry you feel that. You must give yourself a break. Tiredness is a terrible thing and it does terrible things to our minds sometimes. You must book time off and spend time with your daughter who has done so brilliantly."

60 Ms Shuttleworth's witness statement contained this passage:

"36. At the outset I believe that the relationship between the Claimant and [the SBM] was a positive one. [The SBM] was supportive of the need for rapid improvement across the school and she recognised that in turn this would require a significant number of changes to be made. There were a number of staff at Pinkwell who were not on board with the direction of travel that the school was embarking upon and I believe that [the SBM] offered valued support to the Claimant around such issues.

37. However, during the latter stages of the academic year (in April and May 2018) I became aware that an issue of some sort had developed between the Claimant and [the SBM]. I was supporting them both in addressing concerns around the quality of the work undertaken by the cleaning contractor for the school [335] and I remember attending a meeting on site, where the tension between them was very apparent. [The SBM] was actually shaking but was offered minimal support from the Claimant during the meeting. [The SBM] had been delegated responsibility for managing the supplier, and the fact it was not meeting standards created an understandable problem for the Claimant but it seemed to me that there was an undercurrent of the Claimant needing to establish that, should there be any error, it was most certainly not going to be her responsibility. I think at this point I began to get the impression that for the Claimant her professional reputation was of the utmost importance; she was more interested in self than team."

61 Mr Greenway's witness statement contained the following key passage (all of which we accepted) in this regard:

"43. I believe I first became aware of an issue between the Claimant and [the SBM] from Mike Fisher, HR Business Partner, who was assigned to Pinkwell. Mr Fisher was working closely with the Claimant and [the SBM] on a variety of HR issues and commented to me on a number of occasions that the relationship between the pair had deteriorated. I can only speculate as to the source of that breakdown but I think it was around March or April 2018 that news reached me of a problem.

44. I am aware the Claimant has disclosed numerous text/SMS messages between her and [the SBM], which are presumably intended to show their relationship as cordial and friendly. However, that is the opposite of how their relationship was viewed by others. It was clear from conversations I was having with Mr Fisher, Ms Dickens and even the Claimant herself that her relationship with [the SBM] was not good. Indeed, it had obviously reached breaking point because Mr Fisher reported to me on a couple of occasions that [the SBM] had alluded (in

conversations with him) to a race discrimination claim based on the Claimant’s behaviour towards her.

45. There was one conversation I recollect having with the Claimant when she was telling me about an incident involving crash mats in the school hall. The details are vague but it sticks out to me because I remember the Claimant was adamant that [the SBM] had failed in her safeguarding and health and safety responsibilities. I did not believe that health and safety was a core strength of [the SBM]’s but I recall thinking that the Claimant was laying the blame on rather thick. The Claimant was certainly not being supportive of a key member of her staff.

46. The tension between the Claimant and [the SBM] also, indirectly, affected my relationship with the Claimant. When it became clear that there was a significant risk [the SBM] would resign, I had suggested that we might consider relocating [the SBM] to a different school within the Trust. This was an attempt to finesse two problems, the difficulties between the Claimant and [the SBM] and the shortage of experienced and capable financial managers in schools at that time. Given that [the SBM] was a long-serving employee who was seen as an asset it struck me as sensible that we should try to retain her services, whilst at the same time wishing to support the Claimant.

47. The Claimant became very upset with my suggestion. I can only assume that she saw it as my meddling in staff affairs and undermining her judgment, as she seemed to take great offence at the idea. The difficulty I had with this is that I knew the Claimant’s perception of [the SBM] had changed dramatically and I suspected that she may lack objectivity.

48. Nevertheless, given the Claimant’s reaction, we took the decision that it was better to allow a competent Business Manager to leave than to potentially lose an accomplished Principal who was beginning to make strides at Pinkwell. Losing one stabilising influence was hard enough, losing two was something we were very keen to avoid.

49. However, when the Claimant later made an allegation about [the SBM]’s conduct, I was suspicious of her motives and not inclined to immediately take that allegation at face value.”

A discussion; Mr Allen’s submission on the email exchange at pages 332-333

62 It was submitted to us by Mr Allen that the email exchange at pages 332-333 to which Mr Fisher referred in paragraph 21 of his witness statement, which we

have set out in paragraph 57 above, was capable of being read only as relating to the contemporaneously-documented mental state of the SBM. We disagreed. We concluded that it was capable of being read in that way but that it was also capable of being read consistently with Mr Fisher's evidence that it related to a "clear the air" conversation that he had suggested to the claimant she had with the SBM.

What happened next

63 On 2 May 2018, the claimant wrote to the SBM the email at page 337, repeating a request to have monthly meetings to discuss the budget. In paragraph 48 of her witness statement, the claimant said this:

> "On 5 May 2018, I met [the SBM] to discuss the mid-term budget. She informed me that there was apparently a £200,000 deficit gap for the inyear budget against where it should be at the mid-term point. She should have told myself and the governing body about this and I questioned why she had not accelerated this to the governing body. This was a complete surprise to me, and the deficit suggested poor control and financial management, which was contrary to requirements of the AFH. I had expected [the SBM] to keep me notified and I felt it was a direct result of her closed door policy on being accountable. I sought clarity and [the SBM] blamed me for the cost of new staff who I had recruited. In turn, I showed her my emails where I had asked financial questions around each new appointment."

64 We accepted that evidence of the claimant.

65 The claimant's witness statement contained the following further relevant passage:

> "51. By early afternoon on 12 May 2018, [the SBM] had got the deficit down to £80,000. Given the size of the budget deficit, in order to assist with planning and budgeting for the next academic year, starting September 2018, I offered to work 4 days per week and agreed a pro rata reduction in my pay. That reduction took effect from 1 September 2018 (page 941). This would reflect the group size of the School due to a falling pupil role. This was discussed with the governors and Simon Adams.
>
> 52. On the evening of Saturday 12 May 2018, [the SBM] tendered her resignation from her employment with notice (page 339). Her employment was due to end in late August 2018."

66 We accepted that evidence of the claimant too.

Our conclusion on the relationship between the claimant and the SBM during 2018

67 However, we did not accept the rest of paragraph 52 of the claimant's witness statement, which was to the effect that the claimant "remained supportive towards" the SBM and that the SBM's resignation had had nothing to do with any breakdown in the relationship between her and the SBM. It is true that there was nothing to the latter effect in the SBM's resignation email, which was at page 339. However, the fact that she resigned was itself capable of supporting the proposition that she was not happy in her position at Pinkwell, although the fact that we had not heard evidence from her meant that we did not draw the conclusion that she resigned because of the breakdown in her relationship with the claimant.

68 A number of factors were relied on by Mr Siddall in his closing submissions as showing that the claimant's oral evidence was unreliable. While we did not accept all of those submissions, we did accept that the claimant did frequently take what we will call a revisionist view of history. We came to that view ourselves, but we saw that Mr Fisher had done so too: he described in paragraph 64 of his witness statement what he called "an attempt on [the claimant's] part to rewrite history." That was about the meeting of 29 June 2018 to which we refer in paragraphs 109-113 below. A very good example of what we found was the claimant's revisionist approach to history was her response in cross-examination to the content of an email which she had sent on 5 July 2018 (page 533). What she said in response to that email was relevant to the issue of the reason for her subsequent resignation (to which we refer in paragraphs 128-131 below). In that email she referred to the fact that one of the members of staff at Pinkwell had filed a grievance, saying:

> "What a shame that [the member of staff] has gone down this route!!!! It's just exhausting."

69 When it was put by Mr Siddall to her that that email, when read with her resignation letter, showed that she had resigned principally at least because of the number of ongoing staffing issues at the school, she said that what she meant by saying that "[it was] just exhausting" was that it was exhausting that the member of staff's grievance was being investigated when her protected disclosures were not. Mr Siddall relied in his written closing submissions on a record of what he then asked her and she replied as showing how she had a "propensity to seek to rewrite her own emails, to assert that they reflected things that plainly they did not and to suggest that readers of the same enjoy

extraordinary power of clairvoyance enabling them to interpret the same in a manner different from their obvious wording.” The record was in these terms (set out in paragraph d on page 8 of Mr Siddall’s closing submissions):

> ‘[Mr Siddall] No. But I can read your email. It’s not recorded in your email is it?
>
> [The claimant] The words here “it’s just exhausting” is a generalisation. You can’t read my mind any more than I can… Also, why is this being investigated. It’s 5th July, a month on. We all knew about situation with [the member of staff]. It erupted the year before. What I was finding exhausting is how could this on the one hand be investigated and not this one on the other hand.
>
> [Mr Siddall] None of that is in the email?
>
> [The claimant] For me it, it is”.

70 Another example of the claimant not wanting to acknowledge evidence which pointed towards the real reason for her resignation being the difficult staffing situation at Pinkwell was that in a text message which she had sent to the SBM on 27 February 2018 of which there was a copy at the top of page 454, she had written:

> “You really are very important to our team. [SBM], I’m not surprised you got overwhelmed. I did before Christmas.”

71 When asked why she got “overwhelmed ... before Christmas [2017]”, the claimant was, she said, unable to remember why.

72 In any event, in part for those reasons, but also because we preferred the evidence of Mr Fisher and Ms Shuttleworth referred to and in part set out in paragraphs 57 and 60 above to that of the claimant on this issue, we concluded that the relationship between the claimant and the SBM did indeed take a turn for the worse in March 2018 and subsequently continue to deteriorate up to the date of the claimant’s first claimed public disclosure, namely 11 June 2018, to which we turn next. Before doing so, we stress that while, as we say in paragraph 61 above we accepted the passage of Mr Greenway’s witness statement that we have set out in that paragraph, we also accepted Mr Greenway’s oral evidence to us that he had absolutely no doubt that the SBM’s belief that the claimant might have discriminated against her because of her (the SBM’s) race was completely unfounded. We add, however, that we also accepted his oral evidence that he had by June 2018 regretted bitterly the appointment of the

interim FD, to whom, we say above, we refer as "the IFD", who took over from Ms Lombardo in January 2018, as he had found her to be unsuitable to the post of FD for the first respondent in that she did not understand the school sector and what she needed to do to fulfil the responsibilities of her role, and that she had by then started to do things which were aimed at undermining him in particular. He said to us, and we accepted, that (as he had said in the document at page 1775, which was a record of the interview which Mr Richard Powell had conducted with him in the course of determining the claimant's grievance, as we describe below) he thought that his decision to appoint her to the role of interim FD was "possibly the worst employment decision" that he had ever made during the course of his career. We accepted that evidence in part because of a text exchange between the claimant and the IFD of which there was a partial copy at page S1 (which was also referred to as page 364A). That text message exchange was in these terms:

"[IFD:] You've been soooo badly treated.

They should be disqualified from acting as directors of companies.

[The claimant]: If it goes to tribunal everyone would be interviewed.

We certainly want H fired and I".

73 That (incomplete) exchange was undated, and Mr Greenway said that it had not been made clear by the claimant when it occurred. He said that the letter "H" referred to him, and it was not suggested by the claimant that it did not do so.

The claimant's first and second claimed public interest disclosures, of 11-12 June 2018

74 On the same page, but also on page S51, there was this text sent by the IFD to the claimant at 17:29 on 11 June 2018:

"It's [name given, i.e. that of the IFD]

You were tricked

Deceived and constant hiding material from you was because of the ongoing concealment

We need to reverse it and claw it back

I expect you thought (1) there is a contractual entitlement to overtime and (2) it was for a particular period".

75 In reply, the claimant had written (apparently on the same day):

> "I'm just disappointed that I've been fooled. I will tell Hugh [i.e. Mr Greenway] as I think that will make it better for you in the long run."

76 The claimant was unable during cross-examination to explain what she meant by the second sentence of that text.

77 At 20:43 on that day, 11 June 2018, the claimant sent the email at page 350 to Mr Greenway, copying it to the IFD. The whole of the text of the email is material. It had in the subject line these words: "Concern: Whistleblowing". The text of the email was this:

> "Dear Hugh,
>
> I would just like to report a major concern about the salary of [the SBM]. I was under the impression that it was £44,751.
>
> However, in doing the budget I now realise that [the SBM] is being paid £59,300 and with oncosts this comes to £82,095.
>
> Back in November [the SBM] requested that she was given additional salary as had been doing the supply cover and the daily absences. She told me that this was additional to her job description and it was something she had discussed with the leadership before my arrival but just hadn't been signed off. At the time, I had no reason not to believe her and actioned her doing an additional two hours a day, after all she is the business manager and controls the finances. I have since discovered that supply cover is part of the job description.
>
> Since September I have asked for [the SBM] to diary up monthly meetings with me. She has been reticent to do this. I have overtime [sic] had increasing doubts about her but put this down to her emotional state and her on going grief. I also felt hesitant as everyone at the Elliot was always singing her praises.
>
> Please see attached documentation as I would value your opinion.
>
> As of tomorrow, I would like to stop the payment but would seek your thoughts on this."

78 With that email, the claimant enclosed an email trail that was incompletely copied in the bundle (at pages 351-352), but which certainly ended with the one set out in paragraph 48 above.

79 Mr Greenway replied with alacrity (32 minutes later, at 21:15) in the following terms (page 354):

> "Can you leave it with me for 24hrs please.
>
> I'll give you a ring tomorrow to understand a little better.
>
> Are you suggesting fraud, or simply sharp practice?
>
> If the latter then I don't see a problem in discontinuing an unjustified uplift. If the former then we might need to consider more formal processes.
>
> In any case speak tomorrow."

80 Just over an hour later (at 22:21, page 354) the claimant replied:

> 'Hi Hugh,
>
> I think I've been "Pinked!" I'm not sure it's fraud but [the SBM] hasn't been entirely honest either. It's a first for me.
>
> Let's talk it through as it's clearly something you need to know about. I think I'm more worried if there anything else." [Sic]

81 Even later on that day, Mr Greenway replied (page 354):

> "As you say it does make you wonder about what you haven't found doesn't it... ?
>
> Will ring mid morning if that's OK. Got a lot on first thing and Ofsted in Highlees".

82 The claimant replied two minutes later (page 354):

> "Thanks Hugh,
> Ring when it's convenient. Highlees deserves your time. I'm happy to take an evening call."

83 At 21:21, Mr Greenway forwarded (via his mobile telephone, inadvertently not including as a result the enclosures) to Ms Dickens, the emails, as an exchange, set out in paragraphs 77 and 79 above (page 356), asking her to discuss the matter with him on the following day. Ms Dickens and Mr Greenway both gave careful oral evidence on what happened on the next day, but they were both a little hazy in their recollection of precisely when the telephone calls that they had on that day occurred.

84 As far as the timing of the events of the next day (12 June 2018) was concerned, Mr Greenway said that he had a first telephone conversation with Ms Dickens late in the morning, after which, at 13:57, she received from EPM the documents at pages 358-363. Those documents added nothing substantial to those to which we refer in paragraphs 44-48 above. At 14:21, Ms Dickens sent the email on page 364 to Mr Greenway. It was in these terms:

> "Can you give me a buzz back to discuss when you have a moment.
>
> Emails attached show clear instruction from Annette to EPM to process 10 hours per day to [the SBM] at flat rate wef Dec 17. I am not sure if Annette's email to yourself indicates she genuinely had not realised the full financial implications/salary to [the SBM] as a result. However, I am not sure we can hold [the SBM] to account if that is the case, unless Annette is alleging [the SBM] willfully misled her. I also don't see we have a leg to stand on to simply stop the payment for hours already completed this month.
>
> However, if Annette wishes to stop the additional work and allowance with immediate effect so that no further costs are incurred, she could do so but there is risk given it has been awarded as contracted overtime and in light of the resignation in place could be argued as punishment for that (and [the SBM's] refusal of Annette's recent request to reconsider staying at Pinkwell). Also I am not sure we want to create further ill feeling from [the SBM) on this at the risk of yet another grievance at Pinkwell etc??
>
> Finally, Simon [i.e. Mr Adams] is cited as having been aware/part of the discussions approving the arrangement so arguably it had Trust backing (although haven't checked this with him.)
>
> Can we discuss briefly?!"

85 Mr Greenway's evidence was that he did not see the email at page 350, which we have set out in paragraph 77 above, as one which attracted the application of the respondent's whistleblowing policy. His witness statement contained the following passage stating what happened next, and why.

"55. ... At that time, it appeared to us that the Claimant was effectively reporting a personal mistake and seeking guidance on how to deal with the repercussions. We did not view it as a case of whistleblowing or a situation in which the whistleblowing policy would be triggered. In any event, as I have said, at that time, I did not even realise that it was possible to blow the whistle on your own conduct. I would never have categorised someone confessing to a mistake as a whistle blower. I do now know that my understanding of the law was incorrect but that is how I viewed the situation at the time.

