Case Numbers: 3200932/2014 &
3200990/2014

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EMPLOYMENT TRIBUNALS

Claimant: **Mr O Doyle**

Respondents: **1. Essex County Council**
2. Childrens Support Services South

Heard at: **East London Hearing Centre** **On: 6-9 December, 13 December 2016, 31 January, 1-3 February, 8-10 February & 21-23 February & 13-14 March 2017 (in chambers)**

Before: **Employment Judge Prichard**
Members: Ms L Conwell-Tillotson
Mrs S Amatuzzi

Representation

Claimant: In person

Respondents: Mr B Gardiner – counsel - instructed by Essex Legal Services, Chelmsford

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

The claimant's claims of unfair dismissal, automatically unfair dismissal, because of protected disclosures, or detriments because of protected disclosures, disability discrimination on account of victimisation, disability discrimination because of something arising from disability, failures to make reasonable adjustments, and direct disability discrimination are all dismissed.

REASONS

1 This case is effectively a continuation hearing. The claimant brought a total of 6 claims to this tribunal. Claim 1 does not need to concern this tribunal. Claim 2 presented 22 March 2014, 3200422/2014 was disposed of in a judgment of Employment Judge Russell sent to the parties on 24 March 2015. Claim 3 was an application for interim relief presented 18 July 2014, 3200932/2014. It was also a claim for unfair dismissal and disability discrimination. Claim 4, 19 August 2014, was a claim for unfair dismissal claim and disability discrimination, 3200990/2014. Unfair dismissal was added by amendment, consolidated, and stayed by Judge Gilbert. There was some procedural untidiness there. It is unusual to amend an interim relief claim (3200932/2014) to include a substantive unfair dismissal claim. Claim 5, an application interim relief, was presented 6 January 2015, 3200016/2015 and withdrawn following the claimant's reinstatement following a successful workplace appeal. Claim 6, 7 January 2016, 3200036/2016, was another application for interim relief. It was dismissed by Employment Judge Allen on 9 March 2016, in a judgment sent to the parties 4 April 2016. (Although the claimant had been finally dismissed from the school on 24 June 2015, his contractual notice did not expire until 31 December 2015. That is why the claimant then made his last interim relief application in January 2016).

2 The tribunal has had to consider the judgment of Employment Judge Russell in some detail because we take over the narrative where she left off. This judgment should be read as a sequel to her judgment. As this judgment is a sequel judgment it is not necessary for the tribunal to introduce the parties or to fully set out the factual context which the Russell tribunal did from paragraph 6 of the judgment onwards. We are grateful to that tribunal for grappling with the complexities of delegated budgets and the claimant's deemed employment status with CSS. In the event those complexities turned out to be more theoretical than actual. Because of the deeming provisions the employer was CSS and not Essex County Council. In practical terms the only obvious example of some responsibility remaining with the council is the teachers' pensions. It is therefore only necessary for us to deal with the subsequent events of the claimant's dismissal - the failed reinstatement attempt following the successful appeal, the appeal, and then the claimant's final dismissal. We introduce the new characters who have appeared in the later part of the narrative.

3 Judge Russell clearly stated in paragraph 54 of her judgment she would not be dealing with any events which happened after 16 June 2014. The event that happened on that day was that Diane Shepherd, the chair of the management committee, dismissed the claimant's extant grievances at that time. Her letter of 16 June dismissed a total of 9 grievances on the basis that the grievances had either been raised before or were currently (then) being considered by the tribunal, which was true.

4 Ms Shepherd also stated that: "We note that you state you have raised a total of 9 grievances in the past 6 months and consider this an abuse of the grievance procedure and process", something to which the claimant took exception. The word "abuse of process" is a legal technical term and it was surprising, as Judge Russell remarked, that he should take such exception to that. For his part he had bombarded the respondent with legal

technical terms and case law references. See paragraph 131 of the Russell judgment.

5 The original plan was that a panel including Judge Russell should hear part two of this case but Judge Russell's availability at the time in which the tribunal attempted to list it precluded that. This was dealt with at a hearing in Colchester before Judge Warren on 7 October 2016, shortly before this hearing started. As a result of that, this tribunal has had to recap a good deal of the background that was the subject matter of the Russell hearing as it is a continuing narrative.

6 It will be recalled from paragraphs 48 to 49 of the Russell judgment that the claimant attended a sickness absence capability meeting on 9 May 2014. At that meeting he had been open about going to attend a GP appointment that afternoon and therefore had to leave the meeting at a certain time. Sharon Wilson told this tribunal that she was horrified to hear that the claimant was planning to get his GP to sign him back fit for work, as he later did.

7 There was a terse and uninformative fit note of 9 May 2014 stating that because of an: "improvement in mood" … "a phased return to work" and "the patient is fit to return to teaching duties I suggest a phased return basis for the first month the details of which to be discussed between employer and Mr Doyle. During this phased return period I would also suggest some designated time for curriculum teaching planning".

8 It is a reality with which this tribunal often deals that, with mental impairments and mental health diagnoses, the power of an individual patient/employee to dictate the terms of a fit note is almost unlimited. GP's tend to consider themselves professionally bound by the stated wishes and self-reports of their patients unless they are overtly symptomatic. The reason why Ms Wilson was horrified was that the claimant had so obviously been wrong-footed by the composition of a panel at the absence review meeting on 9 May. He had a mental melt down. That stood in complete contrast to the fit note issued later the same day.

9 The claimant was on the point of exhausting contractual sick pay.

10 Ms Sharon Wilson was not happy about the claimant returning to work and required that he visit occupational health to get an opinion from them. She could hardly have done anything else. She made a referral on 15 May. The claimant was involved in that. It will be recalled from the Russell judgment at paragraph 50 that Ms Wilson on advice referred 19 supplementary questions to be answered on this OH referral. She was openly very concerned about his health and safety of his whole situation.

11 The standard OH referral form gives a list of seven specific questions of which the referrer must select "no more than FOUR". There is also an option to add "no more than two other questions". The claimant only grudgingly consented to five of the proposed 19 questions being referred to the occupational health practitioner. This weighed heavily against the claimant with Mr Freel, who subsequently made the dismissal decision. It weighed heavily against the claimant with Ms Wilson and, as later explained, with this tribunal. It seemed the claimant wanted to shut down the respondent's enquiry into his mental health.

12 It was the view of Mr Freel that the format of the OH referral form was probably an attempt to make the data on this form reducible to a database on the computer system. The tribunal thinks that is likely to be so. However it is inevitable that complex cases, like the claimant's, will raise more questions. This was a complex case with a long history by then. Judge Russell dealt with the supplementary questions at paragraph 118 of her judgment.

13 The services of occupational health are vital to an employer in difficult circumstances like this involving risk assessment, fitness to work, risk for employees and pupils potentially other staff members and management and their responsibilities. The outcome of that referral was an occupational health report again from Dr Claudia Rost which concluded that the claimant was fit to return "with caution" - an enigmatic phrase.

14 The occupational health report was tentative. The report specifically said: "He cannot envisage himself working in the centre or in any other capacity within the school at this moment in time". It describes the claimant's diagnoses. He was diagnosed as:-

14.1 post traumatic stress disorder (PTSD);

14.2 depression and anxiety controlled by medication;

14.3 autistic spectrum disorder (ASD)

He had only received the last diagnosis relatively recently, notwithstanding that condition would have been with him all his life. He is at what is called the high functioning end of the spectrum. Describing the 3rd diagnosis Dr Rost stated:

> "He continues to have problems adjusting to unexpected situations or changes and adherence to policies and procedures is of particular importance for him. He needs consistency and structured to feel secure in social situations."

15 The report was coloured by the description the claimant had given of his good workplace situation prior to his long period of absence with depression. He had enjoyed a relatively good period teaching in the community at the homes of certain students, in hospitals with the students who had been admitted, or in libraries for children whose homes were not suitable learning environments.

16 We know a lot about his consultation with Dr Rost because with her consent he recorded the consultation on a recording device. Further the claimant was accompanied by his friend - Penny Ashmore (who has been his support throughout this tribunal hearing). She his been a support rather than a representative on his behalf; she seldom spoke for him but she helped him navigate the bundle and sometimes prompted him with questions to ask.

Witnesses

17 We note at this hearing that this is the first full hearing where the claimant has attended effectively unrepresented. He was represented by Mr Timothy Taylor during the Judge Russell hearing. The claimant in this case was left to draft his own list of

issues. That was a case management decision whose wisdom this tribunal doubts. The claimant does not have a good mindset for such a task.

18 In answer to the question "given the employee's duties are there any risks at work which might worsen his health?" Dr Rost responds: "Social interaction with groups of students can be stressful and unpredictable behaviour may well trigger health problems". It is unclear what the physician was recommending and why she had said yes with caution to the question is he fit to return to work? This was putting severe restrictions on Ms Wilson as to where to deploy the claimant as we shall describe.

19 It has been the claimant's single most persistent theme at this hearing (and in the school) that should have been allowed to return straight to the community team. That is the OPAL team (Off-site Provision of Access to Learning).

20 Ms Wilson explained to us that this report did not give her any confidence and she still had strong reservations. Following the report the claimant had written to her saying that he intended to return, by letter wrongly dated 9 July, sent on 2 July. He stated his intention to return to work on 14 July that was one month after the report. He offered Ms Wilson and Mary Mylott a chance to talk to his GP - an opportunity they did not take up.

21 By letter promptly written the following day Sharon Wilson declined to let the claimant return to work. Her reasoning was:

> "We received the report from Occupational Health on 20 June 2014. The report stated that you were fit to work with caution. However the report did not provide adequate information or advice to allow the school to consider a return to work.
>
> We will shortly be sending you a separate letter inviting you to attend a formal hearing under the school's sickness absence management procedure and therefore ask that you do not attend work on 14 July."

22 It appears during what the claimant characterises as his enforced continuing absence from work the respondent did not treat it as medical suspension under paragraph 4.6 of the Essex County Council Sickness Absence Management Procedure. The claimant was not paid. It was not inconsistent with the procedure, whereby if someone is on a phased return, working part-time hours they will only be paid for the hours actually worked and not paid in full until they return to full hours (Paragraph 4.7.1). However the claimant might have been paid under Paragraph 4.6.

23 We do not have to decide this. This aspect of the case was previously dealt with in the Russell judgment at paragraphs 120 to 121. That tribunal dismissed that complaint.

24 The following day Ms Wilson sent the claimant a letter inviting him to attend a formal sickness absence hearing on 15 July. He was told he could be accompanied to the hearing, by a trade union representative or "some other person" (not necessarily a colleague).

25 Further, the hearing was not before the head teacher:

> "The sickness absence procedure says that formal hearings are usually heard by the head teacher but it has been agreed on this occasion for the hearing to be conducted by Stuart Freel who is a representative of the school management committee. He will be advised at the hearing by Tula Smith senior HR consultant."

Mr Freel conducted the hearing because, at the time, there was an outstanding grievance against Ms Wilson. It was anticipated that the claimant would object. Because Mr Freel had only been on the management committee since 15 May, and because he had come from outside, he was thought ideal to hear the case. He had had no contact with this case before, unlike several members of staff, HR, management, and other members of the governing body.

26 As usual for the absence review management meetings/hearings the head teacher Ms Wilson provided a report. The report starts with a chronology recording the claimant's sickness absence. It had started on 15 April 2013. He had been continuously absent for 15 months. His sick pay had gone to half pay as at 16 October after 6 months. It therefore must have ended in April 2014.

27 Part of the material for the hearing was a specialist report on the claimant's recently diagnosed autistic spectrum disorder by Dr Oliver Mason - dated 29 April 2014. He was a consultant clinical psychologist based at Goodmayes Hospital. The report, like the occupational health, report stressed the need for a structure and routine. The doctor stated:

> "Currently he spends many hours researching technical legal issues and admits that this is obsessive. He likes and needs routine and structure and finds it very difficult outside of these routines/structures. He appears to have stereotypically repetitive hand flapping as a child.
>
> He reported becoming preoccupied with details others tend to miss and is fascinated by numbers and patterns. He tends to lose the bigger picture and instead fixates on the small details. He prefers facts and areas where there are black and white answers such as the law. He finds it difficult to appreciate other's perspectives and points of view. He tends not to change his mind.
>
> Oliver tends to communicate about his own interests and finds it difficult to engage with others on what interests them. Indeed he sees no point in doing so and as a consequence largely avoids others. He does not enjoy or easily makes social small talk or pass time with others. He cannot easily tell if a listener is bored with what he is saying and frequently makes "*faux pas*" to others. Descriptions of his childhood are consistent with this."

28 One can see how reading that might have given Ms Wilson reservations about accepting the claimant back into the CSS as a teacher of children. These were not normal students, but students who had been excluded and were, by definition, emotionally and behaviourally disturbed. However, to give the claimant credit where it was due, Ms Wilson stated that in the recent past he had had a degree of success in teaching children who were themselves autistic.

29 Dr Mason added an addendum to his report on 5 July saying:

> "… Oliver is a case in point. There will be a continuing need for social support and some as in Oliver's case will also require input from mental health professionals. Employment can, and in Oliver's case *should* [Dr's emphasis] be maintained but requires vocational support that is "autism aware" and individually tailored to his needs."

Clearly that was helpful and supportive to the claimant.

30 Ms Wilson's final report was dated 25 June 2014. It was sent to the claimant in good time. As we know from this tribunal hearing, the claimant cannot deal with last minute disclosure of information and documentation. Her recommendation was as follows:

> "… My overriding opinion going from Mr Doyle's own submissions in relation to his health and the effects his conditions have on him, his behaviour in meetings where he has shown signs and symptoms of anxiety stress and depression, and his recent diagnosis of an autistic spectrum condition. The recommendations of Dr Mason coupled with the OH report is that he is not fit to return to CSS. With his recent diagnosis of ASD and its associated concerns about change in routines I do not see how he will be able to teach at CSS.
>
> We are unable to sustain his absence any longer and I recommend dismissal on ill health capability."

31 It is of note that at the earlier 14 March 2014 informal absence review meeting the claimant had stated that his psychologist had said he was not to be around children. (This must have been a reference to Dr Mason). However, after that statement was quoted against the claimant, he worked strenuously to qualify it. Indeed he employed the occupational health report of Dr Claudia Rost as a vehicle for qualifying it. She stated:

> "He feels that the statement made by his psychologist that he is "not to work with young people" was taken out of context and could be misunderstood. It was made for his own protection (not the children's) in February this year and no longer applies."

Clearly the claimant had to do something about the statement.

32 It is one of the features of this case that the claimant, who shows pronounced autistic traits, was artless in his evidence to the employer and to the tribunal. He is quick to make statements which do not favour his case, without necessarily realising their significance. (He disclosed a full recording of his consultation with Dr Rost that says considerably more than Dr Rost said in her final report for the appeal hearing. The report was qualified and restrained compared to the unedited transcript – see below). There was a refreshing naiveté there.

33 In the run up to the hearing on 4 July the claimant sent one of his long and legalistic grievances. This one started "Dear Sharon". It was addressed to Sharon Wilson the head teacher, Jayne Bowers (the HR manager for CSS South), Mary Mylott the head of OPAL, Occupational Health, Penny Ashmore, and Timothy Taylor (his previous representative at workplace hearings and also before Judge Russell).

34 For some reason the claimant considers that his grievance should have been sent to all members of the management committee by Jayne Bowers who herself is one of the management committee/board of governors. We do not see why Ms Bowers should have done that. It would have been against logic to automatically forward an email grievance such as this to the entire board of governors. Nonetheless the email

which attached the grievance said:

> "Dear Sharon and Jayne
>
> I should be grateful if you could confirm receipt of the attached documents and I should be grateful if it could be forward for the management committee's attention.
>
> Kindest regards
> Oliver"

35 The tone of the grievance can be gathered from some excerpts such as:

> "I am requesting that this grievance letter is taken seriously. I would remind the management committee that it is unlawful for employers to subject its employees to detrimental treatment, threats, victimisation, disciplinary action, loss of work or pay or damage to career prospects, on the basis that they have made protected disclosures."

He cited s 43B(1)(b), (c), (d) and (f) of the Public Interest Disclosure Act 1998. (The reference is incorrect for what it is worth. It was the Employment Rights Act 1996). He cited *Merseyrail Electrics 2002 Ltd v Taylor,* an EAT case and the proposition that management could not go behind a medical certificate; something we have already remarked on. He cites *Ring v Dansk* [2013]; *Spring v Guardian Assurance* [1994].

36 At the bottom of it it states:

> "cc Members of the Management Committee
> Mary Mylott, Occupation Health
> Joanna Killian
> Penny Ashmore and
> Timothy Taylor"

The claimant told the tribunal that he had sent a copy for the attention of Joanna Killian. She is no less than the Chief Executive of Essex County Council. The tribunal still fails to understand the logic of this or what the claimant thought he would gain from it.

37 The final and formal sickness absence review "hearing" as it was called took place on 15 July 2014. The meeting lasted 3 hours which included 40 minutes for Mr Freel to deliberate and take advice from Ms Tula Smith. Ms Wilson was supported by Colin Hooker who is an HR advisor in the Essex Education Service, a traded arm of Essex County Council providing services for all schools, libraries, governors. Mr Freel was a witness to this tribunal hearing as well as Ms Wilson. The claimant was represented by his friend and supporter Timothy Taylor in the workplace hearing. Management - Ms Wilson and Mr Freel - stated to the tribunal that they found Mr Taylor unhelpful, oppressive, unduly adversarial, and legalistic like the claimant. He came to the hearing with law books.

38 Without asking permission the claimant recorded this hearing and has now made a transcript of it.

39 Many employers would not have allowed any non-colleague to support an

employee at such a meeting whether this was a reasonable adjustment or whether it was an acknowledgement of the fact that the claimant had been out of the school for over a year, we are not sure. It may have been the respondent's standard procedure.

40 There was an animated and unnecessary argument over the support costs that might be necessary to support the claimant in a return to work. It is well known legal debate in the context of disability discrimination law that has now become the arid "costs or costs plus" legal debate. Timothy Taylor quizzed Ms Wilson if the cost was going to be £10 or £1,000. At one stage Ms Wilson said she was not prepared to be spoken to like that. Mr Freel thought this wasunduly aggressive on Mr Taylor's part. Ms Wilson's bottom line position on this was that the costs were beside the point as she did not consider that she could accommodate his needs no matter what the cost.

41 To his credit Mr Freel was keen to hear from the claimant himself because Timothy Taylor's participation was drowning out what the claimant had to say. He specifically asked the claimant what his position was. One sees this clearly in the transcript.

42 The claimant's aim throughout this case has been to return to the OPAL team. He wanted to retrieve what he saw as a golden age in his career when he worked satisfactorily teaching in the community. He stated to the meeting that he might need telephone support when he was working out in the community - a provision that Ms Wilson considered wholly impracticable and inadequate. Emergency situations could always present themselves and the chosen telephone support contact would not be available to answer the telephone in a school or education service.

43 This year had seen the emergence of a firm diagnosis of autistic spectrum disorder. Having observed him at this hearing over several days and having read of his conduct in meetings and in his correspondence with management it is surprising that the formal diagnosis was made so late in his life. Ms Wilson told the tribunal that she suspected all the time that he was on the autistic spectrum. That entire staff group has a good sense of autism as there is a considerable autistic representation within the student group.

44 The year also confirmed the claimant's post traumatic stress disorder and the long shadow the 2007 assault continued to cast over him.

45 Ms Wilson's plan was that the claimant would have to come back, initially, to work in a centre. This might involve working with more than one child at a time. This was something which the claimant said was hard to accept because it took him back to potential triggers for his PTSD. He had been set upon by a group of boys not a single child. Ms Wilson was clear she did not rule out the claimant returning to the OPAL team in the longer term, but it could only be after he had been observed undertaking teaching in a centre and when he appeared stable and robust enough to return to working in the community.

46 There was this almost irreconcilable tension between the claimant's plan and the head teacher's. Ms Wilson considered that adequate support could not be provided in the community. It carried too many risks. She was asked whether a second worker could attend to accompany the claimant when he was on a one-to-one lesson. She

stated that in many of these homes it was hard enough to get consent for one person to go in. The risk of unpredictable behaviour could never be eliminated even with some of the less challenging students.

47 The other particular problem with OPAL team was that the student group was in constant flux. Hospital lessons would come to an end when the patient was discharged from hospital. People were moving into the area, and people were moving out of the area. New referrals were being made from schools, and some students returned to mainstream schools (even though it would not be the specific school from which they were excluded).

48 Mr Freel in his evidence to the tribunal stated that he was most unimpressed that the claimant had prevented Ms Wilson from getting a fully informative assessment from occupational health by disallowing 14 out of 19 questions she wished to have answers to. She had gone to some trouble to compile that list consulting both HR and legal departments. She was very concerned about the risks for the claimant and for students.

49 He stated that it would have amounted to negligence for Ms Wilson to allow the claimant to return to the OPAL team at that stage. The claimant would have to returned to work via a period in one or other or both of the centres – Saturn Centre in Langdon Hills, or the Galaxy Centre in Fairview where he could be in a classroom with another teacher overseeing him, and within reach should any untoward behaviour occur.

50 In his witness statement to the tribunal Mr Freel said the discussion about the claimant being accompanied or supervised in the home of a single student, and the conjecture about hypothetical costs, was unhelpful posturing. He described the prospect of the claimant being a lone worker in the homes of challenging / vulnerable students, or in a local library or similar space, was out of the question at that stage.

51 He understood that Ms Wilson by no means ruled out the claimant returning to OPAL in the longer term but he had been off for 15 months - completely off-school. The school needed to observe the claimant back in the teaching environment to see if he would be safe.

52 He decided that the plan was hopelessly impractical and the claimant would have to be dismissed. This decision was announced at the hearing and was confirmed by letter dated 18 July. The claimant was given a right of appeal to the governing body.

53 Unfortunately the minutes of the hearing which had been taken by Jayne Bowers took a long time to reach the claimant. The claimant had emailed Ms Bowers on 24 July asking for a copy of the minutes of the meeting and also a PDF copy of the handwritten notes which Ms Bowers had taken on the day. He also asked to see the Public Sector Equality Duty Policy. Ms Bowers had to ask HR if the claimant was entitled to see the handwritten notes. She took advice from Colin Hooker and Tula Smith, both of whom worked for EES:

> "Is he at liberty to ask for my handwritten notes they're even more rubbish than the typed ones

> and I really wouldn't want to provide them. Could I say they get destroyed once typed up?
>
> Is there the policy he is asking for? The Public Sector Equality Duty Policy for Essex County Council?"

(It ultimately appears there is no written Public Sector Equality Duty Policy nor is one mandated under Chapter 1 Part II of the Equality Act 2010 - section 149. Unfortunately this request for black letter law is symptomatic of the claimant's condition as Dr Mason noted. His report suggested that the claimant acknowledged that tendency).

54 Ms Bowers sent a draft of the notes by email to Tula Smith, Stuart Freel and Colin Hooker who had all attended the meeting and saying:

> "Hi Tula/Stuart/Colin
>
> Please find attached minutes of Oliver Doyle's hearing. I have done what I can but it was extremely difficult. I think every time it got a bit heated I stopped writing. Hopefully you may be able to fill in the gaps between you. I would prefer not to have 3 different versions of changes but not sure how best this can be arranged. Tula suggested that maybe Stuart could check them first."

She could not have done more to get these notes finalised and sent to the claimant. The delay was on the part of the other 2. The school holidays did not help. The hearing was shortly before the long summer holiday. Unfortunately they missed the moment before everyone went away for the summer. She was back on the case promptly when the school came back on 3 September when she chased up Tula Smith again for her comments on the draft notes. She stated:

> "Hi Tula
>
> What are we doing about the minutes? He is bound to start jumping up and down soon although I assume you know they taped the meeting, even some of our private conversations when they were not in the room…."

55 At a hearing in this tribunal before Employment Judge Jones considered that portion of the notes during which neither the claimant nor Mr Taylor were present and there were panel deliberations. These were wholly excluded from the tribunal proceedings. The remainder was admissible. That decision was wholly consistent with the previous case of *Dogherty v Chairman and Governors of Amwell View School* UKEAT/0243/06 where precisely the same thing had happened. It is the difference between clandestine recording and "bugging".

56 The claimant submitted a formal appeal on 6 September 2014. The appeal was 15 pages long. It had many legal references. The appeal email was addressed to Jayne Bowers, Sharon Wilson, Joanna Killian, Ms Ashmore and Mr Taylor. Ms Killian in fact responded saying that Essex County Council had already received it and was dealing with it. Ms Shepherd as the chair of the management committee responded saying that she had organised the appeal and by further letter of 26 September stated:

> "I now require further details of the grounds of your appeal in order to decide on the appropriate format before the hearing … An ill health dismissal appeal hearing may be a full rehearing of the original case or a consideration of a particular matter where the appeal is on a specific and narrow point. I would therefore ask you to clarify the specific grounds of your appeal in the

> context of the original sickness absence outcome in writing giving as much information as possible to each relevant point within the next 7 days by 6 October. Once I receive this information I will write to you again to confirm the arrangements of your appeal hearing."

57 The claimant responded on 6 October enclosing a reduced 7 page appeal. It was considerably more helpful than his original appeal with fewer legal constructs, and more hard facts. He referred to the 2007 assault saying how unfair it seemed that he was being dismissed now because of something that happened to him in 2007. He then suffered an injury in service while attempting to protect a student who was being attacked.

58 Ms Shepherd wrote to the claimant on 21 October proposing an appeal hearing for Friday 14 November at 9:30 at CSS in Langdon Hills. The letter carefully outlined the roles of everybody involved. Ms Shepherd as the chair of the committee only had an administrative role setting up the hearing; Mr Freel was to present the management case; Tula Smith would be supporting him. The panel was to be a wholly independent panel; Rosemary Lovett, Christine Dunning and John Hunter outside the service (all from mainstream education); Julie Ann Agland would be supporting the panel; Ms Wilson would be a witness to the hearing.