56. The Claimant had personally confirmed her involvement in the authorisation and the paper trail confirmed the same. There did not appear to be any genuine question of fraud or – so far as we could see – wrongdoing. In the circumstances, neither Ms Dickens or I felt that any further investigation was warranted.

57. I do recall that Ms Dickens and I had relatively brief discussion about whether disciplinary action might be merited against the Claimant because as Ms Dickens pointed out to me, we had a situation in which a highly experienced Principal, with all the responsibilities that entails, including budgets and payroll, had authorised a payment apparently without having any idea what she was authorising or whether it represented value for money. However, we swiftly concluded disciplinary action was unnecessary and likely to prove counterproductive. The Claimant had made an honest, if potentially negligent, mistake and had shown contrition, such that we doubted it was likely to happen again. We felt the repercussions of initiating disciplinary action posed a far greater risk to the school than the risk identified by the Claimant's email of 11th June.

58. I believe that I then spoke to the Claimant by telephone on either 12th or 13th June. I explained that Ms Dickens had investigated and this had clearly shown it was the Claimant who had knowingly authorised the payments she was concerned about; that we did not think it was a good idea to stop the payments to [the SBM]; and despite the fact she had authorised the payment without knowing the quantum, I would not be taking the matter any further, given the good work she was doing in the school. I remember the Claimant pressed her position and restated her worry about what she had found, so I suggested that we get the Trust's internal auditor to take a look, since he was in the middle of a Trustwide audit in any event."

86 It is quite possible that Mr Greenway was mistaken in thinking that he had suggested to the claimant at that time that the first respondent's internal auditor "[took] a look" at the situation, given the terms of the email exchange of 5 July

2018 between him and Mr Adams which we set out in paragraphs 116 and 118 below. Otherwise, however, we accepted his evidence in the passage that we set out in the preceding paragraph above, by which he stood firmly despite being pressed hard on it in cross-examination. We did so in part because of the document at page 357, which the claimant had created, but which she had not put before the respondent at any time before these proceedings began. It was an undated document which the claimant said was a set of notes that she had made on 11 and 12 June 2018. In handwritten text at the top, this was written: "Notes put on iPhone straight after calls". There was reason to question whether that description was entirely accurate, but for present purposes it is sufficient merely to say that the typed document was in the following terms.

> "Hugh - 11.618 [sic]
>
> Noticed that [the SBM] was going to be paid 59,300. Incredibly shocked as Scholarpack said £44k
> Spoke to [the IFD] who spoke to EPN [i.e. EPM]. I'd agreed in November to extra two hours a day in November
> Recalled her saying agreed prior to my coming.
> Her initial email did not indicate impact on budget.
> I know that she said it was because she said was doing additional work taking absence calls and supply.
> I already had previous concerns about [the SBM being] reticent on booking time with me to do monthly meetings. I had given Lisa access to my diary and had told her to organise. By May still nothing done. I wrote stern email about nothing still being booked. It's now in the diary.
> In April finally got to do PM [i.e. probably a Performance Management review] and again eluded me about her PM running from March to March. When eventually got to see it again realised ran from September to September. Old PM had not been completed. Only finance.
>
> Email to Hugh on 11th with attachments.
>
> Replied and said speak to me on 12.6.18
> Hugh Rang at 12:03
> Hugh said he wanted to know if I felt fraud or sharp practice. I said I didn't know. I stated that I felt very bad.
> He said he would keep my name out of this. I had to interrupt him and say this wasn't necessary.
>
> Hugh talked about Ruth who is director of HR doing forensic investigation.
> I said what about [the IFD] and he said Yes, yes, yes, of course.
> He would have noticed I'd ccd [the IFD] into original email.
> He suggested as [the SBM] was going that not worth worrying. But I did.

> [The IFD] rang to ask how I'd got on. I'd assumed she would be part of forensic investigation. Hugh had told her not to follow up because she might throw out race card. This really shocked me as I know other financial leaders had been fired. I didn't know if this was then a case of discrimination"

87 Mr Greenway's evidence (in paragraph 59 of his witness statement) was that the document at page 357 was not "an accurate record of what was said between" him and the claimant in the conversations that they had about the matter about which the claimant had written in her email at page 350, the text of which we have set out in paragraph 77 above. The inaccurate parts were described by him in the following manner:

> "59. ... For example, the Claimant has written that I mentioned a "forensic investigation" would take place but I have no idea where that phrase came from because it certainly was not something I said. The Claimant has also failed to record me telling her to get the internal auditor to investigate. Furthermore, I deny saying I would "keep her name out it", as the Claimant has recorded. I can only assume this attribution has arisen out of the fact I told her we would not be taking disciplinary action against her.
>
> 60. The Claimant's notes also reference a conversation with [the IFD], during which [the IFD] is reported to have recounted a conversation with me in which I had told her not to follow up with the investigation because [the SBM] "*might throw out the race card*". ...
>
> 61. Of course, I am not able to comment on what may or may not have been said in a private telephone conversation between the Claimant and [the IFD]. However, I can confirm that I did speak to [the IFD] because after my discussion with the Claimant I had a conversation with her in the office to outline the basic elements of the issues the Claimant had raised with me and to ask her to instruct the internal auditor, Chris Whiting, to investigate. I also recall explaining that we thought it best to allow [the SBM's] overtime payments to continue for the remainder of her notice (which was around 6 weeks at that point) rather than inflaming the situation, which we knew to be delicate given what [the SBM] had told Mr Fisher. It is possible [the IFD] misinterpreted or paraphrased what I said, but I categorically did not use the phrase "throw the race card". It should be noted that [the IFD] was already aware of the perceived risk around [the SBM] because Ms Dickens had raised it in an Ops Group meeting around that time."

88 Rounding off that passage in his witness statement, Mr Greenway said:

> "62. In any event, I believed that the Claimant had accepted our advice and that the matter was closed, pending the internal auditor's report on financial controls at Pinkwell."

89 In oral evidence, Mr Greenway repeatedly said words to the effect that he had weighed up the situation, concluded that there was much more financially and operationally to lose by taking any kind of action against the SBM in relation to her pay, or stopping the overtime payments, than the amount of those payments, even if taken in aggregate, and decided that the best thing was simply for the claimant and the first respondent to treat the matter as closed. On several occasions he said that (or words to the effect that) (1) the amount that the claimant claimed to have been obtained by the SBM possibly dishonestly (and she said that without having seen the emails to which we refer in paragraph 33 above) was in the region of £12,000, (2) he was concerned with the application of an overall budget of approximately £75 million, (3) the sum about which the claimant was concerned was relatively insignificant, and (4) the email trail set out in paragraphs 44-48 above showed that there was no deceit on the part of the SBM. He was cross-examined on that heavily, and it was put to him that it was not an answer to the concern of the claimant that she had authorised expressly the payment of the overtime sums paid to the SBM, because that authorisation was gained on the basis of a misrepresentation made by the SBM. He nevertheless maintained that it was his view at the time that the most sensible thing to do was to overlook the claimant's failure and to (in our words) let sleeping dogs lie as far as the conduct of the SBM was concerned and as far as the receipt by her of the overtime payments was concerned. He was also adamant that he did not think that what the claimant had said in her email of 11 June 2018 at page 350 and in what she said to him on the following day was a whistleblowing communication, and his justification for that conclusion was that the claimant had expressly authorised the payment of overtime in the clear terms set out in paragraph 48 above, which did not appear to have been the result of any fraud by the SBM.

90 We accepted both (1) that evidence of his and (2) what he said in paragraph 62 of his witness statement, which we have set out in the paragraph 88 above. Mr Greenway struck as being concerned at least primarily (if not completely: we record below how we considered the possibility that he had nevertheless acted in breach of section 47B of the ERA 1996 in this context) with the effective operation of the schools for which the first respondent is responsible, and the effective use of the resources given by the Secretary of State for that purpose. We also accepted completely his view that what the claimant had raised with him in her email of 11 June 2018 which we have set out in paragraph 77 above, and in her discussion with him afterwards, was not a whistleblowing disclosure, i.e. a public interest disclosure within the meaning of section 43A of the ERA 1996.

That of course did not mean that he had not breached section 47B of that Act in the manner in which he dealt with the situation, and, as we indicate above in this paragraph, we return to that issue below.

91 We pause to record, however, that the claimant denied firmly that Mr Greenway had said to her during whatever conversation(s) they had on 12 or (if one happened on the next day) 13 June 2018 anything about the possibility of disciplinary action against her in respect of the authorisation by her of the SBM's overtime payments. However,

91.1 in part because, given the factors which we record in paragraphs 68-71 above, we found the claimant to be capable of self-deceit after an event which she subsequently did not want to acknowledge;

91.2 in part because of what we say in paragraph 105 below about her denial of the accuracy of the passage in the bundle at page 758,

91.3 in part (and most importantly) the claimant had herself recorded in her notes at page 357 that Mr Greenway had "said he would keep [her] name of out this", which indicated that she was seen by him to be at fault and was far more consistent with him saying that he had considered disciplinary action against her and decided not to take it than with him not doing that, and

91.4 the claimant herself recorded herself in her notes on that page to have "stated that [she] felt very bad", which indicated that she was well aware of that fault,

we accepted Mr Greenway's evidence that he had indeed considered with Ms Dickinson and mentioned to the claimant the possibility of taking disciplinary action against the claimant as well as the SBM, but decided against it and said so to the claimant.

92 Before turning to the next claimed public interest disclosure, we record that the claimant sent a text to the IFD at 16:52 on 12 June 2018, in these terms (at page S51):

> "[IFD] I spoke to Hugh [i.e. Mr Greenway] and Ruth [i.e. Ms Dickens] is going to start an investigation. Interesting response."

93 That was inconsistent with the evidence of both Mr Greenway and Ms Dickens, and it showed in our view either that the claimant had completely failed to take on board the fact that Mr Greenway had as far as he was concerned commissioned and (see paragraph 84 above) received the result of an

investigation by Ms Dickens before that text was sent (i.e. before 16:52 on 12 June 2018), or that the claimant was not telling the truth to the IFD. After giving the matter careful and anxious consideration, we concluded that it was the latter, and that the claimant did not tell the IFD the truth because the claimant was concerned by what the IFD had said to her in the text exchange of 11 June 2018, which we have set out in paragraph 74 above (i.e. "We need to reverse it and claw it back"). The claimant's evidence in paragraph 54 of her witness statement was that she had herself seen the issue of the possible inappropriateness of the SBM's salary (so that it was not something about which she was made aware by the IFD). That evidence was borne out by the email exchange between the claimant and the IFD of the morning of 11 June 2018, at page 348. However, at page 349, there was an email from the claimant to the IFD sent at 13:20 on that day, in which the claimant had said this:

> "Hi [IFD],
>
> Do you have a name and number for EPN [sic] management of payroll?
>
> This is making me very anxious now.
>
> My mobile number is [number given]."

94 Accordingly, the IFD's statement in the text set out in paragraph 74 above that "We need to reverse it and claw it back" had the effect, we concluded, of making the claimant so anxious about the situation that she believed that she was obliged to press continually for the matter to be investigated with a view to clawing the money back.

95 In any event, the final paragraph of the claimant's own notes at page 357 (set out in paragraph 86 above) showed that she was told on 12 June 2018 that the matter was not going to be taken further by Mr Greenway. That brief note was explained and expanded on in paragraph 72 of the claimant's witness statement, where she said this:

> 'At around 6pm on 12 June 2018, [the IFD] rang to ask me how I had got on. I reiterated my concerns. I had assumed she would be part of the forensic investigation. I was surprised when [the IFD] said that Hugh Greenway had told her not to take the matter any further and that my concerns about the pay issue would not be investigated by the finance team because [the SBM] might throw the "race card". This really shocked me as I know of one other investigation concerning an SBM at another TEFAT school. For the Tribunal's record, whilst I did not consider race to be an issue at all to my request for an investigation, [the SBM] is Black British. I questioned whether there was an attempt to conceal the wrongdoing as I

reasonably believed the decision to abandon the proposed "forensic investigation" was an attempt to cover up the false claim for wages and poor financial controls. I was not prepared to allow the failure of others to act in an ethical manner to go unchallenged and I remained committed to ensuring that the School adopted measures to correct such failures.'

96 If the claimant did indeed have a concern at that time that there was "an attempt to conceal the wrongdoing" or "an attempt to cover up the false claim for wages and poor financial controls", she did not say so in writing.

The TATA meeting at Pinkwell on 14 June 2018 (at which the claimant made her third claimed public interest disclosure)

97 The claimant's claimed third protected disclosure was made at the TATA meeting at Pinkwell which occurred on 14 June 2018 and was minuted at pages 414-419. The claimant described what she said at the meeting in paragraph 79 of her witness statement. Even the claimant said only that she had "raised the financial irregularity ... at the conclusion of the meeting". She said in that paragraph that she had said that she had "whistleblown to Hugh and wanted a whistleblowing investigation but had been told by [the IFD] that Hugh said there would not be one." The minutes made no mention of that conversation, and Mr Adams did not recall it. Nor did he recall the conversation that the claimant said in paragraph 80 of her witness statement she had with him on the same day when, she said:

> 'Shortly after the TATA meeting, Simon Adams telephoned me to inform me that Hugh Greenway had decided not to investigate the matter because [the SBM] was leaving. I expressed that I was disappointed and told Simon Adams that the purpose of the audit was not to assess "criminality" but that "it was an opportunity to see what training needs to be put in place".'

98 Mr Adams' evidence about that claimed conversation was in paragraphs 47 and 48 of his witness statement. In the latter, he said this:

> "I do not recall us having a telephone conversation on the day. That does not necessarily mean we didn't speak; it is certainly possible we did as it was a regular occurrence, but I can say with complete confidence that at no time did Mr Greenway tell me he had decided not to investigate a matter because [the SBM] was leaving. That simply did not happen. Therefore, I would have had no reason to tell the Claimant that it did. In fact, so far as I can recall, I did not have any communication with Mr Greenway about the Claimant's concerns until 5th July ...".

99 We accepted that Mr Adams had absolutely no recollection of the claimant raising the issue of the payments made to the SBM at the TATA meeting of 14 June

2018 or of a conversation after it about that matter. The attendees at the TATA meeting were the claimant, Mr Adams, Mr Fisher and Mr Devaney. Mr Fisher and Mr Devaney did, however, have recollections of something being said about the matter by the claimant. Mr Devaney's witness statement contained this (and only this) passage (in paragraph 44) about what had happened at the meeting of 14 June:

> "From what I recall, the Claimant said that [the SBM] had claimed the additional hours in one lump sum payment. I think it was Simon who asked something like "how much are we talking?" to which I recall the Claimant saying "about 10k". I asked had it been paid to which I recall the Claimant alluding to the fact that she had unknowing [sic] authorised the payment. The Claimant explained that the overtime claim was within a bundle of invoices prepared by [the SBM] for the Claimant to authorise. My impression at that point was that the Claimant had signed many invoices without actually looking at what she was authorising. My personal view was that clearly it was an oversight on the part of the Claimant for not checking what she was authorising but on the other hand, I recognise the trust in which the Claimant had with the School Business Manager that the claims and invoices being presented were authentic. I do recall the Claimant suggesting that [the SBM] had been dishonest. This issue was complete news to me and my impression was that Simon Adams also did not know. I felt that Mike Fisher may have been aware prior to the Claimant's report of the issue and I recall Mike suggesting that perhaps a further investigation was necessary and discussion outside of the meeting. I promptly left the meeting at that point as I had a pressing need to return to my own workplace leaving the Claimant, Simon Adams and Mike Fisher in the room together."

100 Mr Fisher said in paragraph 30 of his witness statement that he thought that the first time that he became aware that the claimant was raising the issue of overtime payments made to the SBM was at the TATA meeting of 14 June 2018. He also said this in his witness statement about what had happened on that day:

> "31. With the passage of time, I cannot remember exactly how the matter came up or precisely what the Claimant said, but I do recall her mentioning that she had recently found out about the sum of money [the SBM] was claiming in overtime and that it was a payment she had approved. From recollection, when the Claimant was asked some questions about it, her answers were quite vague on details. Someone (I cannot recall who) asked whether [the SBM] was actually doing the hours for which she was claiming the Claimant confirmed that she was. From memory, there was no indication of whistleblowing or fraud from the Claimant and I think I would remember if that was the case. The conversation was more around the fact the Claimant regretted signing her approval for the payments and was seeking advice on what to do."