59 By letter of 28 October the claimant asked what disability awareness training the assembled panel members had had and the dates of their training. That was sent to Jayne Bowers, Penny Ashmore and Timothy Taylor. Inappropriately it was addressed "Dear sirs".

60 By her formal letter of 21 October Ms Shepherd stated:

> "It has been agreed as a reasonable adjustment that we will record the appeal hearing and provide you with a transcript after the hearing a note taker will also be present at the appeal. You will not be permitted to record the hearing on your own device. A copy of the transcript of the recording of the hearing on 15 July 2014 that you provided has been included in the pack. Please note that the private deliberations of the panel has been redacted from the transcript."

Helpfully Ms Shepherd responded to the claimant's queries about the credentials of the panel saying:

> "The panel will be made up of 3 school governors. Governors are lay people who come together as part of a collective body to make decisions about schools under local management arrangements as empowered by the school standards and framework at 1998. They are competent to undertake appeal hearings and have undertaken the following training which incorporates the training you identify within the last 5 years.
>
> Jane Herrington – Diversity and Equality
> John Hunter – Recruitment and SEN and Personnel Training
> Christine Dunning – none.
>
> The panel will be advised by an HR professional who has received the following training again incorporating the training you identify - Diversity and Equality 25 May 2012 - How We Behave 16 April 2012."

At the end:

> "Your letter of 6 October clearly states at paragraph 83 'finally I would like to raise a new

> grievance given the hostile, aggressive and intimidating manner in which the hearing on 15 July 14 was conducted by Stuart Freel, Sharon William and Tula Smith. I felt ganged up on by them'."

She says:

> "It is appropriate following HR advice that this complaint be considered at the appeal hearing".

61 As preparation from the hearing the senior HR consultant Julie Agland, sent the panel the following advance information on 14 November - links to information sites for post traumatic stress disorder (NHS site) and www.autism.org.uk.

62 Due to the misunderstanding of one of the claimant's emails Ms Shepherd remarkably wrote a letter to him on 17 November thanking him for confirming he would not be attending the appeal on Friday 21 November that he was withdrawing his appeal. He was not. The claimant had stated that he was not able to attend the meeting himself because of management's failure to make some reasonable adjustment. He stated as a consequence he had stood Mr Taylor down.

63 On 18 November Ms Shepherd wrote again saying:

> "Having reread the letter I note that you state I could attend in person if the management committee made the reasonable adjustment which I needed. However you have not stated which reasonable adjustment you referred to and having checked the arrangements for the appeal I understand that reasonable adjustments have been made and will be made for you on the day."

The claimant then answered the question with a question. That must have been irritating to management who were trying to do their job and organise an appeal hearing under their procedure. How were they to know which reasonable adjustment they had apparently failed to make?

64 By another overlong email on 19 November 2014, the claimant stated:

> "I am confused about your comment made in the penultimate paragraph where you state you are at 'a complete loss as to what reasonable adjustments have not been made and I would be grateful if you would let me know as soon as possible so that arrangements can be made'."

He then expanded:

> "Furthermore I refer you to an excerpt in my previous letter of 6 October whereby I requested – given your apparent conflict of interest – that you should not have anything further to do with my appeal."

It is a detailed item by item pre-emptive critique of the entire impending hearing.

65 Ms Shepherd had only been organising the dates and times and corresponding with the claimant about the diversity credentials of the panel which the claimant had specifically requested.

66 The claimant based this conflict of interest on the grievance he had about his grievances which were all dismissed by Ms Shepherd's earlier letter. Then he stated:

> "I don't feel it is appropriate you should be asking questions but rather these questions should be asked of me by a person who does not have a conflict of interest. For this reason I would ask that you now provide me with the named persons who have been given delegated responsibility for managing my appeal hearing."

He then went on to say that the decision to refuse to allow him to record the hearing was discrimination on the grounds of "something arising from his disability".

67 It is clear the claimant believed that his psychiatric conditions should properly have given him *carte blanche* exemption from general management or oversight of the absence management process. The letter was over-long and over-technical.

68 The claimant's objection to Diane Shepherd and the conflict of interest was misguided given the limited nature of her administrative role in the appeal. Someone had to make the arrangements. Unfortunately the claimant was running out of people on the governing panel who were not in some way previously concerned in his complaints.

69 On 20 November, on the eve of the hearing Ms Shepherd wrote back to the claimant about the recording she stated:

> "Should you have concerns regarding recording apparatus this can be shown to you and explained on the day".

The claimant had demanded that the management committee should answer 9 questions he had set out in his email of 19 November. In response it said:

> "Having sought further advice I am advised that you are unable to submit the questions before the hearing and this decision still stands".

Concerning the attendance of Mr Taylor, she stated:

> "In relation to the attendance of Mr Taylor at no time have you been told that Mr Taylor cannot accompany you to the hearing or represent you. Indeed the original date of the hearing 14 November 2014 was rescheduled at your request to 21 November as Mr Taylor was unable to attend on 14 November but was able to attend on 21 November. In relation to your request to reschedule the appeal hearing until after your Employment Tribunal hearing (it was imminent) this is refused for the following reasons. You have been aware of the dates of your Employment Tribunal hearing for some time. You have already requested a postponement and ask that we reschedule to 19th, 20th or 21st November to allow Mr Taylor to attend. You have had ample time to request a postponement but have not chosen to do so until the day before the hearing 20 November being the day I have been able to deal with your email (and all arrangements are in place all reasonable adjustments requested have been put in place. Considerable time and effort has been made in preparing for your appeal and putting in place the reasonable adjustments you have requested. Again I assure you that both hearings will be conducted in a fair etc.….
>
> Sincerely"

70 As Julie Agland confirmed in writing to the panel there may have been a miscommunication here because unfortunately the letter convening the appeal hearing

dated 6 November does say that the claimant could be accompanied by a trade union representative or work colleague. The letter inviting him to the original absence review meeting said "any other person". In writing to Diane Shepherd the claimant had given a different reason for standing down Timothy Taylor, namely that they would not make this unspecified reasonable adjustment for him. Julie Agland seemed to think that the terms of the appeal hearing letter is why Mr Taylor was stood down.

71 In his email of 17 November the claimant had stated:

> "For the avoidance of doubt after receiving Ms Shepherd's letter dated 14 November 2014 which stipulated the management committee's refusal to make the reasonable adjustments which I needed in order to have attended the appeal hearing in person I stood Mr Taylor down. As such, Mr Taylor is no longer available on 21 November 2014."

That seems to be the reason if he had spotted it he certainly would have played on the wording of the 6 November appeal hearing letter just as much as he played upon the literal reading of the occupational health referral form and the 2 questions. This is the claimant's tendency to literal interpretation of correspondence.

72 Ms Agland had informed the panel about the recording:

> "The proceedings are going to be recorded using a machine I have borrowed from internal audit. The machine allows for three identical copies to be recorded at the same time this would allow Mr Doyle the opportunity to take home CDs of the proceeding at the end of the day. I cannot be sure that he understands this. He appears to want to record the proceedings himself. This has not been authorised from legal (Helen Simpson)."

That was a fair point. It could have been made clearer because it is clear that Mr Doyle did want instant recollection of the hearing which is why it was an advantage to him to play it back at home the same evening. The absence review meeting of 15 July.

73 The appeal hearing was convened just after 10am Friday 21 November 2014. Neither the claimant nor Mr Taylor was present.

74 The tribunal hearing started on Tuesday 25 November 2014 before Judge Russell. The claimant and Mr Taylor were both there for that.

75 At 9:45 the appeal panel asked Jayne Bowers if she would please try to contact the claimant to find out whether or not he was coming. She discovered then that the telephone they kept on the school records was unobtainable. Jayne Bowers wrote:

> "I've just tried to telephone you at 9:45 on the appeal panel's instructions to clarify that you are definitely not intending to present your case today. Unfortunately the telephone number I have is unobtainable. Please could you clarify if you will be attending."

This was emailed to his home email. He did not respond until after 2pm saying:

> "I've just checked my phone and haven't received any missed calls [he would not have done]. I've only now read your emails. I have been up to the early hours of this morning owing to an upset stomach and not feeling well. I had informed Di Shepherd that I would not be attending the appeal hearing this morning and had provided her my reason for making this decision – and

> I cannot understand why appeal panel were not informed."

76 Nonetheless, the appeal panel was wise to check at the time of the hearing. It is a big step to take to commence any hearing in the absence of the employee. There might be a change of heart.

77 Ms Agland later recorded that the hearing had lasted until 6:30pm that evening. She subsequently wrote to Colin Hooker, Judy Raynor the Wellbeing Business Manager and Steve Nunn, the HR manager, stating:

> "After a long day for the panel from 9am until 6:30pm I can advise you that the panel have directed Mr Doyle back to occupational health for a case conference before they make a decision. They have made it clear that Mr Doyle should cooperate. The panel require a case conference to be held with the relevant parties to assess Mr Doyle's ability to return to CSS and discuss this. I believe there are two areas of work one being outreach work at pupil's homes, libraries and schools and the other being work in a centre."

78 In a controversial statement in that email, which has been enthusiastically cited by the claimant throughout this hearing, she stated:

> "The Head Teacher stated that Mr Doyle could return to a centre at first with a small class and a teaching assistant. She also said he could be kept safe and supported by colleagues therefore her argument that she could not sustain his absence flew in the face of this. Also he was signed fit by both his GP and occupational health."

Ms Agland was critical of the head teacher. Presumably this reflected the views of the panel. At the hearing the head teacher explained that as the arrangements for the formal hearing were in motion she felt she should proceed. It would appear that the head teacher did not go back to occupational health to qualify what occupational health meant by: "with caution" and secure appropriate information. Again one of the problems with this was that it did not acknowledge the fact that the claimant had effectively blocked an effective occupational health referral by refusing to let occupational health answer 14 out of the 19 questions Ms Wilson had proposed.

79 The passage about "flying in the face" of the head teacher's argument was not fair to the head teacher Ms Wilson. In fact it was the claimant himself who said that he could not return to the centres. That conclusion was supported by occupational health because the claimant could not tolerate groups of children. This might be why the claimant's and Mr Taylor's absence from the appeal hearing helped the claimant's case as it did. It was an irony that, of all the hearings in the workplace and in this tribunal, the hearing with the most favourable outcome for the claimant was the one which he did not attend. We can see how that came about.

80 As far as case conferences are concerned, they are part of the occupational health service. They are referred to standard form guidance notes sent out with all occupational health reports. (As is usual with guidance notes, managers tend not to read them!) Occupational health referral and reports is a well trodden and familiar path unlike case conferences. It happens that Mr Freel had never seen the notes, Ms Wilson had not either. In those notes one of the stated options is a case conference. That means a conference between the employee affected, occupational health, in person, and responsible management. It may well be more than one manager or

colleague. It would be the staff affected by the individual's return to work.

81 Mr Hooker informed the tribunal that he had had one case conference in his experience. He knew of the procedure but in his role he was likely to have known of the procedure if anybody did. He had been working for EES for 4 years and he had 6 years experience in HR, mainly in education.

82 Part of the Hunter appeal panel's decision making concerned the grievance that the claimant had raised in respect of the conduct of Stuart Freel, Tula Smith and Sharon Wilson. This had been set out in the claimant's email to Ms Shepherd. There was an outcome letter in which the appeal panel partly uphold this grievance. They stated:

> "The impression given by the transcript [i.e. the claimant's transcript] was that the ill health hearing panel were closing down questions and the questions were being answered by Tula Smith. It was felt that the proceedings were inappropriately dominated by Ms Smith. The ill health hearing chair did not seem to act in an impartial manner. Mr Taylor's questioning did appear to be aggressive on occasions yet it was the role of the chair to help Mr Taylor to understand the processes involved in the hearing of the matter rather than closing him down as he was a lay person. The appeal panel acknowledged that Mr Doyle on occasions perceived that the ill health hearing was hostile, aggressive, and at times he felt intimated. The panel believe that this may have been exacerbated by the fact that Mr Doyle and Mr Taylor are lay people. Other people in the ill health hearing were professionals."

It has to be said in favour of Mr Freel and Tula Smith that although Mr Taylor and the claimant were lay people they came to that hearing with law books which they cited. Further Mr Taylor was extremely assertive and sometimes needed restraining.

83 The next step was that there was a case conference which took place on 12 December 2014 at the offices of occupational health in Chelmsford. It was attended by Colin Hooker for HR, Sharon Wilson, Dr Claudia Rost, the claimant, Penny Ashmore and Judy Raynor, the Wellbeing Manager with EES.

84 This was an important conference. The appeal panel had asked two questions as follows. Dr Rost has been asked two questions by the appeal panel:

> "1. Is Mr Doyle medically fit to return to work? Answer in her opinion "he is fit to teach preferably on a one-to-one basis".
>
> 2. What did Dr Rost mean by the term fit with caution in her letter 13 June 2014? Answer "Dr Rost felt that Mr Doyle may struggle working in larger groups".

And then:

> "Mr Doyle wishes to return to the OPAL team where he did one-to-one teaching. Alternatively he suggested he work into the hospital team to reintegrate back into the job. Mr Doyle informed the group although his treatment for PTSD concluded in July 14 he has now been re-referred to Goodymayes in January 15 for further support. Whatever happens today on Monday he feels that having emotional support in the background would be helpful. He feels ready to return to work. He informed the group that he needed the structure of working life as this helped with his depression. He said he was willing to cooperate to help with his return to work. He acknowledges that if faced with stressful situations he can get panicky but recognises the triggers, and his reaction is less dramatic now. However he did say he finds it stressful being

> around larger groups. I suggested that if he could not return to working in client's homes could he go to the hospital team. Ms Wilson "said she needed to undertake a risk assessment on the role and duties before Mr Doyle return to work taking into account the effect on the young people. She had concerns that should he get flashbacks that there needed to be someone there to support him and if necessary take over from him if he needed to leave the workplace. Replacement would not be possible in a one-to-one setting in the community. She said that the hospital setting was extremely unpredictable and probably the most stressful and bearing in mind the medical advice has suggested he is not exposed to an environment where change is constant. She felt that this would not be suitable. Dr Rost asked if it would be possible for Mr Doyle to return to work in the centre for the first part of his return to work to help his reintroduction back to work."

85 Dr Rost asked the group to take into consideration the fact that these medical experts based their opinion on one-sided information from the patient. By contrast in occupational health the view should be more balanced. She revealed that even she had not been aware at the time she wrote the last report that Mr Doyle's work had been working exclusively in the community. This had to be taken into account when interpreting medical advice. So there was a head on conflict:

> "Mr Doyle says he feels he is being treated unfairly and that we trying to force him into an area which he states causes anxiety to him even when talking about it. He feels he is being pushed to go back into the centre and feels he would be better suited to the hospital team or in the community.
>
> Ms Wilson stated that she is not prepared to let Mr Doyle go back to one-to-one working or in the hospital team in the first instance. Ms Raynor suggested that due to the length of time Mr Doyle has been away from the workplace any return would need to be gradual taking small steps while integrating Mr Doyle with all aspects of the role

It was easy enough to say that.

86 Some decisions were made:

> "Mr Doyle is offered the opportunity to teach maths to the children in the centre for the first six weeks. Mr Doyle has regular support. A full review of the situation takes place by fourth week. A gradual build up of hours takes place. Weeks 1 and 2 half days for two weeks, week 3 full days, 2 half days. Week 4 full time hours. Risk assessment to be undertaken by Ms Wilson before any return to work. Dr Rost asked if there was the option to shadow someone in the hospital team. Ms Wilson said this is possible but there is no vacancy there at present. Mr Doyle asked if the role could be swapped."

87 Ms Wilson was far more likely to know what was involved in the hospital team and be a better judge of it than the claimant. When she considered this medical report and her understanding of what the work was like in the hospital team she could not reconcile them. She was not prepared to countenance the claimant going to the hospital team with his vulnerabilities.

88 Following the case conference there was a reconvened appeal hearing set for Friday 30 January at 20:15. A Risk assessment was carried out by Ms Wilson 7 January 2015, for the purposes of that hearing. She provided risk assessments for teaching in homes and libraries, and in hospitals for the OPAL team. She could not identify practicable control measures for the identified risks. 4 out of 7 areas of risk were high risk. Risk meant an unpredictable environment where situations could

change at a moment's notice. She could make no constructive suggestions about risk.

89 For teaching in the Saturn centre there were 3 areas of medium risk and 2 areas of high risk. However, in the centre, she did find there were possible control measures. Although it was headed "Saturn Centre" she stated there was no meaningful distinction between work there and work in Galaxy (contrary to what the claimant thought).

90 Ms Wilson engaged with the risks constructively and perceptively. She had understood and accepted the consensus view that the claimant found it difficult to cope with groups of young people. She stated as a control measure:

> "Can enable Mr Doyle to teach on a one-to-one basis initially though this will need to be in a classroom setting with groups of children in the same classroom. Support of a senior member of staff and another teacher in the classroom. All staff are trained to deal with situations and senior staff would take control of difficult situations quickly."

Under the heading "To work successfully in the centre and be fully aware of processes and procedures in the school" there is:

> "Would need to be fully aware of the processes and procedures at the centre. This would need to be part of a full induction and begin before he returns. …. Time spent shadowing a member of staff prior to teaching on a one-to-one basis".

Unfortunately the written procedures themselves became a battlefield between the claimant and Ms Wilson.

91 The appeal hearing duly took place on 30 January 2015 at 9:30 and was recorded on the multidisc recording equipment. It does not appear to have been recorded by the claimant separately. As the outcome was favourable to the claimant. There are no complaints about the process or the outcome in these tribunal proceedings.

92 The outcome, recorded in a letter dated 6 February, was as follows:

> "In summary the outcome of the appeal panel's decision was to reinstate you back into the role of a teacher at the Children's Support Service (CSS) initially in the Saturn centre under the support and direction of the Head Teacher. You will be reinstated from 31 December 2014."

93 The panel considered the following points:-

- That the original hearing did not take into account Mr Doyle's request for a meeting to return to work. This request was not actioned.
- The occupational health report was ambiguous. HR failed to advise the Head Teacher to clarify the meaning of return to work with caution.
- There had been no risk assessment carried out to see how Mr Doyle could return to work.
- The Head Teacher had been poorly supported by HR as she had not been advised that a case conference was necessary. The panel agreed that the processes and procedures had not been followed correctly.

94 The panel went on to say:

> "The panel urges Mr Doyle to view his reinstatement as a fresh start and recommended that he approaches his reintegration to the CSS team with flexibility. This concludes the appeal hearing and it is now for the Head Teacher Ms Wilson with cooperation from Mr Doyle to work on the return plan."

There was a return to work meeting on the same day 6 February. The invitation stated controversially as it turns out: "As this is not a formal meeting it is not appropriate for you to have any support".

95 Even at that early stage the claimant was pushing again and again for a return to the OPAL team. It was fixation with him. The record of that hearing states: "I want to know how I am going to be integrated back into the OPAL team" and Ms Wilson said "We will talk about a possible return to the OPAL team at the 6-week review". She urged him to look at the risk assessment saying it was his opportunity to feed into it and make suggestions.

> Ms Wilson:"Looking at point one of the risk assessment you have said you are not up to date which is why we are looking at a gradual increase".
>
> Oliver Doyle: "In the OPAL team I could do a similar role".
>
> Ms Wilson: "We are not discussing the return to OPAL team at the moment we are focusing on supporting you back to work in the centre".

96 Later Ms Wilson said:

> "The third part is about an understanding of the policies. The policies change on a yearly basis so it is important that we give you time to read them. It is unfortunate that you did not get the email that was sent with the links but we will make sure you have time on Monday to read them".

97 Again with reference to the OPAL team (which was managed by Mary Mylott) the claimant asked:

> Oliver Doyle: "Why was Mary not considered to be my line manager".
>
> Ms Wilson: "Mary does not work in the centre and has a very busy job that means she is not often here".
>
> Oliver Doyle: "I understand that Mary is busy but can I meet with her weekly to see how things are going on the OPAL team?"
>
> Ms Wilson: "One of the other points … was that all staff should be autism aware. I can assure you that all staff in the centre are autism aware. We have several children in the centre who are on the autistic spectrum so I'd say they are aware ….
>
> Oliver Doyle: "With regard to further reasonable adjustments can I be invited to attend any meetings or training sessions that are taking place within the OPAL team?"

> Sharon Wilson: "We will discuss that at the 6-week review but we'll try and make sure that there is some contact with the OPAL team. I'll talk to Mary and see if there is any thing specific you need to go on."

98 On returning to the centre the claimant was to be immediately supervised by Kevin Bainbridge who was the assistant head teacher who reported to Tim Moynihan who was the deputy head teacher. The claimant was due to be teaching maths and Mr Bainbridge was a maths specialist. Tim Moynihan had attended the return to work meeting but after the meeting the claimant was given a tour of the building and introduced to Kevin Bainbridge.

99 The claimant returned to work on Monday 9 February 2015. He was given an hour every morning to look at written policies. He admitted at one stage he was quite obsessive about policies. They have obvious appeal to anyone with autistic traits.

100 Unfortunately, early on I the process, by 11 February, the claimant was writing to the whole management committee with his concerns:

> "Despite Sharon Wilson agreeing I would be provided with time to read all the polices adopted and ratified by CSS as time is not being provided. She has only allocated the first day on my return to work to read the policies and I was provided with a table in the maths room to undertake the task. Throughout the day my time undertaking this task the maths room was used by Kevin Bainbridge and Monica Kelly to teach students in the centre and when the maths room was not used for this purpose it served as a thoroughfare for students and staff alike to discuss business and personal matters. I found it extremely difficult concentrating in the absence of a quiet room free from disturbances despite my best endeavours to read all the policies I was not able to complete this task. CSS has conceded I am a disabled employee within the definition of the Equality Act 2010. However reasonable adjustments have not been made to accommodate my autism and depression in returning to work."

101 Ultimately apparently Kevin Bainbridge told the claimant that Sharon Wilson had said that he would thereafter need to read policies in his own time.

102 Another controversy was the form of reading. The claimant asked the management committee to require that he be given written, i.e. printed, copies of the policies. There were many, many policies and they constantly change. Ms Wilson and Ms Bowers at the centre said that no other employees were provided with such written policies it is hard to see why he should be. This does not appear to relate to any of the claimant's named diagnosis as a source of disability although. He told the tribunal that he gets eye strain looking at a screen for any period of time. He used the word "sensory overload" in evidence to the tribunal. Later, on 12 February, Ms Wilson explained to the clamant about the reading of policies that is:

> "Not only did we give you a morning to look at policies you have at least an hour this week every morning to do so. As we have all our policies on a cloud it is possible to access these anywhere therefore it is not necessary to read them all as they are accessible at any time. It is also not appropriate to print them especially as they are updated constantly. I suggested to you that you need to read the staff handbook first which I hope you have done. You might want to also look under departments where you will find everything relevant to the maths department. If it is too busy in the maths room you can use a computer in the staff room or the ICT or PSHE rooms. I informed you last Friday that you might want to use the staff room. I find that I need to read documents at home which is why the cloud system is so good. Hope your first week has gone

smoothly."

103 It is not clear to the tribunal why the claimant, who was pressed for time to read the policies, should have found time to write a letter complaining to the management committee on Wednesday 11 February.

104 Nothing happened in week 2 because the claimant took a full week's annual leave. He came back to the centre on Monday 23 February and by Friday 27 February he sent a full grievance to the respondent.

105 At the end of the week 1 there had been a review meeting on Friday 13 February. It was a review meeting which was part of the whole return to work plan between the claimant and Tim Moynihan, the deputy head.

106 Following the meeting Mr Moynihan reported back to Sharon Wilson who had the ultimate oversight process reported that Mr Doyle had been concerned about:-

1. Reading the policies;
2. Signing the contract;
3. When he would go to the OPAL team;
4. His ongoing tribunal case;
5. His SENCO training.

Mr Moynihan told Ms Wilson he found the meeting very hard and it was hard to keep the claimant on topic because he had his own agenda.

107 This meeting was after Ms Wilson had emailed the claimant and told him in clear terms why he did not need to print off the policies, how he should start with the staff handbook, and how it was unnecessary for him to sit in a disturbed room to do this. He could do it in the staff room or the ICT room or the PSHE room.

108 This problem with the policies was not as simple as the claimant wanting to print them off. The problem went deeper. He was told to read policies and somehow took it upon himself to read all the policies, not to be selective and not to consult them as much as to plough through them from beginning to end. If he was given all the time to read the policies following his approach he would never have had time to do any teaching, which is what Ms Wilson feared. She had tried to persuade him into taking a more proportionate approach to the policies.

109 One of the claimant's complaints was that he was given a new contract. The claimant was given standard Essex County Council contract of employment dated 13 February 2015. The employer was Children Support Service CSS South. He never signed his contract of employment on his return. The contract stated that: "Commencement of continuous service for statutory purposes was 1 January 2015 and for continuous service for conditions of service and also for redundancy purposes will be 18 April 2006" which was the actual date when he started with Essex and before the CSS acquired the delegated

budget status which it did on 1 April 2013. The claimant never signed this. He considered it was controversial for reasons which we deal with below.

110 The contract was nothing more than a misunderstanding and a mistake. Ultimately Jayne Bowers emailed the claimant later, sometime after the event on 11 March, to say that he would not have to sign the new contract after all. The misunderstanding seems to have arisen because his payroll number had time-lapsed therefore he had to be paid under a new payroll number. Payroll had somehow thought that if it was a new payroll number then he was a new starter but in fact he was a reinstated employee who had been out of the system for more than a year but his continuity was not affected. Ms Bowers told him he could forget about the contract, it was not necessary for him to sign it. No harm was done.