101 We concluded from all of the evidence before us that the claimant had raised the issue of the overtime payments that she had authorised to the SBM at the meeting of 14 June 2018, but that she had not said that the issue that she was raising was that the respondent did not have proper controls in place to prevent someone in her position from authorising payments which should not have been authorised.

Subsequent events up to the date of the claimant's resignation

(1) 15 June 2018; sending the external (i.e. independent) auditor copies of the SBM's contract and job description

102 The first respondent had an agreement with a firm of accountants called "Academy Advisory" for the latter to carry out internal audits for the first respondent. There was a document entitled "The Elliott Foundation Academies Trust Internal Audit Plan 2017/18" dated "March 2018" at pages 321-329. That showed that an audit of the finances of Pinkwell was scheduled to start on 26 April 2018. Mr Greenway said that one had indeed commenced before 11 June 2018. There was no written record of Academy Advisory being sent a copy of the claimant's email of 11 June 2018, but there was a sequence of emails at pages 421-423 showing that the IFD had on 15 June 2018 forwarded to the auditor, Mr Chris Whiting, "the JD associated with [the SBM's] contract", and it was clear from that sequence of emails that the IFD had by then sent Mr Whiting a copy of the SBM's contract of employment. That was after Ms Thomas had sent the email enclosing it at pages 421-422. It was therefore an inescapable conclusion that Mr Whiting was alerted, either at the request of Mr Greenway or at the instance of the IFD, to the matter either on or before 15 June 2018.

(2) The claimant's third claimed public interest disclosure

103 The claimant's claimed third public interest disclosure was summarised in the table on page 54 as her "disclosing information about R2's attempt to cover up and suppress evidence relating to the wrongdoing", and was stated to have been made to Mr Whiting and Mr Jonathan Ford, the Chair of the first respondent's Audit Committee, in "Late June/Early July - 19 July 2018". These alleged disclosures were described in paragraphs 83-85 and 87 of the claimant's witness statement. Paragraph 87 showed that the claimant had spoken to Mr Ford only on 19 July 2018 and had then merely reiterated what she had said to Mr Whiting before then. She said in paragraph 84 that she first spoke to Mr Whiting "in late June/early July 2018", when he "telephoned [her] on [her] mobile to request further information relating to [her] disclosure and [the SBM's] conduct". Among other things, the claimant said (in paragraph 85 of her witness statement) that

she had "repeated many times that [her] primary objective was to ensure that appropriate policies, controls and governance were in place to ensure the effective management of the school's finances."

104 We describe in paragraphs 123 and 124 below how the draft report of Mr Whiting was compiled and what Mr Greenway did in response to that draft report. Here, we record only that the claimant referred in paragraph 141 of her witness statement to the pages of the final version of the report which included (at page 758) a description of what she had said to Mr Whiting, without making any criticism of that description. However, in the final three sentences of paragraph 141, the claimant made several criticisms of other aspects of the report. The passage in the final version of Mr Whiting's report which described what the claimant had said to Mr Whiting was at the bottom of the left hand column on page 758, which needs to be read with the preceding two paragraphs. The whole of that passage was in these terms:

> "During internal audit testing at Pinkwell Academy a large discrepancy was noted between the School Business Manager's contracted pay and current pay processed via the payroll.
>
> On further investigation we found that the a pay award of £12,170.83 had been granted in December 2017, in respect of an additional two hours per day, as the Business Manager was apparently coming into school earlier to assist with taking calls in the morning. This explanation was provided via verbal references as there was no formal documentation to support this pay award. The pay award took the Business Manager's salary from £45k per annum to £57k, a significant rise and one where we would expect an audit trail to evidence to rationale for this decision, and clear authorisation in line with the TEFAT Scheme of Delegation; no such documentation was available. The only evidence available to support the authorisation of this pay award was a short email from the Principal stating that the Business Manager was working an additional two hours per day (a copy of this email has been provided at Appendix II).
>
> We queried this issue with the Principal, Annette Sant, who raised concerns with us that she felt she had been misled by the Business Manager and regrets her involvement in authorising the pay increase. According to Annette, she authorised the two hours of additional pay on the understanding that a previous Headteacher had previously authorised this increase. Following the authorisation, no evidence of the previous Head's authorisation has been identified. If this is indeed the case, the actions of the Principal are questionable as she allowed herself to authorise a significant contract amendment without cross-checking facts, without due regard for value for money or budgetary control. This failing appears to be

accepted by Annette, who has openly stated she feels culpable and has requested a formal review / audit of this matter."

105 When she was cross-examined about this, the claimant denied saying to Mr Whiting that she felt "culpable". She insisted that she merely accepted that she was at fault, and said that that was different from being culpable. Like Mr Siddall, we struggled to see the difference between the impact of the two words, and we agreed with his submission that the claimant for the first time during oral evidence realised that the passage at page 758 of the bundle was not to her credit and therefore for the first time denied saying that she felt culpable. We concluded in this regard (as with our conclusion stated in paragraph 68 above) that the claimant revised her recollection when confronted with the impact of the truth.

106 However, that conclusion was relevant only to the credibility of the claimant, and not to the question whether or not she was subjected to a detriment for saying what she did to Mr Whiting and Mr Ford. We return to that issue below.

<u>(3) What happened at the mediation meeting of 29 June 2018; the claimant's fifth claimed public interest disclosure</u>

107 The first respondent, knowing that the SBM was leaving its employment in August 2018, had to make arrangements for the work of an SBM to be done at Pinkwell after then. The first respondent decided to ask Ms Nahbila Sher, who was the SBM for another of the schools for which the first respondent was responsible, to take over from the SBM (i.e. at Pinkwell). On 20 June 2018, Ms Sher sent the (Pinkwell) SBM the email at the top of page 472, inviting her to "meet for a handover". On 21 June 2018, the (Pinkwell) SBM sent to the claimant the email at pages 472-473. It forwarded the email from Ms Sher and was in surprising terms. It started in this way:

> "I am disappointed with the contents of this email [i.e. that of Ms Sher at the top of page 472]. On Wednesday we briefly discussed the fact that Nabhila would be supporting Pinkwell Primary School upon my departure at the end of August 2018.
>
> You also informed me that Nabhila and I should arrange a time to carry out the handover at a convenient time for us both.
>
> At no point during our brief conversation did we talk about me discussing the 2018/19 Budget, Yearend, Payroll and general finance procedures with another business manager – if we had I would have asked for justification. This has left me feeling that the Pinkwell's SLT have concerns about the management of the financial management of the school and if this were the case, why has it not been discussed with me?

My appointment to Pinkwell was based on my wealth of experience and understanding of financial management. I now feel the contents of this email is [sic] questioning my financial management and integrity."

108 Even if the SBM had been told about the claimant's concerns about the overtime payments that the claimant had authorised to be made to her (which she had not), that would have been a surprising email to receive from the SBM. Later on that day, 21 June 2018, the claimant drafted the following text to send to the SBM, and (see pages 479-480) sent it to Mr Fisher, Ms Dickens and Mr Adams for their approval:

> "Thank you for your email yesterday.
>
> I can see you are clearly upset but my memory of the meeting was that I had been clear about having only four weeks and four days to go and that Nabila would be taking up an interim role of Financial Strategist.
>
> As two very highly regarded SBMs I made the assumption you would both see a handover in exactly the same way.
>
> I'm also very sad as I thought we had a good relationship. We have gone though so much this year. I've thought you found me supportive.
>
> Perhaps, I've not seen things as you do. I don't want to make things worse so can I suggest that we ask Mike Fisher to do a mediation meeting for us both? That way we can clear the air."

109 The SBM agreed to attend a mediation meeting with Mr Fisher, who then convened such a meeting on Friday 29 June 2018. The claimant's witness statement contained in paragraphs 92-105 her evidence about what happened before the meeting (in a preliminary meeting with Mr Fisher) and at the meeting itself. In paragraph 99, the claimant recorded that Mr Fisher did not "ask [the SBM questions about the pay issue". If that was a criticism, then it did not make sense to us since it was a mediation, not an investigation, meeting. In addition, the claimant referred in paragraph 99 of her witness statement to Mr Fisher authorising the SBM's request for holiday pay despite what the claimant referred to in paragraph 99 as her "disclosure about [the SBM's] misconduct and the lack of financial/system controls". Mr Fisher's account of what happened at the meeting with the SBM on 29 June 2018 was in paragraphs 39-45 of his witness statement, which he stood by firmly in cross-examination. We preferred Mr Fisher's evidence as to what had happened at it, as described in paragraphs 3941 of his witness statement, which were, as follows:

'39. I remember the main meeting quite vividly because the experience was very unpleasant. The atmosphere was tense and hostile. I recall that it started okay but then descended into a bit of farce. We needed to focus on the handover of [the SBM's] role and there was some conversation about that to begin with, but then the Claimant started to accuse [the SBM] of "purposefully deceiving" her and "playing a game" in relation to [the SBM's] disputed overtime payments (which I know have been described by others in detail).

40. [The SBM] became very upset and left the room, at which point the Claimant admitted that she should not have said what she said. The Claimant explained that she understood I was trying to stop another grievance being raised but went on to say she felt she had to share her concerns. I then went to find [the SBM] and she was on the telephone to Helen Okoro, the previous Principal at Pinkwell. Ms Okoro was put on loudspeaker and explained that she and Caroline Whalley, Chair of Trustees, had approved [the SBM's] overtime prior to the Claimant's appointment. It would be fair to say that Ms Okoro did not understand what all the fuss was about and categorically confirmed that this had been approved.

41. Fortunately, I was able to calm [the SBM], who was in tears and talking about going off sick, and persuaded her to return to the room with the Claimant. The remainder of the meeting probably lasted around 20 minutes and was very tense.'

110 On Monday 2 July 2018, Mr Fisher sent the claimant and the SBM a statement of what he called the key points of the meeting (page 520). He included in it the statement that "Following on from the meeting, it has been agreed that it is best to move forward and focus on the handover." The email recorded that there was to be a follow-up meeting on 17 July 2018 and that at it, they could "clarify holiday and what this will look like baring [sic] in mind I understand the policy currently states up to 5 days can be carried over." That was a reference to the SBM's request to be paid 20 days' pay for accrued untaken holiday, including holiday which had not been taken by her during the preceding (2017-18) holiday year. The claimant's response was sent the next day (it was at pages 521-522), and in it the claimant thanked Mr Fisher for the time that he had spent with her and the SBM on 29 June 2018 and said this:

> "I certainly agree that these are the key points that we discussed with you."

111 However, in paragraph 105 of her witness statement, the claimant said this:

> 'I certainly did not agree with Mike Fisher's statement that "Following on from the meeting, it has been agreed that it is best to move forward and focus on the handover". I do believe that this was an attempt to brush under the carpet the serious issues I had raised.'

112 Mr Fisher's witness statement contained in paragraph 49 the following statement:

> "The sole focus of the Claimant's 'concern' in the mediation meetings was to challenge [the SBM] on her overtime payments. She said nothing about systems and controls or [the SBM] continuing to have access to school systems during the meeting. If she had wanted to remove [the SBM] from the school systems that was, I believe, entirely within her scope of authority as Principal, and I would have asked who else could take over [the SBM's] responsibilities instead."

113 We accepted that evidence of Mr Fisher also, and preferred it to that of the claimant in paragraph 99 of her witness statement, if and to the extent that it could be read as saying that she had raised the matter of "systems and controls". (We have set out below in paragraph 121 the part of paragraph 99 of the claimant's witness statement in which that was said.)

The claimant's conversation with Mr Adams of 5 July 2018; claimed protected disclosure 6

114 The view of the claimant in paragraph 105 of her witness statement (which we have set out in paragraph 111 above) was not reflected in the claimant's email to Mr Fisher of 3 July 2018 at pages 521-522. However, it was supported to an extent by the content of an email that Mr Adams sent Mr Greenway on 5 July 2018 of which there was a copy at page 537. That email related to what the claimant claimed was her sixth protected disclosure. She described that disclosure in paragraph 108 of her witness statement, where she said that on 5 July 2018 in a meeting with him, she "informed [Mr Adams] of the need to carry out a full financial audit before the termination of [the SBM's] employment on 28 August 2018." She continued:

> "As [the SBM] had resigned to commence employment at another school, I was deeply concerned about the risk of fraud occurring in the future. I asked Simon Adams to take steps to mitigate that risk. I requested and made it very clear during my discussion that the financial irregularities should be investigated in accordance with the Trust's whistleblowing and fraud policies and a full audit carried out before the end of the school term and [the SBM's] leave date. I considered the delay in carrying out the audit to be a concealment of the wrongdoing."

115 Mr Adams' witness statement contained this paragraph (number 49) about the manner in which the meeting came about and what was said at it:

> "With regards to PD6 [i.e. the claimant's sixth claimed public interest disclosure], I was at Pinkwell on 5th July 2018 because I was there to conduct some exit interviews [535] with various members of staff and I do recall meeting with the Claimant to let her know the feedback, which was generally positive, and the notes of which I also forwarded to the Claimant [538]. Whilst I cannot specifically recall our conversation, it seems clear from the subsequent email correspondence that we did speak about some concerns she had and her wish to carry out a financial review at Pinkwell because I communicated this to Mr Greenway in an email at 18.52 that evening [537]. Having said that, and as previously mentioned, I do tend to write anything down of significance and having checked my notebook on 5th July, I have no notes whatsoever of a conversation with the Claimant, which suggests to me that the Claimant did not raise an alarm bell."

116 The email from Mr Adams to Mr Greenway at page 537 was, so far as relevant, in these terms.

> "Had a good meeting with Annette this afternoon, she wonders if she should carry out a full financial review after [the SBM] leaves. She is feeling wobbly about some decisions that may have been made without her full knowledge and would like to know sooner than later if there are any issues. Thoughts?
>
> Also I did exit interviews as part of Annettes' PM and for the LGB. Staff were overwhelming [sic] positive about her strong leadership and they trusted her and felt she trusted them now to do their jobs. There were a few issues, mainly about pace of change (although this has settled down) and they felt that as leaders left they were left in limbo somewhat."

117 We found that email to be the best evidence of what was said by the claimant to Mr Adams on 5 July 2018: she suggested that there be a "full financial review after" the SBM had left, and not before then, and that all that she expressed was concern about the manner in which she had authorised payments to be made to the SBM in respect of overtime. As with other aspects of the claimant's evidence (to which we refer above), we regarded her evidence to us about what had happened when she spoke with Mr Adams on 5 July 2018 to result from her remembering what she now wanted to have happened rather than what had in fact happened.

118 Mr Greenway's response to Mr Adams' email to him of 5 July 2018 was this (also on page 537), sent 11 minutes later:

"Why don't you suggest to her that we commission the internal auditor to spend a couple of days reviewing.

It won't cost much

H"

The claimant's email to Ms Giulia Dixon of 15 July 2018

119 On Sunday 15 July 2018, the claimant sent Ms Giulia Dixon, an Assistant Director of EPM, the email at pages 575-576. It started:

> "Thank you so much spending the time to talk to Luke [an Assistant Principal at Pinkwell] and myself. It really has been a horrible first year at Pinkwell dominated by with so many HR cases.
> ...
>
> On Friday we discussed the school's concerns over the pace of support. This is based on both the previous cases and new cases. This has meant an untenable additional workload trying to ensure HR cases are kept on track whilst trying to run a school with over 830 pupils. As you can appreciate I am understandably disappointed that I have potentially five cases going forward into September. I'm sure you can also appreciate this will overshadow my summer break."

The resumed mediation meeting of 17 July 2018

120 The claimant did not refer in her witness statement to what happened so far as relevant at the resumed mediation meeting of 17 July 2018 to which we refer in paragraph 110 above. Mr Fisher, however, did, in paragraphs 55 and 56 of his witness statement. In paragraph 55 he said that "This second meeting was also quite a tense affair but passed without real incident." On 17 July 2018, the claimant sent Mr Fisher an email at 19:36 (pages 592-593). It started: "Thank you very much for the time you spent in Pinkwell today. Hopefully we can score SW off the list soon. The whole salary/ finance issue has been very upsetting." She said nothing more in that email about the matter of the SBM. On the next day, in his email at page 590 sent at 11:30 to the claimant and the SBM, Mr Fisher recorded this:

> "We discussed the policy around carry over, and the circumstances Pinkwell were in last year, and it was agreed that the most pragmatic approach would be for [the SBM] to carry over 10 days leave."

121 The claimant did not respond to that email, as far as we could see. She did, however, refer in paragraph 99 of her witness statement, in connection (wrongly) with what had happened at the meeting of 29 June 2018, to what had happened in that regard in the meeting of 17 July 2018. She did so by saying this:

> "Furthermore, despite my disclosure about [the SBM's] misconduct and the lack of financial/system controls, in breach of the School's policy on the carrying over of accrued but untaken annual leave from previous years, Mike Fisher authorised [the SBM's] request for holiday pay (10 days were approved as opposed to the 20 days she claimed) for the year 2016/2017. This was inconsistent with the treatment of other employees at the School. The School's policy limits carry over of leave to a maximum of 5 days (subject to prior approval). I, as Headteacher, had not authorised the payment and no documents had been provided to evidence the authorisation of the carry-over of leave. My concerns about the importance of adhering to the School policy and the importance of ensuring equal treatment for all staff were ignored."

122 However, the claimant accepted that the SBM had not taken all of her holiday entitlement in her 2017-2018 holiday year. The claimant expressed in oral evidence a concern that the SBM had not worked full working days when the school was closed, and justified her resistance to the SBM being given pay for 20 days' accrued leave on that basis. We did not accept that she had in the resumed mediation meeting on 17 July 2018 expressed what she called in the final sentence of the extract from her witness statement which we have set out in the preceding paragraph above "concerns about the importance of adhering to the School policy and the importance of ensuring equal treatment for all staff".

Mr Whiting's draft report and Mr Greenway's response to it

123 In paragraphs 78 and 79 of Mr Greenway's witness statement he described what had happened when Mr Whiting's draft audit report concerning the first respondent and Pinkwell was completed:

> "78. I believe Mr Whiting's first drafts were sent to [the SBM] on 17th July 2018. [The SBM] forwarded these to me on 19th July 2018 [594]. In the intervening period, I had spoken to Mr Ford by telephone, as he had called me to express his alarm at the findings of the report and asked that I forward the report to the other Trustees, which I did in advance of a scheduled Board meeting the following day [660]. I have since learned that the Claimant had already spoken to Mr Ford but I do not think I was aware of this at the time.

79. It was immediately apparent on reading Mr Whiting's findings that he could not have seen all of the relevant information that we had seen about the issue of [the SBM's] pay because otherwise there was no way he could have reached the conclusions he did on this issue."

124 Mr Greenway described what happened next in the following paragraphs of his witness statement. He said that he sent the documents at pages 714-721, which included the email trail to which we refer in paragraphs 44-48 above, and that he spoke to Mr Whiting on 24 July 2018, when Mr Whiting said that he had not seen that email trail before. Mr Greenway said this in paragraph 87 of his witness statement (which we accepted):

> 'It was clear that Mr Whiting had not been provided with full details by [the IFD] and/or the Claimant and I remember him telling me that he was "mortified" at having been misled in that way and he apologised. Following that conversation, Mr Whiting agreed to revise his report for re-submission.'

The invoice from the educational psychology service about which the claimant wrote on 20 July 2018

125 At 08:31 on 20 July 2018, which was the last day of the summer term of that year, the claimant sent (with "a big apology") an email to Mr Devaney and the other members of the LGB, copying it to the IFD, about an invoice for the services of an educational psychology service which she said she "and the business team" had "forgot[ten] to secure" in respect of the following, i.e. next, year. The email was at page 664. In it, the claimant asked that the LGB agreed to Mr Devaney "signing this off as part of next year's budget". The IFD was not supportive, opposing that occurring (as shown by her email at page 665, sent at 09:33 on that day). Mr Adams, in contrast, was supportive, saying in an email sent at 10:43 of which there was a copy at page 666, that he would ring the IFD and that they would "find a solution". Mr Devaney was also supportive (as shown by his email of 10:47 at the top of page 667). Mr Anderson and the IFD were concerned about the possible application of one of Her Majesty's Revenue and Customs directives, commonly referred to as IR35, but the claimant did not suggest that they were wrong to be so concerned.

The Browne Jacobson report's initiation

126 Also on 20 July 2018, there was a board meeting of the first respondent. The minutes of it were at pages 674-679. At page 675, this agreed action was recorded:

"CEO [i.e. Mr Greenway] and HRD [i.e. Ms Dickens] to commision [sic] external independent investigation into issues at Pinkwell raised in the Draft Internal Audit Report".

127 Mr Ford proposed to Mr Greenway and Dr Whalley a set of terms of reference in an email sent shortly after the meeting. The email and its enclosure were at pages 680-682. The final two (of the proposed six) areas on which a report was sought were these:

127.1 "What steps did the trust take to investigate? How quickly did this happen? Were adequate steps were taken to safeguard the academy and the trust, given the circumstances and information available at that time?"

127.2 "Is there a requirement for disciplinary action, or reports to any government agency?"

The claimant's resignation

128 On Monday 23 July 2018, at 10:31, the claimant sent the email and its enclosure at pages 702-704, to Mr Adams, Mr Devaney, the IFD, Ms Shuttleworth and Ms Dickens. In the email the claimant wrote that "having considered my position I have decided to resign" for the reasons stated in the "attached document". The document was in the form of a letter addressed to "Simon", i.e. Mr Adams. The claimant said during oral evidence that it was not an example of her best work, as it contained textual errors and some entries in the main section of the letter (which was in the form of a list of claimed events in chronological order) were out of date order. The letter started in this way:

Thank you for you call [sic] on Friday. I certainly appreciate the support you were trying to give.

However, I would like to thank [the IFD] for highlighting the oversight with EdPsych's invoice. She was absolutely right to do so and I certainly accept my mistake. I appreciated that [the IFD] has addressed the oversight and found solution to ensure Pinkwell can continue to improve it's Inclusion offer.

However, I would like you all now to review the list of HR and financial irregularities that have impacted so much on moving the school forward."

129 There then followed a long list of events, in respect of some of which there were references to the following or otherwise of policies. The final part of the letter was in these terms:

"On Friday 13th Guilia Dixon and I discussed the school's concerns over the pace of HR support from EPM. I have requested that CK no longer works with school. It appears that even up to 20th July she was still attached to the school.

For myself I have had an untenable additional workload trying to ensure HR cases are kept on track whilst trying to run a school. As you can appreciate I am understandably disappointed that I have potentially five cases going forward into September. This will understandably cloud my ability to relax and enjoy a well-earned rest.

So it is will [sic] much sadness, that I feel this is not a viable position for any Principal and would now like to tender my resignation.

My last day of employment will be 31st December."

130 One of the major factual issues for us (bearing in mind what is said in paragraph 24 above) was for what reason or reasons the claimant resigned, and whether or not she did so to any extent in response to something which we concluded was detrimental treatment within the meaning of section 47B of the ERA 1996 and which contributed to a breach of the implied term of trust and confidence. We therefore had to come to a conclusion on the real reason or reasons for the claimant's resignation. In that regard, we came to the following conclusions and/or took into account the following factors.

130.1 The claimant's main reason for resigning was the "untenable additional workload" of the "HR cases" to which she referred in the passage which we have set out in the preceding paragraph above. We came to that conclusion because it was in our view plainly the thing that caused her to resign; it was the immediate cause of her resignation. That conclusion in turn was supported strongly by the text of the email of 5 July 2018 at page 533 of which we have set out the material part at the end of paragraph 68 above. It was also supported strongly by the email of 15 July 2018 at page 574 the material part of which we have set out in paragraph 119 above. It was also supported strongly by the text at page 454 which the claimant sent on 27 February 2018 and which we have set out in paragraph 70 above, stating that the "before Christmas" the claimant "got overwhelmed".

130.2 That conclusion was also supported by the fact that the final five entries in the list of claimed "HR and financial irregularities" in the middle of the letter at pages 703-704 were references to things that were going to happen and not what had happened: they were things that were going

to happen in August and September 2018 and they concerned staffing issues at Pinkwell.

130.3 That conclusion was also supported by the following passage in Mr Fisher's witness statement, which we accepted:

> "7. During the course of 2018 I got to know the Claimant quite well because we were in regular contact about a large number of HR issues that arose at Pinkwell. In fact, the demands of Pinkwell were so great that from March to July, I was actually physically at Pinkwell on average for one day a week. This was in addition to speaking to the Claimant on an almost daily basis, including evenings, and email correspondence.
>
> 8. I can say with complete confidence that during my time with the Trust, no Principal of any school has received the level of support the Claimant received from the Trust's central HR function."

131 The claimant was distinctly unhappy about the fact that she had approved the overtime payments for the SBM about which she had first written to Mr Greenway on 11 June 2018. The main body of her letter of resignation referred to a series of events (to which the claimant referred, as recorded in the text set out at the end of paragraph 128 above, as "HR and financial irregularities") which occurred throughout the year. In relation to some of those events the claimant referred to the question whether or not she understood a relevant policy to have been followed. We concluded that the claimant referred to the latter question only because she was trying to find a justification for her own culpable behaviour, which (see paragraphs 104 and 105 above) she had admitted to Mr Whiting. Thus, we concluded,

131.1 she sought to deflect attention from her own culpability by asserting that the first respondent's policies and procedures were inadequate in that they had not prevented her from making what she now believed to have been a culpable mistake, and

131.2 the possibility that the respondent had not followed one or more of its policies was not relevant to, in that it did not influence in any material way, the claimant's decision to resign.

132 In addition, the first half of the list of alleged "HR and financial irregularities" necessarily had nothing to do with the claimant's claimed public interest disclosures, since they predated those claimed disclosures. In the subsequent entries in that list there were in fact only two references to something which the

claimant now asserted constituted detrimental treatment of her done on the ground that she had made a public interest disclosure. They were:

132.1 on 18 July 2018 the SBM being "given a further 10 days holiday despite 5 day in policy from 16/17"; and

132.2 the SBM still having "access to Pinkwell finances until 28th August".

The respondents' initial response to the claimant's resignation

133 Mr Adams was the named recipient of the claimant's resignation letter. He did not seek to persuade the claimant to withdraw her resignation, and he explained why in paragraph 69 of his witness statement, which we accepted. It was in these terms:

> "I can understand that someone might ask why, if I believed in the Claimant so much, I did not attempt to persuade her to stay at this point. The truth is that in addition to focusing on what needed to be done to protect the school, I respected her decision. The Claimant had told me as early as November 2017 that she considered her position untenable and had made similar comments to me subsequently. Unfortunately, I cannot recall details but I do remember mentioning one such occasion to Bob Anderson, Trustee, and him replying along the lines of "oh, she is always threatening to resign". Hugh Greenway had also previously commented to me about the Claimant threatening to resign. So, it just seemed to me that perhaps the decision had been a long time coming and she had just finally tired of all the HR issues. Given she is an adult and experienced professional, I simply did not think it was appropriate to question her decision. However, as I shall explain later, I did subsequently ask the Claimant whether she might reconsider her position because of a lack of candidates to succeed the Claimant."

134 In fact, the person who was subsequently appointed as the claimant's permanent replacement (Ms Rachel Jacob) had recently been recommended to the respondents as a Principal and had just (on 20 July 2018, in the email on page 699) declined to be considered for the post of Principal of another of the schools for which the first respondent was responsible for reasons related to the distance of that school from her home. Thirty-two minutes after receiving the claimant's emailed letter of resignation, Mr Adams wrote to Ms Jacob the email at page 707, asking her whether she would be willing to "travel to Pinkwell by Heathrow?"

135 Mr Greenway himself had a conversation with Ms Jacob soon after the claimant resigned, as he said in paragraph 111 of his witness statement. What he said in paragraph 113 of that statement was material to our conclusion on the question whether or not the decision to terminate the claimant's contract of employment

during her notice period by exercising a contractual power to give her pay in lieu of notice was to any extent detrimental treatment done on the ground that she had made a public interest disclosure. Paragraph 112 of Mr Greenway's witness statement was material in that regard too. Those three paragraphs were as follows:

> "111. Shortly after learning of the Claimant's resignation, I had a telephone conversation with Ms Jacobs [sic] about the upcoming vacancy at Pinkwell and suggested that, if she were interested, she might like to discuss the position with Simon Adams.
>
> 112. The early discussions with Ms Jacob were positive and it appeared that we may have secured her services by the end of August. However, at that time she had some personal concerns about aspects of the role and decided not to pursue her interest, which she communicated to Mr Adams by email on 4th September [1006]. This was a disappointing blow, as I understood we were not inundated with viable candidates.
>
> 113. I know that Mr Adams was particularly anxious about the prospect of failing to secure a permanent replacement for the Claimant at Pinkwell and he started to think about whether the Claimant could be persuaded to retract her resignation and remain with the Trust. I remember that he called me one day (which I now understand to have been on 12th September) to explain his thoughts and intentions. I must admit that I had my reservations about the Claimant continuing long term. To my mind, the Claimant did not represent a truly stable permanent option for Pinkwell and she did not appear a good 'fit' for the Trust as a whole. After threatening on numerous previous occasions that she might do so, the Claimant had finally tendered her resignation citing an untenable workload. That did not strike me as someone who could be relied upon going forward. In addition, the Claimant's HR, governance and legal demands had proved to be an enormous drain on the Trust's central team, which had drawn capacity away from other schools in the Trust. In essence, I felt that the Claimant was not a team player and that her employment came at a detriment to other schools, who all needed support. With that in mind, I explained to Mr Adams that he had been shielded from the full extent of the Claimant's demands on the Trust's central functions and advised that he exercise caution. I told him that ultimately it was his decision, which it absolutely was, but I suggested it might be sensible for him to focus the conversation on the Claimant remaining for a limited period of no more than one year. That struck me as a reasonable basis on which to proceed; it would offer immediate stability to Pinkwell, with

a backstop should all parties need one. Of course, if the extension then worked out, there always remained the possibility of making it permanent."

136 Mr Greenway was pressed very hard on the sincerity and accuracy of his evidence in the latter paragraph. We accepted that, like the claimant, he did, on occasion, remember things in a way which suited his position, but we found him to have done that very much less than the claimant, and certainly his evidence about the claimant's demands was supported by the evidence of Mr Fisher which we have set out in paragraph 130.3 above which, as we say there, we accepted. In addition, the extent to which the claimant had sought to work against Mr Greenway was evident from some of the text exchanges between her and the IFD which were in the bundle, most notably that which we set out at the end of paragraph 72 above. Further, we found Mr Greenway generally to be an honest witness, doing his best to tell the truth, and we agreed with his proposition that his willingness to permit Mr Adams to seek to persuade the claimant to remain as the Principal at Pinkwell showed that his motivation towards the claimant was in no way malicious, at least consciously.

The ESFA letter of 17 August 2018

137 On 17 August 2018, the ESFA's Mark Foley sent the letter at pages 866-869 to Dr Whalley, saying that the ESFA had "received allegations with regard to" the first respondent, which related to the management of public money by the first respondent. It later transpired that the allegations had been made by the IFD, who had (unknown to Mr Greenway) sent the ESFA Mr Whiting's draft report before it had been seen by Mr Greenway.

138 Mr Greenway was on holiday at the time, in Spain. He was sent the ESFA's letter by Dr Whalley, and he sent her a draft response to the ESFA in a long and detailed email which he told us (and we accepted) was written by him laboriously writing it on a mobile telephone screen, with intermittent access to the internet at the time. The draft response was at pages 870-871. It was robust. It had the following passage under the heading "Background":

"• Pinkwell is a very complex school in a turnaround situation
• The relationship between the Principal (Annette Sant) and the SBM [name given] which had been close has completely broken down amongst vicious recriminations
• We believe there is a significant risk of an Employment Tribunal claim from one or both parties
• The SBM resigned at the beginning of the summer term and has left our employ

- The Principal resigned at the end of the summer term and will leave at Christmas
- The [IFD] has not had her contract extended and has left our employment; amongst the reasons we let her contract lapse were:
  - o A significant lack of understanding of education finance o Very poor communication skills that upset and undermined a significant number of the Trust's headteachers and senior staff
  - o A tendency to only see black and white and to jump to premature conclusions
- The Trust has appointed an experienced Academy Finance director and long term public servant, Simon Pink, who starts as our permanent FD on Sept 1st".

139 The email included this passage under the heading "Events":

> "• Our auditor has since revised his report twice and removed the findings of fraud and breach of funding agreement and may revise it again but he has stuck to his recommendation of an independent review (with which I disagree but accept)
> - I have invited proposals from a number of firms, having pointed out to the Trustees that the cost of this and its impacts will be significantly higher than the £12k at issue, indeed one was for £60k
> - It should be noted that the actual sum at issue from the point at which the Principal flagged her concern to the Trust is closer to £3k, as from her own evidence she approved the pay rise at the time
> - We have already engaged Browne & Jacobson to review the events outlined above at an indicative cost of £12k".