111 It had become convoluted in Mr Doyle's mind because he somehow imagined that if he signed a contract with Children Support Service CSS South instead of Essex County Council as his original contract had been that he would not be entitled to the protection of the section 149 Public Equality Duty. That entire thought was legally and factually misconceived. He was imagining problems where none existed.

112 The tribunal has already observed how insistent and fixated the claimant was returning to the OPAL team and regarded the return to teaching at the centre as a temporary and unwelcome delaying tactic and nothing else. That was why he seemed to Mr Moynihan and to Ms Wilson also as not engaging with the return to teaching properly. Ms Wilson decided that she would have to take some of his review meetings because they were becoming increasingly difficult. Unknown to her until later the claimant was secretly recording the review meetings.

113 It is unfortunate that Mr Moynihan at one stage on 13 February review meeting had said:

> "… that creates a little bit of difficulty for me as I want to be able to treat you like any other member of staff and work with you on that basis and you raising concerns that you should be working with me in a different way. I understand that its return to work after a period of absence. That is the way I would look at it being out of the system for 18 months whatever it is and to get you up to speed and working in a classroom setting with the sort of kid that we've got."

114 In his customarily adversarial way the claimant seized upon this as revealing (as it does) an ignorance of "reasonable adjustments" as mandated in disability discrimination law. That was one of many reasons that Ms Wilson felt she needed to take the meetings herself. She was ultimately responsible for the return to work process. The next Friday review meeting on 27 February she was there. If that meeting was secretly recorded the transcript has not been produced here. It was at that meeting that the claimant presented Ms Wilson with his formal grievance of the same date. It was addressed to the management committee. She later handed it to Diane Shepherd the chair.

115 The claimant said that he was tired by the demands of the environment i.e. the centre and as a result it was suggested to him that he might wish to slow down the rate of the phased return to work. That sounded reasonable. He was due to work full-time in the following week and they suggested that he might stick to 3 full and 2 half days.

The claimant was unhappy with the suggestion however. His reason seems to have been that he wished to adhere to the programme originally suggested by occupational health. A change of plan could be unsettling. This was a conflict for him. The suggestion was intended to benefit him and make him less tired. He saw it simply as a change of plan and therefore something difficult to cope with in itself. Unfortunately change is inherent in the whole concept of "reasonable adjustments".

116 At this review meeting the claimant was told that the following week he would be needed to work an afternoon at the other centre that is the Galaxy centre in Fairview. He was not happy about this aspect partly because it had not been specifically included in the risk assessment which Sharon Wilson had previously done. However, as far as she was concerned, the 2 centres were so similar that risks would be the same and the control measures would be the same, although the staff might be different.

117 The claimant's grievance letter was mainly a complaint about the conduct of Jayne Bowers. He became fixated on her personally for the whole new contract issue. It was also about needing printed copies of the policies which we have already discussed. It mentioned in the final paragraph that Gary Fitzgibbons of Gibbons and Associates was asking that they employ him to advice and support on autism. Ms Wilson decided she would not take up that suggestion. She considered that the staff at the centres were sufficiently autism aware and that adjustments were in place, i.e.:

1. The review meetings;
2. Changes to be agreed in advance;
3. The gradual increase in time was to be agreed on a weekly basis;
4. No changes were made without consulting him before;
5. Support in the classroom, was teaching one-to-one and he had a line manager there and accessible.

118 In Galaxy the equivalents of Kevin Bainbridge and Tim Moynihan were respectively Rochelle Bone and Jo Barak. It was agreed that those 2 would brief the claimant on students to be taught, and the lessons, the day before those lessons were to commence. Again at this meeting the claimant was insistent that six period was only a preliminary to his return to the OPAL team and he was insistent that suitable adjustments were not being made for him. As part of his concern about delaying the phased return to work was that it would delay his return to OPAL.

119 On Tuesday 3 March the claimant met Rochelle Bone. Ms Bone reported back to Sharon Wilson that the claimant had expressed concern about his ability to manage student's behaviour. Ms Bone had been very concerned that he should say that and Ms Wilson was equally worried.

120 At the end of the week, Friday 6 March, the review meeting did not include Ms Wilson this time. Mr Bainbridge gave some upbeat and positive feedback about one-to-one work that the claimant had done with a particular student PM and advised about ways to try and engage better with students who were reluctant to engage. However, Mr Bainbridge's experience was that the claimant dominated the meeting. His fixation with the OPAL team was unabated and he talked about risk assessment, the Equality Act, meeting with Mary Mylott and again his SENCO qualification.

121 The SENCO qualification is an important feature of employment in CSS. A normal teacher's salary at Mr Doyle's qualification was £37,216 per annum. The SEN allowance was £4,034 a significant amount and one that Ms Wilson had to be concerned about. If that was the grade he was returning to they could not for any length of time having him working substantially below grade e.g. working as a teaching assistant (who would be paid a fraction of that amount). SENCO status needs to be kept up with periodic training; Ms Wilson had this in hand. There was to be some extra training at the forthcoming in-service training (INSET) day.

122 The SENCO status was of current concern because at one stage on that same date he had said to Ms Kate Smith the head of English that rather than doing literacy intervention he suggested he might do photocopying duties instead. That was just the sort of work that is undertaken by a teaching assistant.

123 The claimant was not indifferent to the financial implications of his position. He requested from Sharon Wilson that he be paid in full even at a time when he was not working full-time hours. She had responded to him on 16 March stating:

> "At your request I asked the Management Committee if it would make an exception to our normal practice and pay you full-time while you are on a phased return to work. Their decision is to decline this request on the grounds that there are others who this applies to and there is no reason to treat you differently in this respect."

We note, legally, following such cases as *O'Hanlon v HMRC* [2007] IRLR, 404, CA that the duty to make reasonable adjustments under disability discrimination legislation does not include a duty to extend sick pay.

124 Mr Bainbridge and Mr Moynihan reported back to Sharon Wilson. On Tuesday of the following week 10 March, she met with the claimant. Both the meetings of the 6 and 10 March were recorded by the claimant who produced transcripts for them.

125 The meeting took place in Sharon Wilson's office in the Saturn centre. The panel can see that she tried hard to accommodate the claimant's wishes. The transcript of the secret recording is a reliable record. She felt obliged to remind him that he was paid upper pay scale 2 and the top end of the SEN allowance but at CSS the teachers were paid that. She asked him to explain his suggestion about doing photocopying which a teacher might do if they had spare time not as a dedicated task in itself.

126 On the subject of OPAL to which he again steered the conversation, she was insistent. She said:

> "You're not employed by the OPAL team you're employed here. I made that quite clear that anybody can be asked to work in any part of the service to go anywhere any time. That is what people do. They go. We might have a teacher out in primary and we need to put somebody in there today. That sort of thing happens all the time. We have to cover wherever we can and that especially happens in the OPAL team when at the moment save for Tony who works here also does a couple of hours working on the OPAL team teaching French. It happens all the time … So at the moment we have more needs at the moment in the centre where we have a lot of children – and we have more coming in. We need to cover those children"

127 She also said:

> "I can arrange a meeting with Mary but she and I would like to know what the focus of that meeting and what you want to get out of that meeting."

> Oliver Doyle: "First what I am thinking and have thought about this a lot from last night and since the meeting I had with Tim where my anxiety levels went to the point where I was not able to eat my lunch in the centre on Friday. I had to pull over on the A127 because I felt I was coming into these meetings with Tim and Kevin and they hadn't been given the knowledge they needed in terms of the case conference minutes and I found that very difficult."
>
> "…. I should return to effectively the role the same as any other teacher in the centre where the contract of employment dictated the same expectations as any other teacher in the centre should be able to deliver at this point. The fact that you have done a risk assessment and you have identified it is not the case because I need a period of monitoring taking into account the fact that I have three disabilities that was set out in the case conference and the fact that I am attending these meetings and people who are assessing and monitoring me aren't aware of those. I find it difficult. What I feel is that I am a square peg that is being fitted into a round hole. …. analogy say you have a soldier and their legs and arms get blown off are they still a soldier?"
>
> Ms Wilson: "… but they leave that job".

128 Kevin Bainbridge and Tim Moynihan were not at the case conference and we have already quoted unfortunate passage from Tim Moynihan's meeting with the claimant. The claimant had directly accused Tim Moynihan of discriminating against him and Mr Moynihan felt threatened and extremely bad about it.

129 In practice there are limits to the extent that reasonable adjustments can be made because after a time the entire nature of the job is changed and you are not doing that job, but some other job. The claimant wanted to return to a teaching job with a teacher's salary and an SEN allowance for working with this challenging student group. What he was given was support to do the job but the job was the job. Sharon Wilson continued:

> "You have just told me that your anxiety levels went sky high. What if that happened when you are out and about? You are at somebody's home something kicked off, and it will, and you then can't drive?"

Ms Wilson made the point well:

> "Again Oliver you want to come back to work as a teacher. If you are a teacher you've got to teach and do the things that a teacher does. It is not fair on other people you are always wanted to be judged given reasonable adjustment absolutely but actually what would happen if Ofsted came in for example or outside people to judge people? They wouldn't say that's ok he isn't teaching as well as other people because of his conditions. That is not good enough. You know as a teacher we have things that have to happen and what has to happen is you can't do that role then we have to look at other roles. We can't say you can work as a teacher in a lesser capacity.
>
> I have said to you a couple of times that the OH phased return to work was quite fast and that I've done phased returns to work that have taken a lot longer and I've said that to you but exactly what happened with Tim on Friday and I said to you on the Friday before 'do you want

> to' and you said 'yes we'll do it because occupational health said so'".

130 Ms Wilson also dealt with the policies, and made her views plain to the claimant:

> "For example about the policies we have a huge amount of policies each policy is a huge amount and we will fell several trees if we start printing policies and procedures. We have just changed 15 policies. This happens three times a year. About a third of the policies are updated and are on cloud base and it that's why we went to that rather than having it in writing. It may take longer to process it but there is no need for you to read them all. I don't know all the policies. The policies are there are as an aide memoir. When you have a problem you find the relevant policy and you see what it is. We don't expect people to be able to read and know every policy that would be silly. Nobody does that but they are there and we have a policy on virtually everything and you can access it when you need to. We are not saying you need to read every policy there is. What we are saying is you need to be aware say for example safeguarding. Say if you felt I'm not sure whether I need to talk to somebody else – who does know more than you would know or you read the policy at that point. You know we cannot keep all those things in our head."

And he, later showing some insight, said:

> "In terms of policy – I understand that I am excessive in reading policies – and in terms of my mental health that is one of the issues I have."

She must have been grateful to hear that coming from him.

131 Disappointingly at that same meeting on 10 March the claimant also raised his issues around the Leverton assault which had been so many years previously. He frankly told Ms Wilson that he was unable to move on from it.

132 The claimant declined to meet with Tim Moynihan that Friday 13 March but nearly all the ground had been covered by Ms Wilson on 10 March. The problem was that the meetings were intended to discuss the claimant's actual teaching, rather than taking stock of the phased return generally, as Ms Wilson had done. It indicated the claimant's lack of engagement with the practicalities of returning to teaching. Ms Wilson was concerned enough to ask Mr Bainbridge to complete a report on the claimant's teaching as against the teaching standards. The report was dated 18 March.

133 It is controversial because the claimant says it should have been shared with him and he should have had input into the compiling of that report. It is a highly technical objection. The objective of the report was to take stock of how the claimant was actually performing in the Saturn centre where he spent most of his time. Ultimately the report was not all negative, far from it. Mr Bainbridge has shown in the past that he was willing to give credit where credit was due. He stated:

> "OD has worked well with some of our highly motivated students who are studying the higher grades at GSE but there is no motivation when OD is working with the lower ability students or those whose behaviour is more challenging."

And:

> "The lack of enthusiasm by OD is having a negative impact on work that Monica Kelly and Kevin Bainbridge have done over the last three terms with regards to getting students to enjoy maths

> and engage thoroughly in their learning.
>
> Merits are being awarded for positive behaviour and good work but in my opinion OD is very eager to give reds on the students' cards where myself or MK would give greens in way of encouragement."

Ominously he states:

> "There is a level of challenge from the students when they are told that OD will be teaching them. Students would prefer to be taught by MK or KB."

And later:

> "OD comes to work sits at his desk in the corner of the maths room and teaches the students he is asked to teach. He is not proactive in any way and there is no enthusiasm for anything that he does. I am aware of his medical condition but at present the maths room can be quite an oppressive environment for both staff and students. MK and myself have worked hard over the past 3 terms to try to get our students to enjoy maths, challenge themselves, smile and interact with each other in a positive manner. At the moment we seem to be going backwards."

134 Ms Wilson sensitively did not want to increase the claimant's stress levels by observing his teaching herself; it would be better done by Kevin Bainbridge who was far less senior and who was working in close proximity to the claimant. The report these other teachers provided by being in the same room as him was seen by the claimant to be intrusive because in truth they were observing him as well as being there to support his phased return to work.