140 The email ended in this way:

> "I strongly recommend you defer your investigation until we have completed ours. By which point, I suspect will probably be a significant waste of public funds itself.
> I will be back in the office on August 30th and look forward to talking to you then."

The Browne Jacobson investigation

141 The investigation to be carried out by Browne Jacobson ("BJ") (not, as Mr Greenway wrote in the passage set out in paragraph 139 above, "Browne & Jacobson") was commenced after BJ's Mr Nick MacKenzie had sent the firm's letter of 20 August 2018 and its enclosures at pages 879-893. The scope of the investigation and the report was stated at pages 881-882, in terms which did not reflect in full those which Mr Ford had proposed as we describe in paragraph 127

above. Instead of the two which we set out in that paragraph, there were these final two questions for investigation and report:

141.1 "any areas of sector best practice not adhered to in respect of these matters", and

141.2 "any recommendations for further actions to be taken by the Trust in respect of these matters."

142 There was much evidence before us about the BJ investigation and report, and there was much cross-examination by reference to what was recorded by BJ to have been said in the interviews which they carried out with Mr Greenway and relevant witnesses of the first respondent. There was also much made of the fact that BJ as a firm were engaged by the first respondent from time to time (i.e. not on a retainer) to provide legal services to the first respondent in relation to for example employment matters, so that the investigation which they carried out was, it was asserted by and on behalf of the claimant, not truly independent. Much was made of the fact that the partner of BJ who led the investigation, Mr Mark Blois, had been at education sector events at which Mr Greenway had also been present and in one case contributed to a report to which Mr Greenway had also contributed. We bore those things in mind in considering the one material part of the evidence before us relating to the BJ report, which was that Mr Greenway had asked BJ to include in the report a paragraph which, it was contended, was not called for by BJ's terms of reference and was evidence of Mr Greenway's desire to suppress or preclude proper consideration of the issues which the claimant had raised in what she claimed were public interest disclosures. The relevant event and its justification were described by Mr Greenway in paragraphs 126 and 127 of his witness statement, which were in these terms:

‘126. Browne Jacobson shared a first draft of their report by email timed at 16.58 on 19th September [1249] and invited our comments. We provided responses on 20th September [1258]. In my email attaching the draft report, I asked:

“*Would you be prepared to consider the addition of two points between 90 and 91 along the lines of:*

- *It is our view that that management of the trust has acted promptly, fairly and proportionately in dealing with these issues as they have arisen.*
- *The decision not to instigate disciplinary proceedings against SW or AS was appropriate given the available evidence and organisational risk.*

This will help significantly with the ESFA and I trust is not putting words into your mouth...”

127. Evidently, Browne Jacobson agreed with my suggested wording, as they were included in the report [1284], as can be seen in my summary of the Report’s findings, below. I understand that the Claimant may seek to interpret this as demonstrating both a lack of independence on the part of Browne Jacobson and my ability to influence the outcome of their report. However, I reject that view. Browne Jacobson is an SRA regulated professional law firm of good standing and the highest integrity. I do not believe there is any reasonable or warranted basis on which to question their ethics or their competence in acting independently. I have no doubt that had they disagreed with my proposed wording, they would have said so. I think it is quite wrong to impugn their integrity and professionalism in this manner.’

143 In fact, we saw much reason for the inclusion of the suggested paragraphs, assuming they were justified, given the terms of the AFH set out in paragraphs 40 and 41 above. As for whether or not they were justified and whether or not Mr Greenway’s suggestion that they were included in the report showed a desire on his part to suppress evidence or hinder any proper consideration of the issues raised by the claimant, we concluded that

143.1 they were objectively fully justified; and

143.2 they did not show any desire on the part of Mr Greenway to suppress evidence or hinder any investigation by anyone into the issues raised by the claimant.

144 BJ's report did, however, contain one or two minor errors. The claimant referred in paragraph 18 of her supplemental witness statement to a number of things that she claimed were erroneous or unfair to her, but we did not see them as affecting the validity of the conclusions of the report. The report was in fact sympathetic to the claimant in material ways, most notably in what it said in paragraphs 88f, 88g, 88i and 89 on pages 1295-1296.

145 On 24 September 2018 at 22:53 the claimant sent the email to Ms Shuttleworth at the top of page 1324, in which she said this in response to Ms Shuttleworth's immediately below that, where Ms Shuttleworth had written:

> "Further to your conversation with Simon this morning I thought it best to email to confirm that, as per Caroline's email below, the report from Browne Jacobson will firstly go to the Audit Committee and it is that committee of the Trust Board which will consider and approve communications with all parties involved as appropriate.
>
> I am hopeful that the Audit Committee will be in a position to meet this week and I will confirm that with you as soon as I can."

146 The claimant's response was this:

> "It's not a concern of mine that the investigation report should go to the AC first.
>
> I would like to add that as a key witness to the investigation and as the Principal of the School it would be abnormal if I did not receive a copy as this affects Pinkwell directly."

147 The following morning, at 08:11, i.e. on 25 September 2018, Ms Shuttleworth forwarded (page 1323) that email to Mr Greenway. He then, evidently having reflected carefully, at 13:49 on the following day, 26 September 2018, sent the email at pages 1322-1323. The email started by saying that the claimant would not be given sight of the whole report and giving reasons for that, which included that the report was "legally privileged" (which he reiterated in oral evidence as the reason for not giving the claimant the report before these proceedings were commenced). The email then referred to the fact that the claimant had "intimated in a number of conversations and emails recently that [she felt] 'bullied' and 'isolated'" and recommended that she contacted the first respondent's "Employee Assistance service" and took up the offer of an exit interview with Ms Dickens. Mr Greenway then referred in the email to the process being followed for the appointment of a successor to the claimant and asserted out that it was

"neither traditional nor appropriate to involve an outgoing member of staff in the process of recruiting their replacement". The final part of the email was in these terms:

> "4. In the interests of facilitating stability and a successful handover for the school, I should be grateful if you would prioritise the following actions for the duration of your notice period
>
> - Maintaining an optimistic and positive behaviour towards children, teachers and governors to mitigate the impact of your departure on the outcomes for children
> - Creating an ethos of openness, reflection and self-development in Pinkwell staff
> - Identifying and developing emerging talents to support succession planning
> - Engaging positively with Trust staff to facilitate the successful resolution of ongoing staffing matters at the school, including ongoing grievance and performance management procedures
> - You will be aware that these are drawn both from National Standards for Headteachers and the Elliot Foundation' Golden Rules
>
> If you have any queries in relation to the content of this email please don't hesitate to let me know."

148 Mr Greenway's explanation for sending that rather strong email was in paragraph 152 of his witness statement, in which he said this:

> "Given that Pinkwell was once again in a state of uncertainty, I did not want the Claimant, who had already resigned two months prior, creating more difficulties and stirring up trouble with the LGB, which I suspected she was doing. With that in mind, I decided to confront her with some truths about her position and what we expected from her going forwards."

149 It was not claimed that the email was detrimental treatment within the meaning of section 47B of the ERA 1996, but we regarded it as an important part of the background to the decision to terminate the claimant's employment before the ending of her notice period. As a result, we considered whether or not to accept Mr Greenway's explanation of his reason for sending the email at pages 13221323 and his motivation in sending that email. Having done so carefully, we accepted that what he put in paragraph 152 of his witness statement was his sole conscious motivation for sending the email at pages 1322-1323.

150 The aftermath of that email was described by Mr Greenway in paragraphs 153 and 154 of his witness statement, which were also relevant, and which we also accepted:

> "153. I did not receive a reply from the Claimant. However, I believe she must have discussed the email with Ann Breslin-Bowen, Principal at another of the Trust's schools, Hillingdon, because on 27th September, Ms Dickens reported a telephone call she had received that morning from Ms Breslin-Bowen, who had called to express concern about the Claimant's well-being and mentioned that "a letter she received yesterday had knocked her for six" [1326].
>
> 154. A couple of days later, the Claimant was signed off sick and ultimately did not return to the school. However, despite being unwell, the Claimant continued to check her email and was communicating with Governors and Headteachers at other schools within the Trust, effectively lobbying for support and, so I was told, being very negative about the Trust as a whole."

The communications of Mr Greenway to the members of the LGB and the claimant of 5 October 2018

151 On 4 October 2018, Mr Shajhan Ali, an elected parent governor, called for an emergency meeting of the LGB to take place on 11 October 2018 to discuss (see his email at page 1353) "the resignation of [the claimant]". He wrote that the key questions that remained in his mind unanswered were:

> "1. Why has Annette resigned?
> 2. What has been done to retain her?
> 3. Does she have another post to go to?"

152 On 5 October 2018, Mr Greenway sent the documents at pages 1368 and 1370. The document at page 1370 was a letter addressed to the claimant. The document at page 1368 was an email addressed to Mr Devaney in his role of Chair of the LGB. They were in similar terms, and summarised the outcome of the BJ report. The letter to the claimant included this passage:

> "**Relevant findings**
>
> - Pinkwell school is in a complex turnaround situation
> - There was no malicious intent from any party involved in these matters
> - A combination of ambiguity and assumption led to the issues that were investigated

- There was no fraud
- The management of the Trust acted promptly, fairly and proportionately
- The decision not to instigate disciplinary procedures against either [the SBM] or yourself was appropriate

Next steps

- No disciplinary action will be taken against any party involved for the events covered by the investigation

I trust that you will find this news reassuring. If you have any questions, feel free to contact me."

153 The email to Mr Devaney was in equivalent terms, and showed that a letter in the same terms as that which was sent to the claimant was sent also to the SBM. The email to Mr Devaney included a second bullet point under the heading "Next steps" in the following terms:

> "• The Finance Director and I are considering what additional checks and balances to the Trust's payroll procedures it may be necessary to implement in future".

154 On 9 October 2018, Mr Devaney forwarded to the other members of the LGB Mr Greenway's email to him to which we refer in the preceding paragraph above. The claimant responded by email on the same day. It is her case that what Mr Greenway did in referring to the possibility of disciplinary proceedings being initiated against her was a detriment done on the ground that she had made a protected disclosure. In her response (at pages 1372-1373; the text was also in a letter form rather than in the body of an email, at page 1375), she said things which were inconsistent with the proposition that she had in fact made such a disclosure and with the case which she later advanced in paragraph 67c of her Grounds of Claim (to which we return in paragraph 199 below) where she alleged (at page 26) that it was part of conduct which taken together constituted a breach of the implied term of trust and confidence to fail to "investigate concerns about gross misconduct/potential criminal conduct in accordance with the First Respondent's policies on fraud and whistleblowing (among other policies) and/or take any disciplinary action against [the SBM] or Ms Thomas" which "stunned" her. The email at pages 1372-1373 was also inconsistent with the case advanced in paragraph 66(b) of the Grounds of Claim (at page 25), which was in these terms:

> "She had a reasonable suspicion short of certainty that fraud and/or corrupt practices were being undertaken at the School by the First Respondent's employee as set out in her email exchange with the Second Respondent on 11 June 2018".

155 The majority of the response of the claimant at pages 1372-1373 is material. After an introductory paragraph, the response was in these terms (the italics being in the original; we have added the underlining in order to highlight the passage which is inconsistent with the above-mentioned pleadings):

> "I will respond to the substantive issues raised by your note and Hugh's summary in due course through the appropriate processes, having taken the advice of my professional association and their lawyers.
>
> However, for clarification and so that everybody copied into this note can be in no doubt, until I received Hugh's summary, *confidentially*, on Saturday 6th October, I had not been informed that I had been subjected to a disciplinary process, and I have still not been made aware as to why such disciplinary action might have been considered or taken. *For the record, in the course of my thirty-five years in education, and across a range of senior roles in schools and a Local Authority, including successful headship, I have never been the subject of a disciplinary process.*
>
> <u>This issue arose because I raised concerns about the school finances and sought the support of The Elliot Foundation in addressing these. I did not make 'allegations', as suggested in your note, but merely expressed concerns for which I argued that an audit would have been the appropriate response.</u>
>
> I am disappointed and surprised that governors and others have heard about these - apparently *disciplinary* - matters for the first time in a note that you chose not to discuss with me, or at least to notify me of, before circulation. The circulation of such a note clearly raises a range of issues, not least in terms of the erroneous damage to my reputation and, for that matter, the other employee named in your correspondence.
>
> For reasons of my own wellbeing, I have been advised not to respond to any further correspondence on this or related matters, before the lawyers acting for me through my professional association have advised me on an appropriate response. I (and they) will, however, require the minutes of any meetings, including board meetings, at which this note or my case is discussed.
> Minutes and similar records aside, I ask that all copied into this note respect my request that there is no further correspondence at this stage."

156 That email was sent at 20:49 on 9 October 2018. Mr Ali at 23:35 on that day sent to all of the recipients of the claimant's email of 20:49 the email at pages 13731374, which started:

> "Dear All
>
> I have asked for and Manjit has supported a request for a[n] extra ordinary meeting of the governors. Its sole purpose is to discuss Annette['s] resignation. The details that had been provided to date were not sufficient for me to feel comfortable about the situation.
>
> Given Annette is unwell I do not expect her to be to be there.
>
> Connecting the dots this is an extra ordinary and disappointing chronology of events."

157 The rest of the email was very supportive of the claimant and assumed that the words which we have underlined in the extract set out in paragraph 155 were accurate. A meeting of the LGB was arranged to take place on 11 October 2018 to discuss the claimant's resignation.

158 On 10 October 2018, at 10:42, Mr Greenway wrote a draft email to send to Mr Devaney. That draft email was at pages 1376-1377. It suggested the text of a response to the email from Mr Ali. Mr Greenway evidently revised the draft email, as he sent a slightly different version at 11:50 (at pages 1377-1378). The final versions of paragraphs 4 and 5 of that proposed text are of particular importance and were in these terms:

> "4. Were disciplinary proceedings considered against Annette at any point?
>
> - Yes.
> - In making her initial allegations or raising her concerns (to be charitable), Annette implicated herself by saying that she had authorised overtime payments to [the SBM] representing an uplift of more than 20% without knowing or checking the amount and without seeking authorisation from or informing the LGB
> - Annette alleged that this was because [the SBM] took steps to hide the quantum of her overtime pay in order to get it approved - this allegation was refuted by the BJ investigation
> - Annette further suggested in her evidence that this was because

    - She assumed that overtime would be paid at national minimum wage
    - She had understood that she was approving casual overtime rather than contractual
- In my initial phone conversation with Annette following her 'whistleblowing' email I reassured her that we would not instigate any disciplinary proceedings against her for a number of reasons
    - She had admitted the failing and appeared contrite and focused on addressing the procedural issues
    - The turnaround context of the school meant that Annette was dealing with multiple calls on her time
    - [The SBM] had already resigned so the problem had solved itself provided that we could avoid a costly employment tribunal resulting from the complete breakdown in the relationship between Annette and [the SBM]
    - The BJ investigation entirely supports this decision

5. Were disciplinary proceeding considered against [the SBM]?

- Yes. Given that the initial allegation was effectively that of fraud and breach of trust
- I discussed this in detail with Ruth Dickens (HR Director) following Annette's initial email
- Given that [the SBM] had already resigned and the relationship with Annette was obviously and irretrievably broken we were convinced that any disciplinary process would fail to be able to find misconduct let alone fraud and it would be better for all if [the SBM] were allowed to leave the employment of the Trust as smoothly as possible

To summarise the position

- The relationship between the Trust and Annette is beyond repair and she has resigned
- Offence is being taken where none is given
- Fundamentally, I suspect that this is a personality clash that is noone's fault, it just happens
- The Trust is working hard on finding a replacement who will stay with the school for the long term and continue the good work that Annette has started
- It is time to move on".

The meeting of the LGB of 11 October 2018

159 Mr Devaney described the meeting of the LGB as a difficult one. The minutes of it were at pages 1431-1433 and they showed that the discussion had been detailed. Mr Adams was present at the meeting, and he said this about it in paragraph 103 of his witness statement:

> "I recall that some of the governors were quite upset, which I think was partly due to them having formed close friendships with the Claimant. I remember that they wanted to get a better understanding of the big issues that might cause a Principal to leave a school and they were keen for HR to arrange an exit interview with the Claimant (which I knew had already been offered by Ruth Dickens). What the minutes do not record is the mood of the meeting, which I felt was really quite hostile and I was pleased when it was over".

160 We accepted that description of the mood of the meeting as being an accurate one.

The claimant's grievance

161 On 25 October 2018, the claimant sent to Dr Whalley the letter with its enclosures at pages 1414-1426. It was headed "Written grievance" and was stated to be a complaint of "1. Automatic unfair dismissal" and "2. Detriment suffered as a result of making a disclosure in the public interest about financial irregularity/breaches of the Academies Financial Handbook".

162 The grievance was acknowledged by Dr Whalley on 30 October 2018 in her letter at pages 1443-1444, in which Dr Whalley wrote that she had received it by email only on the day before.

The claimant's subject access request

163 On 1 November 2018, the claimant sent Dr Whalley a subject access request (stated to be made under "s.45 of the Data Protection Act 2018 and Article 15 of the EU General Data Protection Regulation"). The email enclosing the request was at page 1459 and the request itself was at pages 1465-1467.

Deciding to give the claimant pay in lieu of notice instead of putting her on garden leave or simply letting her notice period expire

164 There were in the claimant's contract of employment these provisions (at pages S5 and S6):

"16.5 The Employer reserves the right, at its sole discretion, to pay you in lieu of any period of notice.

16.6 The Employer may at its discretion at any time including during any period of notice given by either party amend your duties and/or suspend you from the performance of your duties and/or exclude you from any premises of the Employer and/or the Employer's clients' premises and/or require you to work from home. During such time the Employer reserves the right for you to remain employed and to receive your salary and benefits.

16.7 You shall throughout any such period of suspension, exclusion and/or Employer requirement(s) continue to be an employee of the Employer and must comply with your obligations under your contract of employment."

165 Mr Adams' witness statement contained the following passage.

"109. There is little doubt that by [30 October 2018], I was of the view that the Claimant's situation was beginning to create difficulties for the Trust. Not only did we have the uncertainty around the future leadership of Pinkwell but the Claimant's continued sickness absence was giving us a more immediate headache, and was affecting the whole community. For example:

107.1. from a purely presentational perspective, the school was missing a visible figurehead, who would be at the school gate every day;

107.2. the senior leadership team were all relatively inexperienced, so they did not have anyone to whom they could seek guidance, or everyday approvals;

107.3. her absence meant that I had to conduct all of the performance management reviews, which are sensitive because they impact on pay;

107.4. budgets needed to be signed off;

107.5. parents evening was approaching;

107.6. we knew that an OFSTED inspection was approaching in January 2019 and so we needed to prepare the school

but we did not have anyone in-situ who was monitoring and evaluating the school.

110. The consequence of this, as I explained above, was that I effectively had to step in to support the leadership team at the school and assume some elements of responsibility normally held by a Headteacher. This was because we needed someone on-site on a regular basis and we wanted the school to continue on a 'business as usual' basis, working on the assumption that the Claimant would eventually return and not wanting her to return to a mess. During this time, I progressed a number of matters which would ordinarily have fallen in the Claimant's remit including an office restructure that had already commenced, a capability situation with the maths subject leader, in depth support needed for a specific member of the senior leadership team and resolution of an ongoing site staff job roles remit issue. In addition, the school needed my regular presence on site and availability via email and telephone in order to support with the general day to day business. My records show that I attended the school 8 times between 3rd October and 19th December. However, I also had another eight schools in my cluster to look after, another one of which was also operating with temporary headship support as the Principal had left and we had been unable to appoint a permanent replacement at that stage.

111. In addition, every time I was at Pinkwell I had to field questions about the Claimant and when she was likely to return, and I didn't really have any answers, apart from the knowledge of when her sick note ran out. The situation was really becoming quite detrimental.

Recruiting a new Principal and decision to terminate the Claimant's notice period early

112. As I have mentioned above, we had identified two options for replacing the Claimant. Our preferred option was, of course, to find a suitable permanent Headteacher. [The other was stated in paragraph 103 of Mr Adams' witness statement as being "to adopt the Executive Headteacher model, in relation to which I had approached two Principals within the Trust's London cluster".]

113. As it happened, in early October, Rachel Jacob (the candidate I had been in discussion with back in July and August) contacted me to say that she was interested in the position after all. I met with her at Pinkwell on 11th October (prior to the LGB meeting) and showed her around the school. To my delight, she really enjoyed the experience

and emailed me on 17th October to confirm that she would like to be considered for the position.

114. At this stage the Claimant had been signed off sick since 1st October (for two weeks) and then on 15th October for a further three weeks, and we suspected that the Claimant was unlikely to return to work before the end of her notice period.

115. Ms Jacob was actually available to start straight away and so, following her email to me on 17th October, we began discussing the prospect of her providing some leadership support to the school during the Claimant's sickness absence, particularly given the operational challenges we were facing, as mentioned above.

116. However, we were concerned about how this would be perceived by the Claimant and whether she would attempt to interfere with this arrangement. Despite being off sick, the Claimant had been active on emails pursuing her own agendas. Indeed, we believed she was stirring up the governors, who were very focused on assessing why the Claimant was leaving and what the Trust had done to try to retain her or had failed to do to make her want to leave, rather than concentrating on the task of securing a good replacement which, given Pinkwell's history, was critical. In addition, Ms Jacob herself was understandably a little uncomfortable assuming what would effectively be a headship style role whilst the Claimant was still employed as the Principal.

117. Ms Jacob was invited back for an interview with me and James Devaney, Chair of the LGB, on Friday, 2nd November, following which we decided to formally offer her the role, to take effect on 1st January 2019.

118. However, on Monday 5th November, we received notice that the Claimant had been signed off sick again for a further three weeks and by now it was obvious that the Claimant would not be returning. In the circumstances, in conjunction with Mr Greenway, Ms Dickens and Ms Shuttleworth we decided it was imperative Ms Jacob was able to commence work as soon as possible at the school and it became a question of how to achieve this.

119. The initial thought, which I think may have been advanced by Ms Dickens, was to explore whether we could place the Claimant on garden leave for the remainder of her notice period. That would at least enable us to cut the Claimant from the school systems and

allow Ms Jacob an opportunity to come in without fear of the Claimant being able to communicate and potentially intervene by email.

120. From memory, it was agreed that Ms Dickens would seek legal advice to check whether there were any risks attached to putting the Claimant on garden leave and what the process for doing that would be; whilst Hugh Greenway would seek the necessary internal permissions to take that action and also to appoint Ms Jacob."

166 We accepted the whole of that passage as being a completely honest and accurate statement of Mr Adams' perception of the situation.

167 The sequence of events which followed was described by Ms Dickens in paragraphs 113-126 of her witness statement, and by Mr Greenway in paragraphs 157-168 of his witness statement. We accepted those passages of those witness statements, not least because they were supported by the documents to which they referred. Those documents included a note of the advice given by a solicitor at BJ, Ms Helen Badger, in relation to which the first respondent had evidently waived privilege. There was a copy of that note at page 1520. The sequence of events, in summary, was this.

167.1 Ms Dickens (as recorded in the email at page 1511) sought advice from Ms Badger at 17:13 on 6 November 2018 about the possibility of putting the claimant on garden leave. At the time, Ms Dickens was not aware that the claimant's contract of employment contained a power to put her on garden leave. Ms Badger called back shortly afterwards and advised (as she recorded on page 1520) that giving pay in lieu of notice would be "better and more justifiable". Ms Badger advised then that "Both are a risk but PILON is cleaner."

167.2 Ms Dickens then had a telephone conversation with Mr Greenway immediately afterwards, to, as she put it in paragraph 117 of her witness statement, "relay the advice ... given". She also said to Mr Greenway that she needed a copy of the claimant's contract of employment, and as a result of such need she emailed Ms Lisa Gannon, Pinkwell's Operations Manager at 18:09 (the email was at page 1512) asking for a copy of the contract. It was supplied by Ms Gannon at 18:21 (as shown by the email at the top of page 1513).

167.3 Just under half an hour later, the claimant's solicitors sent by email to Dr Whalley (the email was at page 1514 and was sent at 18:50) the letter before action at pages 1515-1519. It was headed "Proposed

proceedings: Annette Szymaniak v (1) The Elliot Foundation Academies Trust; (2) Hugh Greenway" and it started:

> "We act on behalf of the above named Client in connection with all matters pertaining to the termination of her employment with notice on 23 July 2018 and the detrimental treatment that she has been subjected to as a result of her protected disclosures at work."

167.4 That email was forwarded to Mr Greenway by Dr Whalley on 07:57 on the next day, 7 November 2018 (page 1521). He had not seen it before then. He forwarded it at 08:05 to Ms Dickens (also 1521), with this message:

> "Morning
> Here's today's instalment of joy ...
>
> Actually I think this makes things easier. Will discuss with you shortly".

168 The decision was taken by Mr Greenway on that day (7 November 2018) that the claimant's employment should be ended with pay in lieu of notice. Before he made that decision, he caused Ms Dickens to seek further advice from Ms Badger. Ms Badger advised caution and the taking of (as she said in her email sent at 12:05 on 7 November 2018, of which there was a copy at page 1530) "a little time to consider the position properly and to formulate a robustly worded rebuttal of the claims". Ms Dickens replied (on the same page) at 12:28, saying this:

> "[We] appreciate your response and concur with those sentiments entirely so happy for a more considered response to go out by end of the week.
>
> However, we would still like to invoke the PILON clause today as this facilitates removal of Annette's access to our IT systems with immediate effect (we are genuinely concerned about the risk her access poses to us as an organisation) and lends itself to the interim leadership support starting tomorrow without risk of Annette undermining that. I can draft a basic letter to Annette confirming that to go out from us today with the proposal that a more substantive response to her solicitors goes out from Browne Jacobson (or Rachel Broughton) later this week, does that sound acceptable to you?"

169 Ms Badger responded at 13:40 (also on page 1530) in these terms:

"I very much understand why you want to bring the employment to an end immediately. The contract entitles you to do so but the receipt of the letter from her solicitor today significantly increases the chance that she will claim that this is a further detriment on the grounds that she is a whistleblower and there is an attempt to conceal wrongdoing. I don't know whether you have kept evidence that you were considering this step before receiving the letter but I advise that you do collate any evidence you have to that effect and that you also collate evidence of why you feel her being on sick leave but still employed presents a risk to the organisation.

As we discussed, there is a risk that she will successfully argue that this is a detriment because of disclosures and this risk needs to be balanced against the risk of her causing damage to the organisation. There is of course an equal risk that she will claim removal of email access etc is a detriment linked to her disclosure even if you chose not to terminate now.

I just need to be sure the organisation is alive to the risks, which I know from our discussions you are, before you take the step of terminating her employment. If you are comfortable that it is appropriate to terminate, a very short letter confirming that would be acceptable."

170 That advice did not deter Mr Greenway, who made the decision that the claimant's employment should be terminated on that day with immediate effect on the giving to her of pay in lieu of the remainder of her notice period. Mr Greenway communicated that termination by an email enclosing the letter at page 1538, which gave no reason for the termination, and merely informed the claimant of the fact of the termination.

171 On the next day, 8 November 2018, Mr Adams sent to the staff of Pinkwell the letter at page 1539, saying that the claimant "has been unable to be in school for the past few weeks and it is now clear that she will not be returning to Pinkwell before the end of term" and introducing Ms Jacob, who was going to be the school's "substantive Principal at the beginning of the Spring term." Mr Adams sent a similar letter to the parents and carers of pupils at the school on the same day (page 1540), starting the letter with this paragraph:

"I am writing to inform you that our Principal, Mrs Annette Sant, has made a decision to leave Pinkwell Primary School at Christmas. We are all really sad to hear this and I am sure that you will join me in thanking Annette for the huge amount of effort that has gone into transforming Pinkwell over the last year. You will have seen and heard about many positive changes."

172 We pause to say that the respondents had no reservations whatsoever about the claimant's abilities as a head teacher, and appreciated what she had done for Pinkwell during the 2017-18 school year.

173 Mr Greenway's explanation in cross-examination for the words in his email at page 1521 which we have set out in paragraph 167.4 above, namely "Actually I think this makes things easier", was that " it made us feel less bad about it [i.e. terminating the claimant's employment with immediate effect and giving pay in lieu of notice] but it did not motivate the decision".

174 In considering the real reason(s) why that decision was made, we considered carefully and accepted the following passage in Ms Shuttleworth's witness statement (it was paragraph 68 of that statement):

> "I was aware that the Claimant had resigned and was signed off sick. I was also aware that the Claimant was involving herself in matters pertaining to the running of the school which was proving increasingly difficult for staff at the school to deal with. There was a growing sense that the attitude and actions of the Claimant were doing more harm than good and as a result the school was yet again increasingly vulnerable. The progress that had been made in key areas was far from embedded and the school was sliding backwards at an alarming and very apparent rate. In particular, there were challenges over pupil admissions, difficulties with the Local Authority around supporting SEND pupils on roll, and ongoing HR issues. My sense was of a relatively inexperienced leadership team falling into a reactive state, being pulled in different directions to put out the next fire, rather than proactively focusing on the job of school improvement. Senior leadership was desperately needed on site to stabilise the situation."

Relevant events after the ending of the claimant's employment with the first respondent

<u>The claimant's subject access request of 1 November 2018</u>

175 The claimant's subject access request of 1 November 2018 was dealt with by Ms Shuttleworth. She gave evidence about the manner in which she did so in paragraphs 77-83 of her witness statement. In paragraphs 82-83, she said this:

> "82. The general position is that SARs should be responded to within one month. However, as the data controller we have the right to extend that

period by a further two months where requests are complex or numerous. Whilst I believe we did have the grounds to exercise this right I initially chose not to do so because I was aware of the importance of the documentation to the Claimant; my understanding being that the Claimant felt the SAR disclosures were essential for her to participate fully in the investigation of her grievance.

83. Documents responding to the Claimant's request were dispatched to her (following a redaction exercise) on 15th December 2018, 1st February 2019 and 4th February 2019. I acknowledge these dates fall outside of the one month timeframe but the process of collating a high volume of documentation from multiple custodians and then reviewing this all to ensure that we were not providing information we should not (for example, breaching the rights of others or disclosing legally privileged information, which is exempt) proved far more time consuming than I originally envisaged. Nevertheless, all of the information was provided within the window of extension available to us."

176 We accepted that evidence of Ms Shuttleworth. She satisfied us on the balance of probabilities that the fact that the claimant had made what she (the claimant) claimed to be public interest disclosures on and after 11 June 2018 had nothing whatsoever to do with the speed or the thoroughness with which she (Ms Shuttleworth) responded to the claimant's subject access request of 1 November 2018.

177 The claimant made two subsequent subject access requests, but the claim that they had been dealt with in breach of section 47B was not pressed on behalf of the claimant, given that those requests post-dated the claim form.

The claimant's grievance

178 Initially the first respondent asked Mr Andrew Harper, who was described by Ms Dickens as "a Trustee" and whom we therefore understood to be a volunteer member of the first respondent's board, to hear the claimant's grievance. However, he was plainly going to need assistance in doing so, and Ms Dickens, arranged it for him by instructing a law firm, Averta Employment Lawyers, to advise him. BJ then advised that the first respondent approached a barrister in independent practice who was also a fee-paid Employment Judge, Mr Richard Powell, to carry out the investigation, and the first respondent took that advice. Ms Dickens sent Mr Powell the grievance on 5 November 2018 and he was formally instructed by Averta to "conduct a fair and impartial investigation" (page 1553) on 20 November 2018.

179 On 23 November 2018, the claimant's solicitors objected to that appointment in their email at pages 1577-1578. There then followed correspondence with the solicitors as described in paragraphs 144-154 of Ms Dickens' witness statement, after which it was clear that the claimant was not going to participate in the investigation to be carried out by Mr Powell. In the middle of January, Mr Powell gave up trying to meet up with the claimant, and he therefore started his investigation without first hearing from the claimant.