135 There followed the Easter break. School restarted on Monday 13 April - an INSET day where the claimant might have had more SEN training. The claimant did not attend on that day as he had a stomach complaint. He had a total of 4 days off sick and returned on Friday 17 April. He informed Mr Bainbridge he was anxious and under a great deal of stress. It had been part of the return to work meeting back on 6 February that the claimant should take part in a teaching observation. One such was proposed for the following Monday 20 April. The claimant refused to participate.

136 At the end of the term before the Easter break there was an incident whereby the claimant failed to leave the building when a fire alarm went off. Ms Wilson wrote him a terse email:

> "Dear Oliver
>
> Can you let me know why you left today at 3.10pm without informing anyone? Also you were asked three times to leave the building when the fire alarm went off. In future please leave the building immediately when there is a fire alarm unless told otherwise. Thanks for your cooperation.
>
> Sharon"

137 He wrote a long email of reply but not until 17 April protesting his innocence and that he had left the building when asked. Apparently he was working in the staff room and Debbie Smith came into the room and told him that the alarm was the fire alarm and that he needed to leave the building and he proceeded to shut down his computer. Thereupon she probably asked him 3 times to leave the building. He said that was

surplus to requirements and that he had been at the assembly point prior to Ms Wilson's arrival. But he went further:

> "In the future I am requesting should you need to single me out and provide specific instruction, as in this instance, you are in possession of all the facts as to do otherwise will be perceived as an act of victimisation. This is not the first time you've made an incorrect judgment about my person, and I remind how you incorrectly formulated from information received from Kate Smith that I wanted to become a teaching assistant - which was never the case. In all likelihood in my opinion, unless you review your practice, you will continue to perpetually make further errors of judgment.
>
> I trust my grievance concern raised within this letter will be taken seriously and as an appropriate means of redress given the undue stress this matter has caused me an apology is provided post haste."

138 In response to the claimant's refusal to participate in a teaching observation before meeting with Ms Wilson again, she stated:

> "Dear Oliver
>
> I understand you've agreed to have an observation before you meet with me for a meeting. I'll try and meet with you either the end of this week or next. In the meantime you are required to have an observation which was agreed in your return to work meeting in February."

This email elicited a 2nd formal grievance from the claimant – the 2nd after the claimant's return to work.

(For completeness there had been what could have been taken to be a grievance addressed to the management committee on 11 February 2015. However, this was taken as a request for certain measures to be adopted rather than a grievance that they had not been adopted).

139 This latest was a grievance on 22 April, in response to Ms Wilson's email about the claimant's refusal of an observation. Unlike many previous grievances, it was more focussed and practical. It states:

> "Further to your email dated 20 April and given the position or stance whereby you instruct that a formal lesson observation go ahead despite the fact I have raised concern that line management have not provided me with the support I need insofar as I am not provided with detail as to how my return to working in the OPAL team will be planned for. For the avoidance of doubt I find this situation very stressful.
>
> At the case conference … in 2014 it was agreed that by the 4th week of my phased return to work occupational health would participate in a <u>full review</u>. Further during the RTW meeting in February 2015 it was agreed the review would happen at the end of 6 weeks. Please explain why this has not happened."

140 He then reported experiencing symptoms of psoriasis and his GP had told him it may well be linked to the stress and anxiety that had been generated by his return to work.

141 There then follows the long running controversy about being given a set of keys for the Galaxy centre. The claimant described it thus:

> "The current arrangement in place is that I need to wait until the office staff are in a position to provide me a set [of what are called spare keys, of which there are two sets]. You can understand given the custom and practice of students congregating in this foyer for whatever purpose, I find this situation generates further anxiety for my person.
>
> Initially Rochelle Bone informed that it was impossible for me to have a set of keys as is provided to all staff including part time staff and members at the centre. But after speaking with Steve Turner the maintenance manager he inform me he was instructed not to provide me with keys. Rochelle Bone later explained after making further enquiries that I would need to continue with the practice of receiving and returning spare keys to the office on entering and leaving the building owing to a large amount of keys that needed to be cut. Given the anxiety for this prospect generated for me I suggested that I would pay for the cost of having keys cut. Further to this suggestion Rochelle again after enquiry explained that this solution was unacceptable and the protocol needed to remain in place. Despite explaining to Rochelle that … this protocol generates for me further anxiety and induces my feelings of claustrophobia …. one of the triggers of my PTSD.
>
> I am therefore raising this as a matter of grievance for your attention.
>
> For your information presently I also have the stress of needing to prepare for a preliminary hearing on May 13th in the Employment Tribunal and as you are aware I am not in the privileged position of being able to instruct a legal advocate to support me through this process.
>
> I should again request that reconsideration be given to the timing of the lesson observation and request you take into account the fact I agreed to complete a formal lesson observation during the 6-week review period but Kevin Bainbridge was unable to facilitate. My understanding is that Kevin Bainbridge has been monitoring my working in the centre and has provided positive reviews of my work."

142 Ms Wilson was very reluctant to let the claimant have a set of keys. As with all educational establishments there is a signing in procedure for everybody who enters and leaves the unit, staff and visitors alike. The custom was that staff who were full-time or regular part-time staff would be given keys. These were keys to the internal doors within Galaxy (not the external doors for which there was an entry pad). Apparently even those staff do not take their sets of keys away from the centre but leave them there, as a security measure. Ms Wilson herself did not have a set of keys to Galaxy although she was technically its head teacher. She was based in Saturn where her office was. The claimant was only there twice a week in the afternoons. Ms Wilson instructed the reception staff that when the claimant signed in they would have a set of keys which they would promptly give to him. He would have had to stop in the communal foyer just to sign in at the reception hatch. There was no obvious extra delay caused by the claimant not having a set of keys. He would have had no extra exposure to the groups of young students who sometimes congregated there.

143 Ms Wilson noted that when the claimant reported for work on Monday 27 April he appeared to be more withdrawn and uncommunicative than he had been previously, indicating he might be becoming unwell.

144 On Tuesday 28 April there was an incident at Galaxy centre. The claimant and Ms Kate Smith who was the head of English in both Saturn and Galaxy were teaching 2 boys who were both misbehaving. The timing was unfortunate. Ms Smith left the room on 2 occasions to log boys into the ICT system in the adjacent ICT room. Apparently the claimant would not have been able to do this task as he was not a

frequent visitor to the Galaxy centre and was not familiar with that logging on process.. Apparently Ms Smith was gone was for a short time.

145 After the event both he and Ms Smith made formal written statements about the events as they recalled them. The claimant stated that one of the boys, T, had a container full of colouring markers and started throwing them from one corner of the room to the other in the direction of the bin. He asked T to stop but T did not listen to him and continued. Then the other boy, C, joined in. At this point Kate Smith came back and informed C that she was unable to print off his work. She spoke to them about their behaviour. Neither was interested. T continued walking around the room for the remainder of the lesson punching the steel filing cabinets with his fist.

146 The claimant says that at that point T started throwing pens directly at himself and said to him: "you are nothing but a queer". He went to get further support from Rochelle Bone. The claimant felt he could not return to the scene and he went to the toilet. When he came out he asked Rochelle Bone what was happening and Ms Bone told him that students had gone home. Apparently Ms Bone said to him that it was a pupil referral unit and asked the claimant: "what do you expect?".

147 Kate Smith's statement gives a similar overall account. Apparently that day a number of students were out on a trip so numbers at Galaxy were low. The claimant arrived for his pre-arranged teaching period. She had asked C to print his work from a previous lesson but it could not be done. She asked C to log on to her laptop so that he could print it from there. There was some discussion "Essex Boys" and student C commented that one of the men in it was gay. In an attempt to shut down that whole conversation Ms Smith changed the subject. She went to the ICT room to see if C was still logged on and noted that his computer had timed out. She came back to see both boys throwing pens into the recycling bin and that student T had hit out at the book that the claimant was holding at the time. She decided to split the boys up because they were encouraging each other. She went back and logged C on but he would not cooperate and would not leave the room. T was wondering around the room punching filing cabinets and he threw a board pen hard in the claimant's direction. She directed the claimant to get Rochelle Bone to have T removed. That was when Ms Bone came on the scene and took T away. She did not hear any remark about a queer directed at the claimant (but she had been out of the room).

148 There was an email from Rochelle Bone to Sharon Wilson on 1 May documenting her brief account because she only came in at the end of the incident. She recalled the conversation between the claimant and herself quite fully. The claimant had said that he was going to leave the site. She asked him why. He said he was very anxious about the 2 boys. She replied the boys had been sent home. She said that at this point she was unaware that T had thrown pens directly at the claimant. He said he was going to leave the site as their behaviours made him anxious. She then said (and her statement added "maybe I shouldn't have ...."):

"What kind of behaviour are you expecting Oliver? I mean these children are challenging which is why they aren't in mainstream school. You do know this is a PRU don't you?"

He said: "I know but I feel unsafe so I am going to leave now"

She said: "Do what you have to".

149 As soon as the claimant had left, Ms Wilson tried to telephone him. She was very worried about this incident. The respondent might not have had the correct number for the claimant on their records. She eventually sent an email at 4:26pm and said, amongst other things:

> "I would be grateful if you could let me know you are safe as I am concerned for you. Also I would like you to meet with me first thing tomorrow 8.30am".

The claimant responded:

> "For the avoidance of doubt … after today's experience I feel very vulnerable and have been left very shaken. I have made an emergency appointment with the GP for tomorrow but I will meet with you in the morning."

150 The claimant duly met with Ms Wilson that morning, 9 April. He said he was not well. She said she had been concerned about how he had been since returning to work, and especially since Easter. She told him that she was medically suspending him from then on. She had already written a letter of suspension which she handed to the claimant. He chose to read it there in her presence. She had also already written a referral for occupational health of which she gave the claimant a copy. She confirmed with the claimant that he had a doctor's appointment later. She asked him if there was anything he wanted to collect or if she could fetch anything for him. He said he still had a spare set of Galaxy keys because he had left in a hurry. He agreed to send them to her. She told the claimant to be safe on his journey home.

151 The letter of suspension records that:

> "Over the past few weeks since your return to work I have increasing concerns about your ability to cope with the role even with the adjustments we have made … I am concerned to protect your health and that of the students with whom you are working. I am also concerned that your present state of health may be having a detrimental impact on your ability to carry out the core responsibilities of your role as a teacher."

152 Later on Thursday 30 April Ms Wilson enquired. He replied the same that he could not get a GP's appointment because they were all given out so he went the following day and bizarrely stated:

> "Its outcome was my GP inputted on to my medical records my present medical suspension subsequent to my decision to remove myself from the Galaxy centre owing to my concerns for my physical safety. For ease of communication I recorded a written record of what happened on 28.04.2014 of which I shared with my GP and attached for your information."

This was his same statement of the incident with T and C, which we already précis'd above.

153 Ms Wilson's OH referral was comprehensive. She recorded all the incidents we have described above. There was a very minor point about using different coloured pens for marking students' work but it has been accepted that the claimant might never have been told what the right colour was for each sort of marking. Controversially she stated:

> "His appearance is not as smart as we would expect from our teachers and generally he appears to be anxious, sullen and uncommunicative with both fellow members of staff and with students. This is having a negative effect in the classroom and a negative effect on morale within the staff room."

She continued:

> "He would like to work on a one to one basis as part of the OPAL team working off site. I don't consider he is ready for such a role where he would have no immediate support from other teachers. Although this has been explained to him he refuses to accept my decision on this. Indeed in my personal dealings with him recently I have found him to be rude, uncooperative and uncommunicative."

She followed up with 5 questions. This was the same formal referral form again with the usual "no more than 2 other questions" requirement.

154 This OH referral has been particularly controversial at this tribunal hearing. The claimant focused on one of the most insignificant points - his appearance. When asked for details of what she meant by this, Ms Wilson told the tribunal that the woollen jumpers that the claimant wore appeared to have stains on the fronts. She also confirmed, by comparison, that the claimant's appearance throughout at this tribunal was smart and wholly appropriate. If he had appeared like that within the centres, she would have had no cause to worry. He appeared to the tribunal to be smart and kempt.

155 At this point the claimant had two outstanding formal grievances dated 27 February and 22 April. On 5 May Mr Martin Coulson wrote to him telling that he had been appointed as the grievance investigator. He was a senior deputy head teacher at a mainstream comprehensive secondary school in Wickford. He was completely independent as the claimant had requested. He sifted a number of the grievances which he had been told about on advice from HR and legal. Some grievances had already been dealt with by the Russell judgment; not having read the judgment Mr Coulson took HR's word for this.

156 He replied to the claimant's request for details of other staff who had been given new contracts and for the start date of Jayne Bowers' employment. He stated all this information was data-protected and not disclosable. Of the new contract itself he stated what we already confirmed, as Jayne Bowers had confirmed to the claimant, that it was an error in Essex payroll and the claimant had no need to sign it. Therefore there was nothing left to complain about.

157 After this sifting process, it seems that what was left was the grievance about not having printed copies of the policies and the Galaxy spare keys. He would also be investigating the more general point that the claimant had been asked to have a formal lesson observation when the respondent had deviated from the plan for the phased return to work and had not provided the support needed by the claimant.

158 Mr Coulson held a hearing on Tuesday 19 May at the Saturn centre. The claimant attended with Penny Ashmore. Mr Coulson was supported by Leah Knowles senior HR consultant and there was an independent note-taker. This was Helen

Clarke from Essex Clerking Agency. (The claimant cites that as exemplary process in contrast to the respondent's use of Jayne Bowers from the committee to take minutes, as she had been compromised by her official capacity). The scope of the grievance hearing was the printed policies and the Galaxy keys. The claimant recorded the grievance hearing secretly. The outcome was that the grievance process was adjourned in order for Mr Coulson to speak to (1) Sharon Wilson, (2) Jayne Bowers and (3) Rochelle Bone.

159 Mr Coulson had pre-written questions to which each replied. Ms Wilson confirmed that no staff bring their own computers or iPads into work and this follows their ICT agreement that Macs are only used for specialist subjects - art, music, and drama. She says she does not know that he ever asked for a Mac and such a request would have been refused. She stated the written policies could have amounted to 3,000 pages or more in total. The cost of printing is 3p per sheet. The total cost would be something like £215 to include admin time. Policies are updated annually on a rolling programme. She confirmed it was not the respondent's understanding that occupational health should be taking part in weekly reviews. It was not what was agreed.

160 When asked about the 6-week programme and the review of his progress at that point she responded:

> "The main reason this didn't take place was that OD was off sick the first week back after Easter. When he returned he was distracted and seemed depressed. He refused to cooperate with an observation and I became very concerned about his mental health and his effect on students and staff. A meeting was made for 5 May but this did not take place as he was medically suspended on 29 April."

As for mentoring and support on the Cloud based system she said:

> "Rachael Perkins ICT Systems Manager gave support. He also had daily support from Kevin Bainbridge. It is a very simple system to use."

Of the keys for the Galaxy centre she said:

> "The music teacher spent two whole days at Galaxy but unfortunately she is on long term sick. She kept a key to her room in her pigeonhole she used when she was there. Those staff who have keys leave them in their pigeonholes. They do not take them off site."

Of autism awareness she said:

> "During the 30 years I've worked at CSS I've received a lot of training on autism especially Aspergers, however most of my training has been either through experience working with children on the autistic spectrum or reading books or on the internet. I would say I am very autism aware."

The last question was:

> "Oliver states that after his grievance dated 27 February was received in school, you met with him to state your disappointment in his decision to do this. How would you respond to this? What was the purpose of this meeting?"

She responded:

> "The purpose of this meeting was to address some of the issues that had occurred, especially as he had been very aggressive in a meeting with …. [Tim Moynihan]. Part of this meeting I expressed my concern and disappointment that he had not discussed his issues with me face to face as our policy suggests rather than go straight to a formal grievance."

It is minuted that she expressed disappointment. It is minuted on 10 March. She said:

> "It would have been reasonable to talk to me before putting in a formal grievance. This is what is stated in our policy. All other staff do this and things are always sorted out with discussion."

161 The eventual grievance outcome was sent to the claimant on 7 July. The outcome letter confirms there were 5 substantial complaints.

1. Printed policies
2. Support in learning the new computer system
3. Wi-Fi for the personal laptop in the centre
4. Set of keys for the Galaxy centre
5. To be taken out of the centre and transferred to the OPAL team.

His conclusions were as follows:-

161.1 Printed policies: Mr Coulson stated what Ms Wilson had said many times before; there was no need for the claimant to read all the policies and considered it impractical for the school to print off some 3,000 pages of policies.

161.2 Support on the new computer system: continuing support was available and the claimant only had to ask.

161.3 Wi-Fi access: he reiterated it was contrary to the school's ICT policy for personal laptops and mobile devices to have access to the school's wi-fi system. Further the only Macs in the school were being used in creative subjects art, music and drama.

161.4 Keys to the Galaxy centre: Mr Coulson made a recommendation that there should be a documented process to support the allocation and management of keys to the centre. He recommended that the current practice should be reviewed to ensure consistency among the staff group. (So he was critical of the respondent's system for allocating keys, but this was not in a way which would have benefited the claimant or have given him what he sought, so it was not really upholding the claimant's grievance. He said the existing system was too lax and open).

161.5 OPAL: Mr Coulson declined to order that the claimant be transferred to OPAL. He calls it the "OPAL Centre" which might illustrate that he and whoever was advising him had missed the point here. OPAL is not a centre. That was the claimant's point. He simply declined to intervene in management's conduct of the absence review procedures and the return

to work procedures

So the claimant's grievances were substantially rejected.

162 Within a week on 13 July 2015, the claimant sent a written grievance appeal. It was addressed to Ms Marion Mosley the Finance Manager of CSS for forwarding to the management committee. This was dealt with summarily by Ms Diane Shepherd.

163 The basis of her response to the appeal of14 July 2015 was that his grievance appeal seemed to concern a complaint of victimisation which Mr Coulson had already stated, as at 5 May 2015, would not be investigated. He sifted the claimant's grievances which were subject either to previous workplace grievances or were the subject to the jusrisdiction of the Russell tribunal. She wrongly assumed that the claimant had not objected to that letter of 5 May. (In fact the claimant had objected contrary to what she stated). Ms Shepherd also referred to the fact that since the Russell judgment there were further complaints including victimisation complaints already proceeding in the tribunal.

164 The tribunal needs to revert now to the absence review procedure. Unknown to the claimant on 18 March 2015 Mr Bainbridge completed a report on the claimant assessing him against 8 teaching standards. As we have seen before Mr Bainbridge was measured in his assessment of the claimant and quick to give credit. He had a motivational approach with students and staff. Indeed he accused the claimant of not being motivational enough with the students as cited above. (The claimant was giving too many reds and not enough greens).

165 The claimant was thoroughly critical of this report when he found out about it because he was not involved in the process of compiling it. He seemed to think that he had a right to be involved in every report which was written on him. (Compare the occupational health report for instance).

166 Ms Wilson explained that she had asked Mr Bainbridge to produce a report. She noted that Mr Bainbridge said, as she had observed many times, that the claimant had convinced himself that he was just passing through the centre, on his way back to the OPAL team. Mr Bainbridge stated:

> "OD appears to think he is returning to the OPAL team after his 6-week appraisal period and he feels that he is certainly not preparing himself to be in our maths room for any longer than the 6-week period. That is my opinion and also what I have heard him discuss with other members of staff when they have come in to chat to OD."

167 Ms Wilson confirmed that she had been concerned about the claimant and therefore needed this report from Mr Bainbridge. It was increasingly her thought that with the degree of reasonable adjustments they were making the claimant was no longer carrying out his role as a teacher with a SENCO supplement. The purpose of reasonable adjustments was not to transform a job into something which it was not.

168 On 17 April, the same day as he returned after the Easter break, the same day as he emailed his indignant response to Sharon Wilson about her queries as to why he left the site early on 27 March, he apparently informed Kevin Bainbridge that he was

anxious and under a great deal of stress.

169 The following Monday 20 April, the claimant refused to have a teaching observation before meeting with her. Ms Wilson emailed him on that day he was required to have such an observation and reminded him that it was agreed in the return to work meeting back in February. This teaching observation never happened. The claimant stipulated in his grievance letter dated 22 April that he had agreed to having such an observation during his 6-week review period (which Kevin Bainbridge was apparently unable to facilitate). Ms Wilson did not accept the truth of that.

170 The claimant clung to the idea of the 6-week review period. In his logic, he considered he should have been placed into the OPAL team after 6 weeks. That was never the respondent's intention and they never said it was. It was just a date to review the claimant's return to work more generally.

171 An appointment was made with occupational health, on 22 May, but the claimant did not attend. He eventually attended a meeting with Dr Rost on 4 June. This was the meeting the tribunal referred to earlier. The report stated:

> "I'm obviously not witnessing Mr Doyle's work. However the way you described his recent difficulties as well as his own account of events suggest that he loses his ability to function if his anxiety levels rise to a certain level…
>
> The environment he has returned to (the two centres as mentioned above) is clearly unhealthy for him and is fuelling his symptoms of anxiety and social phobia. I do not think that adjustments made in these centres will reduce Mr Doyle's stress levels…
>
> Pupil referral units do not seem to be an environment where he is able to get better".

172 As previously stated above Dr Rost was far more outspoken to the claimant face to face. According to the transcript she stated:

> "You'll see my letter first don't worry too much about it now. You'll see it first and you can discuss it with your friend or your friends or whatever and you want to discuss it with but I won't change my recommendation. This is poisonous for you it is exactly what you do not need."

Elsewhere:

> "Even your psychologist is at the end of his tether isn't he because he thinks you are making things worse by going to or being in this work so I'm sorry but it will probably be the end of employment … because what can she do…
>
> You say your anxiety level is sky high you can't eat you have to stop the car because you are too anxious. These are so worrying I just don't think it's the right job for you. You've had this trauma experience and you relive it every day and you are always at risk of being called something rude and nasty things being thrown at you or being spat at or whatever. It happens in most schools doesn't it?...
>
> And the places where you are now they are poison for you aren't they?"

She went further:

> "I will have to find out first what is suitable for you and I will find out who can advise you on that

> because I feel it is not necessarily education because I feel education is a field where you need particularly good people skills don't you and I'm sure you have got your skills and I am sure you can be good at a job but you have to find the right one, not try to fight your weaknesses all the time but develop your strengths."

It appears that her views became stronger during the meeting. Initially she had thought that he might find a "nice little niche within education" by the end she was strongly recommending that he leave education.

173 Ms Wilson organised a formal capability hearing on 24 June. Ms Wilson did her usual report, fully updating the chronology from February 2015, describing the claimant's return to work following his successful appeal. The bottom line was that:

> "I have therefore have no alternative but to recommend that Oliver Doyle be dismissed on the ground of capability due to ill-health".

174 The hearing took place as scheduled. This time Emma Terris from the Essex Clerking Agency took the notes. Ms Wilson was the decision-maker as well as the report writer in her role as head teacher, as per the normal procedure. She was supported by Colin Hooker HR. The claimant was supported by Penny Ashmore. The claimant read from a prepared statement. The meeting was recorded on the respondent's same multi-disc equipment as the appeal hearing had been recorded on.

175 The claimant felt very bitter about Ms Wilson's report:

> "This is not my first experience of a capability hearing on the ground of lack of capability due to ill heath. Ms Sharon Wilson has tried to procure my dismissal many times. Sharon Wilson has cherry-picked the policies available to her and manipulated the procedures to accommodate her agenda of terminating my employment with ECC. I am here today because Sharon Wilson has set me up to fail and I find the whole thing abhorrent."

That was his perception.

176 The claimant provided a verbatim transcript of this whereas the respondent's notes of the meeting were just handwritten notes from Ms Terris.

177 By letter 2 days later Ms Wilson wrote to the claimant to confirm the termination of his employment as he had been told 24 June. The letter itself does not restate the rationale but the report had already done so.

178 On 1 August 2015, in other words outside the school term, the claimant submitted a "whistle-blowing letter" to Helen Simpson legal department of Essex County Council. This whistle-blowing letter was full of reference to legal authorities old and new – even 2 from the USA.

179 If this was a grievance at all, it seemed to be a discrimination complaint against Helen Simpson's acts. He states:

> "I genuinely believe that Ms Simpson's acts (and the acts of those instructing causing inducing and/or aiding her) making costs threats and settlement without liability in without prejudice letters is tantamount to unlawful discrimination pursuant to [… many sections of the Equality Act 2010] on the protected grounds of disability."

We remind ourselves this was sometime after the dismissal which had occurred on 24 June 2015 although his official termination date was when his notice expired on 31 December 2015.

180 By email of 6 July the claimant attached a letter of appeal dated 3 July. The ground seemed to be that CSS failed to undertake a risk assessment identifying reasonable adjustments needed and that CSS had departed from decisions made in the previous case conference as part of the previous appeal process and the return to work meeting on 6 February 2015.

181 An appeal hearing was set for 17 September. Ms Wilson presented the management case again supported by Colin Hooker. The claimant attended with Penny Ashmore, Emma Terris; Clerking Agency took notes against. There was a 3-person panel, of whom 2 were outsiders. Mike O'Sullivan was the then current chairman of the board of governors. Andy White was a retired head teacher from outside. Jenny Commerford was a deputy head teacher at Enfield High School. The panel was supported by Nicola Reynolds who is a senior HR consultant with Essex Education Service. The meeting was once again recorded. It lasted about 3 hours. The decision was reserved to be given in writing. At this stage Ms Wilson had taken retirement from the service at the end of the summer term.

182 The outcome letter followed promptly on 18 September 2015. The appeal was rejected. The panel did not accept that there was no risk assessment. They considered the history showed that Mrs Wilson had implemented any adjustments that were reasonable or practicable. The panel did not consider that the claimant's grievances were relevant to the issue they had to decide - ill-health capability. In their view these were separate and distinct, even if to the claimant's mind they were linked. The panel accepted the medical report of Dr Rost. They concluded that there was no failure to seek professional external advice.