180 In summary, Mr Powell interviewed relevant persons in January 2019 but he was not able to finalise his written report, and send it with copies of all of the documents which were referred to in it, before April 2019. The report and its appendices were then sent by Mr Harper to the claimant on 2 April 2019 (the letter enclosing the report and its appendices was at pages 1911-1912). The letter invited the claimant to attend a hearing with Mr Harper on 2 May and asked her to provide any further documentation that she wanted him to consider at the hearing by 23 April 2019. The claimant subsequently sought (in the letter dated 23 April 2019 at page 1922) an extension of time for doing so and the deadline for doing so was extended to 29 April 2019. In the letter at page 1922, the claimant thanked Mr Harper "for providing such a full and extensive bundle of papers, which in total runs to in excess of 500 pages". She then on 28 April 2019 sent (at pages 1926-1950) a detailed response to the report and some of the interview statements enclosed with it (including, at page 1942, a criticism of the reliance by the first respondent on legal advice privilege to justify not giving the claimant a copy of the BJ report). The claimant then, at 08:10 on 2 May 2019 informed Mr Harper (page 1982) that she would not be attending the grievance hearing. Mr Harper then decided to hold the hearing on 22 May 2019 and on that day Mr Greenway, Ms Dickens and Mr Fisher attended to answer questions asked by him. On 28 May 2019, Mr Fisher sent an outcome letter to the claimant, which appended a number of documents, including a detailed statement of his reasons for rejecting the grievance and a copy of some notes made of the hearing (pages 2005-2039).

181 The claimant then appealed that outcome in a letter dated 3 June 2019 (pages 2046-2047), which she replaced with one dated 9 June 2019 (pages 2050-2051) but, according to what Ms Dickens said in paragraph 170 of her witness statement:

> "The appeal has not, in actual fact, taken place as the Claimant did not actively pursue the matter."

<u>The claimant's claims, our conclusions on them, and our reasons for those conclusions</u>

Did the claimant make a protected disclosure on 11 June 2018 when she sent the email at page 350?

(1) What was it reasonable to believe had occurred in the circumstances described by the claimant in her email at page 350?

A discussion

182 A reasonable person in the position of the claimant on 11 June 2018 would have gone back to the email chain referred to in paragraphs 44-48 above and considered the situation in the light of that email chain. In paragraph 13 of his closing submissions, Mr Allen referred us to paragraph 3.25 of the IDS Handbook on whistleblowing, where reference is made to the case of *Wharton v Leeds City Council* EAT 0409/14 as being "a good example of how finely balanced the question of reasonable belief can be." In paragraph 14 of those submissions, he said this:

> "It is not accepted that the Claimant was disclosing her own misconduct – but if that is what her disclosures amounted to in part, that does not preclude the disclosures from being protected."

183 However, in marked contrast, in the opening sentence of his closing submissions, he said this:

> "Plainly C shouldn't have authorised the additional payment to W. She was at fault."

184 In fact, the situation was not clear-cut. It would have been clearer to the claimant if she had checked with Mr Adams whether or not he had indeed, as the SBM asserted in the email which we have set out in paragraph 44 above, "agreed this". Of course, as the claimant acknowledged in paragraph 66 of her witness statement, she did not do that before sending Mr Greenway the email of 11 June 2018 at page 350 (the terms of which we have set out in paragraph 77 above).

185 In addition, it was the claimant's own evidence to us (in paragraph 75 of her witness statement) that "[The SBM] was always in by 7:00. She did take the early morning calls and updated the absence logs for staff."

186 If the claimant had asked herself why she was being asked to authorise the ongoing payment of remuneration for two hours of extra time per day when Mr Adams had (it was the SBM's case) already agreed to that, then she (the claimant) would have seen that Mr Adams could not have authorised it in the way in which the claimant was now being asked to authorise it, since the authorisation of the claimant would not then have been necessary.

187 On that basis, with one caveat, the only questions which arose in regard to the authorisation of pay for those two hours were two essentially managerial questions. Those questions concerned

187.1 the management by the claimant of the SBM as an employee, i.e. (1) whether or not it was acceptable and effective for the SBM to be required to work relatively long hours, (2) whether or not the claimant could have given responsibility to someone other than the SBM for doing those things which the SBM did between 7.00am and 9.00am, and (3) whether or not the claimant should have offered to pay for those hours at a lower rate than the SBM's full hourly rate; and

187.2 the issue of whether the claimant herself was authorised by the first respondent to spend the money involved in giving the SBM what was in effect a pay rise, albeit on the basis that she was in practice working far more hours than she was required by her contract of employment to work.

188 The caveat was that it might have been reasonable to believe that the claimant did not have the power (in strict legal terms, applying public law principles, albeit that they were almost certainly not applicable to this issue) to authorise what was in reality an increase in the SBM's pay. However, the claimant appears not to have given that issue any thought at the time of sending the email of 11 June 2018 at page 350, since there is no mention in it of that issue. The fact that the final two paragraphs of the email ask for Mr Greenway's "opinion" and then his "thoughts on this" does not detract from the proposition that the email contained a public interest disclosure (although it does make Mr Greenway's evidence that he did not see it as a whistleblowing disclosure easier to accept than it might otherwise have been). Nevertheless, given her experience of the statutory provisions concerning the regulation of maintained schools with delegated budgets and the second bullet point in the extract from the first respondent's Finance Manual set out in paragraph 39 above, the claimant might be said to have had a reasonable belief that she could not (i.e. that she did not have legal power to) authorise expenditure of more than £10,000 in one go.

Our conclusion on this issue

189 In deciding whether or not the claimant had made a disclosure within the meaning of section 43B of the ERA 1996, we paid particular attention to what Mr Siddall said about the applicable legal tests in paragraphs 17-26 of his "Updated skeleton argument", which he put before us at the start of the hearing. Having done so, we came to the conclusion that the claimant could not on 11 June 2018, without having asked Mr Adams whether he had in fact authorised the payment of remuneration for overtime of two hours a day on an ongoing basis, reasonably

have concluded that the SBM was seeking to deceive her (i.e. the claimant). Nevertheless, we concluded

189.1 albeit with a little hesitation, that the claimant could reasonably have believed that she had, by authorising expenditure of more than £10,000 in one go, breached the first respondent's internal mechanisms for ensuring the effective use of public money, so that arguably she had caused the first respondent to do something which was in breach of the first respondent's funding arrangements with the Secretary of State and was therefore a breach of a legal obligation (although in fact that would probably constitute only a breach of a funding condition, and not of a legal obligation), and

189.2 without any doubt at all, that the claimant did reasonably believe that she might have breached one or more implied terms in her contract of employment, namely either (1) the implied term of trust and confidence or (2) the implied obligation to exercise reasonable skill and care, as confirmed by the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Limited* [1957] AC 555.

190 We record for the avoidance of doubt that while the claimant thought that the SBM had tricked her by putting her under pressure by giving her only a short period of time to consider her (the SBM's) request, in fact the claimant was given more than two days to consider it, so that the claimant was wrong to think that she had been put under unfair or undue time pressure by the SBM in that regard.

191 As for whether the claimant could reasonably have believed that it was in the public interest for her to make the disclosure, we concluded that she could have done so, if only because she had authorised a pay increase of over 25% to an employee who was being paid over £40,000 a year plus oncosts, out of public funds. Whether the claimant could reasonably have believed that it was in the public interest for it to be known that she had not been stopped by an attempted fail-safe mechanism from authorising the pay increase was, we concluded, an allied question, so that it added nothing to the possible public interest in the matter.

<u>(2) The subsequent claimed disclosures</u>

192 Given (1) that we have found that the email of 11 June 2018 at page 350 was a public interest disclosure within the meaning of section 43B of the ERA 1996, and (2) section 43L(3) of the ERA 1996, we concluded that every subsequent claimed public interest disclosure made by the claimant was in fact such a disclosure. We pause to observe, however, that the more that a person re-makes a protected disclosure, the less likely it will become that the recipient's action in

response to it will be done "on the ground that" the employee has made that disclosure, and the more likely it will be that the action in response is done for a different reason, such as the manner rather than the substance of the disclosure.

Was the claimant treated detrimentally within the meaning of section 47B of the ERA 1996 in any respect before the claimant resigned?

193 The claimant's claims of detrimental treatment before she resigned were set out in paragraph 67 of the Grounds of Claim, at pages 25-27, albeit that (1) she had before the trial withdrawn that which was in paragraph 67d and (2) during the trial, Mr Allen on behalf of the claimant withdrew part of paragraph 67h. We therefore now address the claims of detrimental treatment within the meaning of section 47B of the ERA 1996 which were pressed at the conclusion of the trial, taking them in turn.

"a. Failure to adequately deal with her concerns about potential fraud/corruption dated 11, 12 June 2018 promptly and in a fair, proper and timely manner and provide appropriate redress in respect of her complaint of financial misconduct involving a subordinate (R1 and R2)"

194 We could not understand what was meant by the word "redress" in that sequence, unless it was that the claimant was seeking that the first respondent sought the return of the money that the claimant was now saying was an overpayment to the SBM by way of pay for two hours of overtime per day. In that regard, we concluded, it would be reasonable for the claimant to regard it as being detrimental to her to fail to do that only if the claimant was at risk of being made to account in some way for that overpayment. However, she was not at risk in that regard, because Mr Greenway and Ms Dickens had in fact (see paragraphs 79-96 above) investigated the issue as much as was in their view necessary and decided to take no further action about it. In addition, Mr Greenway was shown, if only by his email at 5 July 2018 to Mr Adams which we have set out in paragraph 118 above, to have had no desire to suppress any evidence relating to the situation, which indicated that if and to the extent that there was any failure by Mr Greenway and Ms Dickens to take the matter further than they did initially, that failure was not done on the ground that the claimant had made her disclosures of 11 and 12 June 2018.

195 We saw Mr Greenway's response to the claimant's repeated assertions of possible wrongdoing by the SBM as being the result of a growing sense of wholly justified frustration that she was continually pressing the point. We concluded that she did that because

195.1 she had been pressed by the IFD to do so and therefore felt obliged to do so(see paragraphs 74 and 93 above), and

195.2 she felt that if she did not do so then she would risk damage to her reputation, her reputation being of paramount importance to her.

196 In any event, we rejected the claim of detriment set out in paragraph 67a of the Grounds of Claim. In fact, if anything, what Mr Greenway did in response to the claimant's public interest disclosure set out in the email of 11 June 2018 at page 350 and subsequently repeated was helpful to rather than detrimental to the claimant, since it was her fault (which she now does appear formally to acknowledge, albeit that that acknowledgement is contradicted by a contemporaneous denial: see paragraphs 182-183 above) which was central to the possible overpayment of remuneration to the SBM.

197 In addition, there was in our view no failure to investigate the concerns stated by the claimant in the email at page 350 and to tell the claimant the result of that investigation. That is for the reasons set out in paragraphs 78-96 above. We add that it was open to the claimant herself to approach Mr Adams at any time and to ask him whether or not he had authorised the payment of remuneration to the SBM for two hours of overtime a day. If she had done that then Mr Adams would probably have found the email trail to which we refer in paragraph 33 above.

"b. Failure to immediately carry out an internal audit and refusing to allow [the IFD] to carry out an internal investigation of the finances of the School (R1 and R2)"

198 There was no legal requirement on the part of the respondents to carry out an immediate internal audit, whether by the IFD or anyone else, and it was not contended that there was such a requirement. In any event, we concluded on the evidence before us that there was no refusal on the part of either respondent to carry out an internal audit, or to permit the IFD to carry out an internal investigation, of the finances of Pinkwell. In any event, we concluded that there was no detriment caused to the claimant within the meaning of section 47B of the ERA 1996 through any failure to investigate the matter about which the claimant had written in her email of 11 June 2018 more than it was in fact investigated.

"c. Failure to investigate concerns about gross misconduct/potential criminal conduct in accordance with the First Respondent's policies on fraud and whistleblowing (among other policies) and/or take any disciplinary action against [the SBM] or Ms Thomas"

199 In our view the respondents were under no legal obligation to apply the first respondent's policies on fraud and whistleblowing, and the claimant could not reasonably think that it was detrimental to her for those policies not to be applied

in the circumstances. Thus, allegation 67c did not succeed. What we say in the rest of this section is said for the avoidance of doubt.

200 In our view, by coming to a swift conclusion in the manner described in paragraph 89 above and deciding to take no further action on the matter, Mr Greenway acted sensibly and proportionately. We came to that view without any regard whatsoever for the fact that BJ evidently came to the same view. We add that if there had been any in-depth investigation under the respondent's fraud and/or whistleblowing policies, then the conclusion to which Mr Whiting came in the passage from his report at page 758, which we have set out in paragraph 104 above, would inevitably have been arrived it, and it was helpful rather than detrimental to the claimant to regard the matter as closed, as Mr Greenway did (see paragraph 88 above).

201 In paragraph 109 of his closing submissions, Mr Allen said this:

> "The tribunal is asked to find that the internal auditor was not asked to carry out an internal investigation (see submissions above). If the tribunal find that R2's evidence about this is inaccurate, it is asked to draw an inference that this is an attempt to hide that a material reason for the failure to investigate is that the Claimant made the protected disclosures."

202 In fact the documentary evidence to which we refer in paragraph 102 above showed that Mr Whiting was informed with alacrity by, if no one else, the IFD, about the situation. In addition, Mr Greening's email of 5 July 2018 set out in paragraph 118 above showed that he had no intention of stopping the internal auditor from investigating the matter, but in any event we concluded without any doubt at all from his evidence that he did not seek to hide the situation from the auditor or anyone else.

203 As for the taking of disciplinary action against the SBM or Ms Thomas, that was something that the claimant could have done and chose not to do; indeed, it is difficult to see who else was in a position to take such action. In any event, Ms Thomas' actions were plainly taken at the instance of the SBM, and the reason for not taking disciplinary action against the SBM was stated by Mr Greenway in paragraph 89 above which (we found) had nothing to do with the fact that the claimant had made a public interest disclosure, i.e. it was not done on the ground that she had made her disclosures of 11 and 12 June 2018.

"e. Attempts to cover up and suppress evidence relating to the wrongdoing on various dates in June and July 2018 (R1 and R2)"

204 Despite what Mr Allen said in paragraphs 115 and 116 of his written closing submissions, we concluded on the facts, in part for the reasons given in

paragraph 202 above, that there was no attempt to cover up and suppress evidence relating to the wrongdoing during June and July 2018. In any event, we concluded on the evidence that we heard and saw that there was no act done by either Mr Greenway or anyone acting on behalf of the first respondent with a view to covering up or suppressing any evidence relating to the alleged wrongdoing of the SBM. If there was anything more that could have been done, it was to ask Mr Adams for the evidence which he eventually unearthed in the circumstances which we describe in paragraph 33 above, but that failure was the result of decisions made by Mr Whiting and BJ, for which we concluded neither respondent was responsible. As for the wrongdoing of the claimant, she had admitted it, and been contrite, so there was nothing more that could reasonably have been expected by her to be done in that regard.

205 In his closing submissions, Mr Allen dealt with the allegations in paragraph 67f, 67g, 67h and 67i of the grounds of claim together. We therefore do the same (not least because they overlapped). They were in these terms:

*"**f. Failure to provide reasonable support following the Claimant's disclosure and take steps to recover the overpayment of wages;***

g. Isolating/bullying the Claimant and treating [the SBM] more favourably than other employees;

h. Arranging a "mediation meeting" on 29 June 2018 and conducting the mediation meeting in a manner that was humiliating and degrading. Despite the Claimant's concerns and reservations about making any further payments to [the SBM], the employee suspected of wrongdoing was rewarded with a payment for accrued but untaken holiday pay and told that she was permitted to claim overtime pay for two hours additional work per day indefinitely until her termination date in August 2018;

i. Allowing [the SBM] to have access to the School's finances, despite the Claimant's concerns until her termination date"

206 Mr Allen's summary of his submissions in regard to those paragraphs was in paragraph 119 of his closing submissions, which was in these terms:

> "The actions of R1 in these regards amount to subjecting C to a detriment because they left her with the impression that the serious concern she had raised about the SBM was being ignored which undermined her. Had C not made the protected disclosures, R1 would not have treated her in this manner."

207 In paragraph 120 of his closing submissions, Mr Allen said that it was no longer contended that arranging the mediation meeting was itself a detriment and that the holiday pay issue was dealt with at the later meeting (as we describe in

paragraphs 120-122 above). In paragraph 121 of his closing submissions, Mr Allen said this:

> “The tribunal is asked to find that these were both actions (g) and (h) and (i); and deliberate failures to act (f) - and that a material factor in R1 and R2 making these decisions was the fear that a fair, proper and timely investigation would throw light on R1’s inadequate financial control policies and / or that if there had been fraud, ESFA would have to be informed, which is intrinsically linked to C having made the protected disclosures. The Respondents have failed to prove that their actions and failures to act were not on the ground that C had made the protected disclosure.”

208 We could not understand why it was alleged that the mediation meeting was conducted in a manner which was humiliating to and/or degrading of the claimant. Rather, as Mr Siddall pointed out in paragraph 98 of his closing submissions, the claimant’s treatment of the SBM at that meeting included saying to her (as stated by the claimant when she was interviewed by BJ, as recorded on page 1220): “Don’t you think you’ve had enough from this school?” That was arguably humiliation and or degradation of the SBM, which was done by the claimant. In any event, having accepted the evidence of Mr Fisher which we have set out in paragraph 109 above, we concluded that the manner in which the mediation meeting was conducted was in no way done by Mr Fisher in a way which was detrimental to the claimant on the ground that she had made a protected disclosure.

209 Further, we concluded that the complete explanation for what happened after 12 June 2018 until the SBM’s employment with the first respondent ended was, as Mr Siddall submitted in substance in paragraph 89 of his closing submissions, the conclusions to which Mr Greenway and Ms Dickens had come as described in paragraphs 84-91 above. Thus, we concluded, in no way was anything of the sort referred to in paragraphs 67f, 67g, 67h or 67i of the grounds of claim done or not done by either Mr Greenway or anyone acting on behalf of the first respondent on the ground that the claimant had made a protected disclosure: there was no retaliation of any sort for that disclosure in the events to which those paragraphs relate.

“j. Failing to commit to and ensure that rigorous procedures were in place for monitoring finance;

k. Failing to manage public money in accordance with the requirements of the AFH 2018 and in particular, HM Treasury’s principles of managing public funds, which include but are not limited to “selflessness, integrity, objectivity, accountability, openness, honesty and leadership”. Compliance with the AFH is a requirement in trusts’ funding agreements with the Secretary of State (R1 and

R2);

l. Failing to take responsibility for not having systems and controls in place for managing the finances of the School and failure to use public funds efficiently to maximise outcome for pupils (R1 and R2);

m. Failing to put measures in place to reduce fraud and theft (R1 and R2)"

210 Both parties' counsel dealt with these allegations together. We do the same. Both parties' submissions on this were relatively brief. Mr Allen's were in these terms:

> "122. It is accepted that the failure to have policies in place pre-dated the disclosures and therefore cannot be on the ground of the disclosures. However the failure after 11/6/18 to follow the whistleblowing and fraud policies after the disclosures were made was a detriment to C. The failure after 11/6/18 to work to put adequate internal financial control policies in place and demonstrate to C that they were being put in place was damaging to C's reputation as she was concerned about the nature of the organisation that she was working for.
>
> 123. The tribunal is asked to find that these were deliberate failures to act - and that a material factor in R1 and R2 making these decisions was the fear that a fair, proper and timely investigation would throw light on R1's inadequate financial control policies and / or that if there had been fraud, ESFA would have to be informed, which is intrinsically linked to C having made the protected disclosures. The Respondents have failed to prove that their actions and failures to act were not on the ground that C had made the protected disclosure."

211 Mr Siddall's submissions on these allegations were in paragraph 113 of his closing submissions and were these:

> "These allegations are defended on the basis that they are factually incorrect as the issue arose from C's own failure to comply with the processes in place rather than their absence per se. It is also problematic for the Respondent to understand how their alleged absence is destructive of trust and confidence as between C and the Respondent. However if the allegations were found to be factually accurate and arguably unlawful it is submitted that even on C's own case they predate her alleged PD1 (as their absence is what caused her to make the same). Indeed even C accepted that point in cross-examination. Thus it submitted that these allegations avail C not at all even if proven."

212 We (through Employment Judge Hyams) pressed Mr Greenway on the possibility that he had come to a conclusion that involved no further action being taken against the claimant and the SBM because he knew that if such action were taken then it might be necessary (after taking the action) to report a fraud to the ESFA in accordance with paragraph 4.9 of the AFH 2018 set out in paragraph 41 above. His response was that, no, that was not the case: rather, he had acted simply on the basis of the practicalities of the matter as described by us in paragraphs 85-91 above. We considered his evidence in that regard very carefully, including against the background of his actions as described by us in paragraphs 123-124, 126-127, 135-153, 158, 167.4, 168 and 170 above. Having done so, we came to the firm conclusion that he had not done anything to or in relation to the claimant on the ground that she had said what she said in her email of 11 June 2018 set out in paragraph 77 above and later, either to the same or a similar effect. Rather, we concluded that Mr Greenway had not even subconsciously or unconsciously in dealing with the situation before the claimant resigned done anything on the ground that the claimant had made a protected disclosure, i.e. whatever he did before the claimant resigned, it was in no way materially caused by the fact that she had made a protected disclosure. We did not see any other person acting on behalf of the respondent as having treated the claimant detrimentally before she resigned on the ground that she had made a public interest disclosure about principally her own actions but also on the basis that there might have been other breaches of legal obligations by other persons.

213 Therefore, we concluded that the allegations in paragraphs 67j, 67k, 67l and 67m of detrimental treatment within the meaning of section 47B of the ERA 1996 were not well-founded.

214 For the same reasons, we found the allegation in paragraph 67n to be not wellfounded. That allegation was in the following terms:

'***n. Failing to report the disclosure about potential fraud/corruption to the police, the ESFA and the Charity Commission, contrary to the "strong" advice of the independent auditor. Clause 4.9 of the AFH 2018 states that trusts must notify*** **"ESFA as soon as possible of any instances of fraud, theft and irregularity exceeding £5000 individually or £5000 cumulatively in any academic year. Any unusual or systematic fraud, regardless of value must also be reported".'**

215 Having accepted (in paragraph 86 above) Mr Greenway's evidence in paragraph 56 of his witness statement (which we have set out in paragraph 85 above), and having reconsidered the matter after reaching our preceding conclusions, we concluded that the respondents had satisfied us that their not reporting the matters to the ESFA or the Charity Commission raised by the claimant for the first time in her email of 11 June 2018 at page 350 (set out in paragraph 77

above) and then subsequently in other ways was not something done on the ground that the claimant had made her protected disclosures.

The claimant's claim of constructive unfair dismissal contrary to section 103A of the ERA 1996

216 That meant that the claim of constructive dismissal contrary to section 103A of the ERA 1996 had to fail. In addition and in any event, given the factors to which we refer in paragraphs 128-132 and 212-213 above, we concluded that

216.1 there was no breach of the implied term of trust and confidence on the part of the first respondent, and

216.2 the claimant's resignation was in no way a response to anything that was detrimental treatment within the meaning of section 47B of the ERA 1996.

217 For the avoidance of doubt, we rejected Mr Allen's submission in paragraph 127 of his closing submissions that

> "The requirement that process be followed in relation to the Ed Psych and EM matters, in contrast to the failure of process and failure of communication in relation to C's concern of 11/6/18 was the last straw for the Claimant."

218 As will be evident, we concluded (in paragraph 130.1 above) that the "last straw" for the claimant was the "untenable additional workload" of the "HR cases" to which she referred in the passage of her resignation email that we have set out at the end of paragraph 129 above. That last straw had nothing to do with any public interest disclosure that the claimant had made.

The claimed detriments in paragraphs 73b, 73c and 73d

219 Mr Allen sensibly dealt with the three claimed detriments in paragraphs 73b, 73c and 73d together. That made sense because they were in reality different ways of making the same allegation. They were in these terms:

"b. Informing the Claimant that disciplinary action had been contemplated against her in a letter dated 5 October (received on 6 October) and in an email dated 9/10/18 (R1 and R2);
c. Disclosing sensitive personal data about the proposed disciplinary proceedings against the Claimant to governors, without her knowledge or consent on 9 October 2018 (R1 and R2);

d. Failure to explain why the Respondents considered instigating disciplinary proceedings against the Claimant (R1 and R2)"

220 Mr Allen's submissions on these allegations were in paragraph 128 of his closing submissions, and were in the following terms:

> "The idea that disciplinary action had been contemplated against C had not emerged until 20/9/18 [1258] when it was requested by R2 to be inserted into BJ's report. Once accepted by BJ and incorporated into their final report despite not having been in their scope, it became a tool to be used to sully C's reputation with the LGB members and to quell their agitation for her return - both were detrimental to C, who was also upset just to learn that disciplinary action had been contemplated. The summaries sent to C and the LGB [1370 and 1371-1372] did not explain why disciplinary action had been contemplated against C and left open an interpretation that C had in someway been implicated in the fraud. R1 and R2 used this to close off any avenue of return for C and their reason for doing so was that she was another vexatious whistleblower, who had not easily given up on wanting the subject of her 11/6/18 [email] properly investigated and who wanted to know the outcome of the BJ investigation. Had she seen the BJ report, she would have been able to challenge its findings, given the number of errors that R1 and R2 had allowed to find their way into the final report. This was clearly done on the ground that C had made a number of protected disclosures."

221 We found this allegation to be not well-founded in part for the reasons set out in paragraphs 91 and 158 above. That is because

221.1 the proposition "that disciplinary action had been contemplated against C had not emerged until 20/9/18", was not true, for the reasons we state for example in paragraph 91 above; and

221.2 it was not true that the statement that disciplinary action had been contemplated against the claimant was used as a "tool ... to sully C's reputation with the LGB members and to quell their agitation for her return". That is because what we say in paragraph 158 above shows that Mr Greenway gave Mr Devaney sufficient information to know why disciplinary action had been contemplated (and then swiftly rejected) against the claimant. We noted in this regard that there was in a set of notes of the meeting of the LGB of 11 October 2018 of which there was a copy at pages 1379-1385 (which were rather more detailed than the minutes of that meeting, at pages 1386-1388) this exchange noted (at pages 1380-1381):

> "MS [i.e. a parent governor] Referred to the email giving details of the Whistleblowing investigation and outcome. Would like to know why Annette was subject to disciplinary - was it because she whistle blew?
>
> JD [i.e. Mr Devaney] Confirmed that information could not be shared in more detail. The investigation has happened and outcomes agreed. Hugh Greenway TEFAT and the Audit Committee (which BA [i.e. Mr Bob Anderson] was part of) agreed that the outcomes could be shared with the LGB for information only. Stated that some issues are not presented to the LGB, but JD may be involved due to being Chair of Governors. Part of the Committee discussion was that more experience was needed in the LGB relating to Finance."

222 If and to the extent that Mr Devaney did not pass on the detail of what Mr Greenway had told him as can be seen from the extract set out in paragraph 158 above, that was, in our view, not something done by either respondent, unless Mr Devaney was acting as an agent of either of them. We concluded that he was not acting as an agent of Mr Greenway in this regard, since there was no evidence before us from which we could conclude that Mr Greenway had indicated that Mr Devaney should not do what he (Mr Greenway) had asked him in his email set out in paragraph 158 above to do. We also concluded that Mr Devaney was not acting as the agent of the first respondent in this regard, not least because there was no evidence before us that he was doing so but also because we found him to be a completely honest witness, doing his best to tell us the truth, and acting at all times only on the basis of his own understanding of what was right for Pinkwell.

223 As for the alleged errors in the BJ report, we did not (as we say in paragraph 144 above) see them as affecting the conclusions stated in the report in any material way. Further, given our conclusion stated in paragraph 143.1 above, the part of the BJ report about which the claimant was most concerned was unassailable.

"e. Refusing to disclose information concerning the Claimant in accordance with the requirements of the Data Protection Act/GDPR and failing to appropriately deal with her request (R1 and R2)"

224 Given our conclusions stated in paragraphs 175-176 above, the claim stated in paragraph 73e of the grounds of claim had to fail.

"*f. Delay in disclosing relevant documents and failure to disclose documents necessary for the fair disposal of the Claimant's grievance and appeal (the Claimant's solicitors requested many documents to support her contention that*

***there was a cover up/suppression of evidence but the Respondents refused to provide disclosure of edited reports and communications relating to amended reports received from the auditor of Brown Jacobson) (R1 and R2)*”**

225 Mr Greenway’s stated reason for not giving the claimant the BJ report or any of the draft versions of that report in the respondents’ possession was (see paragraph 147 above) that it was “legally privileged” material.

226 Privilege could of course have been waived, and that is indeed what happened when the claimant made her claim in these proceedings, so the report was in fact disclosed and inspected in these proceedings.

227 There was, as Mr Siddall correctly submitted, no obligation to disclose the report in connection with the claimant’s grievance. No evidence was led about the reasons for the failure to give the claimant a copy of the BJ report other than the fact that it was a report prepared at the request of the first respondent’s board and was obtained to advise the board.

228 Having taken all of these things into account, we concluded that the first respondent did not disclose the BJ report to the claimant for the purpose of enabling her to prepare her grievance because (i.e. only because)

228.1 she did not need it in order to press her grievance, and

228.2 the respondents were by that time in a situation in which the claimant’s solicitors had sent a letter before action, and the respondents were acting in contemplation of threatened litigation by the claimant.

229 On that basis, it was not a detriment to the claimant within the meaning of section 47B of the ERA 1996 for the first respondent to fail to disclose the BJ report. In addition, we concluded from Mr Greenway’s oral evidence (i.e. on the balance of probabilities, having heard and seen him give evidence) that he was frustrated by having to spend so much time responding to the claimant’s repeated allegations of detrimental treatment because of whistleblowing, and he did not want the claimant to have any more material than was strictly necessary at that time. In any event, the report was the first respondent’s, and not Mr Greenway’s. If and to the extent that he had any say in the question whether or not the claimant was given sight of the report, we concluded that what he did in regard to the report was not done to any extent on the ground that the claimant had made a protected disclosure: rather, it was done in anticipation of litigation (including by the claimant, as he had envisaged that already by 17 August 2018: see paragraph 138 above) and on the basis that he (Mr Greenway) would take advice from the legal team advising and acting for the first respondent on the question

whether the report should be disclosed and only cause the report to be disclosed if the first respondent was advised to disclose it.

"g. Dismissing the Claimant during her notice period and sickness absence on 7 November 2018 (Claimant's notice period was due to end on 31 December 2018), in breach of her contract of employment (R1 and R2)"

230 Allegation 73g is not made out in so far as it alleges that the claimant was dismissed during her notice period, according to the decision of the Employment Appeal Tribunal in *Marshall (Cambridge) Ltd v Hamblin* [1994] ICR 362. We were of course bound by that decision.

231 Nevertheless, the termination of the claimant's contract of employment by giving her pay in lieu of the unexpired period of her notice was capable of being a detriment within the meaning of section 47B of the ERA 1996.

232 We have set out in paragraph 173 above Mr Greenway's reason for cutting short the claimant's notice period and in paragraph 174 above a relevant passage of Ms Shuttleworth's witness statement. We have also said in paragraph 167 above that we accepted paragraphs 113-126 of Ms Dickens' witness statement, and paragraphs 157-168 of Mr Greenway's witness statement. We have not set out those passages in these already-long reasons solely for the sake of brevity. We concluded in the light of all of the things referred to above in this paragraph that the decision to terminate the claimant's employment with the respondent on 7 November 2018 was taken p because (in the words of Mr Greenway in paragraph 158 of his witness statement) "the Claimant's continued employment seemed only to pose risks", and that it had nothing to do with the fact that the claimant had made public interest disclosures.

"j. Failing to deal adequately with her grievance and/or appeal against dismissal in accordance with the First Respondent's procedures and the ACAS Code of Practice (R1)"

233 Mr Allen relied in paragraph 135 of his closing submissions on the delay that there was in dealing with the claimant's grievance in support of allegation 73j. He then submitted in paragraph 136 of his closing submissions:

> "The Respondent did not want C to obtain details of the auditor's report or the BJ report - particularly prior to the end of her employment. It did not wish her to challenge the findings of those reports (some of them based on erroneous assumptions). The reason for that was rooted in the Claimant having made a protected disclosure and being regarded as someone who was 'not a team player'."

234 Those things were not stated in the pleadings, and Mr Siddall pointed out in his closing submissions that no witness of the respondents was cross-examined about motivation in regard to the grievance process.

235 We were satisfied on the balance of probabilities that the delays that occurred in the course of determining the claimant's grievance were in part the result of the claimant's conduct and otherwise the result of Mr Powell taking time to deal with the grievance properly. On that basis, the claim of detrimental treatment within the meaning of section 47B of the ERA 1996 was not made out in regard to the delay in the determination of the claimant's grievance.

236 We saw the content of paragraph 136 of Mr Allen's closing submissions as being relevant to the claim in paragraph 73f of the grounds of claim, but if it was not and Mr Allen was seeking to add to the claim made in paragraph 73J, then that additional claim was answered by our conclusion in paragraph 229 above, so that it made no sense to permit the addition of that claim, and we declined to do so.

In conclusion

237 In conclusion, none of the claimant's claims succeeds.

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Employment Judge Hyams

Date: 21 May 2021

JUDGMENT SENT TO THE PARTIES ON
....

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FOR THE TRIBUNAL OFFICE