183 In his list of issues, the claimant makes no discrimination or detriment complaints about the appeal outcome or process. It has been considered in the context of his unfair dismissal complaint. The claimant applied to the tribunal after his dismissal on June 24 2015. He made an interim relief application on 7 January after the expiry of his contractual notice. He never complained about the appeal in any of his claims to the tribunal, or in his list of issues. Nor is there an obvious complaint in the claimant's witness statement.

General disclosure

184 As a general observation, halfway through this tribunal hearing the respondent produced extra disclosure which had previously been missed on the claimant's earlier subject access request. The explanation, which we accept, is that the respondent kept hard paper copies of significant correspondence. What they did not keep in hard copy was the process emails i.e. the emails which had the attachments on them. These give information about distribution, dates and times, and whether it is FW, RE, or a new originating email in a thread. This has cleared up some of the mysteries. We do not think that the respondent was guilty of bad faith here. They have learned a lesson for the future that, with subject access requests, Outlook needs to be searched so as not

to exclude process emails.

Conclusions

185 The claimant's principal complaint in these proceedings is unfair dismissal. He seeks reinstatement through these proceedings.

186 Mr Gardiner has been helpful to the claimant and the tribunal in summarising the claimant's diffuse list of issues and making it more manageable. We are sticking to his sequence. It is a sequence rather than a structure. The claimant's list of issues defies structure. It is hard to follow. He groups his complaints under headings with letters:

186.1 A1 protected disclosures;
186.2 A2 detriments including unfair dismissal;
186.3 B victimisation;
186.4 C direct discrimination;
186.5 D discrimination because of something arising out of disability and
186.6 E section 20 reasonable adjustments.

187 Many of the matters complained of fall under more than one of these headings. So, for instance, bizarrely Jayne Bowers' presence in the meetings and failure to forward the minutes of the Freel meeting were said to be A1 protected disclosures. The categorisation follows no particular logic, or even pattern.

188 The respondent's overall stance is that the claimant's grievances were not justified and therefore the subject matter of those grievances could not be a detriment. As a matter of law, that argument is correct. (*Shamoon v CC of the Royal Ulster Constabulary* [2003] IRLR, 285, HL).

Jayne Bowers

189 The first complaint we needed to deal with is the alleged failure by Jayne Bowers to forward her notes of the Freel dismissal hearing which took place on 15 July 2014. We have dealt with the facts of this above. We remind ourselves that this is a technical point because the claimant had the best record of all possible - a transcript of his own covert recording. Much of the delay, but not all, was caused by the summer holidays. The claimant through these proceedings has sought to blame the one person who really was not to blame - Jayne Bowers. The delay was with HR and Mr Freel. Ms Bowers chased them promptly.

190 In other respects the claimant has demonstrated serious hostility towards Ms Bowers inasmuch as she had taken the minutes at all. She was on the board of governors. He saw this as a clash of roles and a conflict of interest. We find the logic of that incomprehensible. Her taking the notes at all is claimed to be a detriment in these proceedings.

191 This is not the only example of the claimant objecting to an individual whose role was purely practical and administrative. (Another example of that was objecting to Diane Shepherd's conduct in managing arrangements for a grievance hearing). The respondent makes the good point that using outside note-takers in fact enlarges the

group of those who become acquainted with the personal detail of the claimant's employment and his mental health problems which is in itself bad thing.

192 We cannot conceivably uphold either of the complaints against Ms Bowers. We note that it was she who was blamed for issuing a new CSS contract as well. It seemed to be a personal choice of the claimant to single Ms Bowers out for complaint over the things he was unhappy with. We would not have upheld this complaint however it was categorised under any of the claimant's 5 types of complaint. As it is, the claimant categorised it as a "protected disclosure" which is not in itself a cause of action, just a pre-condition for a cause of action. That may have been an error.

Suspension after fit note of 9 May 2014

193 Then the claimant makes 2 complaints arising from his earlier extended absence after he had obtained a fit note from his GP on 9 May 2014 and the occupational health report from Dr Rost of 13 June 2014 (wrongly cited by the claimant as 30 June) stated that he was "fit to work with caution". That advice was qualified to the extent it could have been, by stating:

> "He is hoping to return to the outreach team… he should have a phased return to work… He cannot envisage himself working in the centre or in any other capacity within the school at this moment in time and… social interaction with groups of students can be stressful and unpredictable behaviour may well trigger health problems."

194 We have already stated that Sharon Wilson had justifiable reservations about the claimant's GP's note that he was fit to return to work for a phased return given she had seen him in a dreadful mental state earlier on the same day as that certificate was issued on 9 May 2014. In the tribunal's view Ms Wilson was quite correct judging that, despite these reports, the claimant was not fit to return to work in any way that she could see. Any responsible manager would have done the same.

195 Ms Wilson was also fully justified in not accepting the occupational health report at face value because the claimant had forbidden Dr Rost to answer 14 of her 19 questions, all of which were considered by this tribunal, and the Russell tribunal, to have been pertinent questions. It was striking that in the subsequent case conference some time later Dr Rost told everyone that she did not appreciate that the claimant had worked in the community prior to becoming unwell. It is quite clear that she did not have a full picture and that was because the claimant was not giving her the full picture. Indeed he was shutting down management's questioning, preventing there being a full picture. (That was possibly because he apprehended that if Dr Rost had a full picture he could not possibly have been found fit to return to work for CSS).

196 Ms Wilson clearly set the situation out subsequently in a head teacher's report for an absence review meeting on 25 June 2014. This tribunal considers she was justified in doing this and that any responsible employer would have done the same. The risks were enormous for all concerned. CSS could have been liable for some serious untoward incident harming the claimant and/or the students he was teaching.

197 At this time the claimant was in fact saying in his usual way that he could not envisage himself working in the centre. Ms Wilson could not see an alternative to

working in the centre as a way of re-entering work after a whole year off school. There was no practicable fast track to the OPAL team. He would have had autonomy and been left isolated and vulnerable. He had vulnerability of a far higher order than Dr Rost or the claimant's GP were led to believe. The claimant had asked them to make a leap of faith, based on his account.

198 As a complaint of detriment (whistle-blowing), victimisation, or s 15 EQA discrimination because of something arising out of disability, this complaint cannot possibly succeed. There is no room to infer any ulterior motive or hidden agenda. The extension of the sickness absence was a proportionate means of achieving a legitimate aim – safety for the claimant and the students.

Failure to pay the claimant after 9 May 2014

199 Part of this complaint is that Ms Wilson did not treat this continued absence as medical suspension but as prolonged absence on sick leave. That meant the claimant had no pay as he had exhausted any sick pay after his year's absence starting on 16 April 2013.

200 Subsequent events later in the year contrasted, in that there was a more respectable body of opinion saying the claimant could return. That was treated as medical suspension under paragraph 4.6 of the sickness absence management procedure. The claimant was paid for that absence.

201 But at this stage, the medical professionals, probably unwittingly, had set up an impossible mission for Ms Wilson. The claimant was steering the process to achieve his desired goal. We cannot find that this treatment of the claimant was an unjustified detriment on any prohibited ground.

202 The failure to pay full pay is alleged as an act of direct disability discrimination. The case of *O'Hanlon v HMRC* [2007] IRLR, 404, CA provides a complete defence to this claim. It cannot succeed.

Joanna Killian

203 The next matter complained of is Joanna Killian's failure to deal with serious concerns raised for her attention, rather than referring the claimant back to his local management Sharon Wilson and Colin Hooker. This arose out of an email on 25 July 2014. We have already stated we do not know what the claimant hoped to gain from involving the Chief Executive of Essex County Council in his disputes which were local. Given the delegated status of the school it was not Essex County Council's concern to oversee. It would have been very surprising if she had done anything other than what she did, stating:

> "Dear Oliver
>
> Thank you for your email and accompanying document. I understand Sharon Wilson is investigating the matter and will respond directly to you in due course. If you need any assistance in the meantime I would suggest you contact Colin Hooker Senior HR Consultant, and school HR team is aware of the matter.

Joanna Killian
Chief Executive"

It was a courteous, unexceptional, and expected response to what the tribunal find to be an inappropriate action by the claimant involving her. To attribute this to whistle-blowing detriment or disability discrimination victimisation is quite impossible. The connection is non-existent.

204 It has been a theme throughout these proceedings with this panel and the Russell panel, that the claimant has real difficulty in accepting that Essex is no longer his employer. He is somehow emotionally committed to being employed by Essex. Maybe that is because of his fixation with the public sector equality duty. It is odd that his understanding of the law is so selective. He does not appreciate, or refuses to accept, the concept of delegated budgets and the modification of employment-related statutes to put employment responsibilities onto the delegated governing bodies of schools.

The Freel meeting - 15 July 2014

205 The next matter complained of is a generic one, and the one for which the claimant previously claimed unfair dismissal (until his appeal was successful). This is brought as a protected disclosure detriment, an act of victimisation under the Equality Act, and also discrimination under section 15 EQA, because of something arising out of disability.

206 It is the claimant's fundamental case that the 15 July 2014 Freel absence review meeting should never have happened and the outcome of that meeting should have been in his favour. The tribunal cannot accept either contention, given the medical situation as it then was, or the duration of the claimant's absence from work for over a year. Any other decision would have been surprising.

Remploy

207 The next matter complained of is a sub-issue arising from the Freel hearing of 15 July. It is said to be a protected disclosure detriment and an act of disability discrimination victimisation. Mr Freel understood that a return to the OPAL team was not possible. The fact that he did not consider involving Remploy is unexceptional. He would not have been advised to consider Remploy. It is not for management in any workplace to initiate contact with Remploy. It is for an employee to do so. To see this as anything but a normal management decision (if it was a decision at all) is wrong. No evidence was led of the respondent ever proactively involving Remploy. To call it victimisation or a whistle-blowing detriment is very far-fetched. The complaint cannot succeed.

Cost of adjustments

208 This debate was fiercely pursued by Timothy Taylor on the claimant's behalf ("£10 or a £1,000"). It concerns reasonable adjustments. We have already stated in the above narrative that Ms Wilson thought that costs were beside the point. It was an

inappropriate measure to send somebody into a pupil's home with him. Factors other than cost were against that: (a) parents or a student might object, (b) it would be extraordinarily difficult to explain to the students and their parents why there were 2 people coming into the home, let alone doing so truthfully, (c) it would tie up another teacher because meaningful supervision could not be given by anyone less qualified (which is a budgetary factor). We have already discussed the difficulty of recruiting suitable teachers for this sort of work. It would have meant working one teacher short in the centres or elsewhere. In the context of cost, no other adjustment was mentioned.

The Freel dismissal of the claimant

209 The next complaint is the substantive decision of Mr Freel to dismiss the claimant which is said to be a whistle-blowing detriment, Equality Act victimisation, direct discrimination and discrimination because of something arising out of disability. This has been stated in other respects and is co-extensive with other issues in the list. This illustrates the problems of the claimant compiling a list of issues.

210 The logic of Mr Freel's decision leaves no room for any inference that any of his reasoning was on any ground other than flegitimate management concerns for CSS – both for students and the claimant. Mr Freel dealt with the claimant's suggestion that if he was working in the community he would only require telephone support. Mr Freel regarded that as an impracticable and inadequate adjustment, as does this tribunal. In doing so we entirely agree with Ms Wilson.

211 This overlaps with issues where the tribunal has already dismissed the whistle-blowing and disability discrimination complaints. There is no need to repeat the logic of those conclusions.

Case conference – 12 December 2014

212 The claimant's stated issue is not sufficiently particularised to see what events he is complaining about. It may be that there was no full review after 4 weeks after the claimant's return to work (as indicated at the case conference). Another later instant of slippage was that he was then told at the return to work meeting on 6 February there would be a review after he had been at work for 6 weeks rather than 4, so it changed. Ultimately it never happened because events overtook. The claimant was clearly not coping.

Tim Moynihan

213 It is not clear where this fits into the list of issues. It is the claimant's complaint that Mr Tim Moynihan lacked a legal conceptual grasp of the realities of reasonable adjustments under the disability discrimination legislation, by suggesting that everyone should be treated the same. This is said to be an act of victimisation under the Equality Act. Despite Mr Moynihan's statement, there was no instant of an actual application of this incorrect statement of the law. Everything about the claimant's return to the centre underlined that his situation was different from others'. It was a bespoke adjusted role he was asked to undertake, under the sort of supervision which was only practicable in the centre. The respondent also avoided assigning the claimant to teaching groups. This looked like legal point scoring. It did not indicate

that reasonable adjustments were not in fact made for the claimant. To describe a mere mis-statement of disability discrimination law as an act of victimisation (if that is what is contended) would be a bizarre hypothesis – as if this was deliberate. There is nothing in this complaint.

Failure to consult over risk assessment

214 The next complaint is said to be public interest disclosure detriment, direct discrimination and discrimination because of something arising out of disability. That is that the claimant was not consulted over the individual risk assessment. It seems to be a procedural rather than a substantive point.

215 At the case conference on 12 December 2014 a risk assessment was mentioned. It clearly had to be carried out. Ms Wilson compiled it, in the light of information which came out in the case conference and was to be discussed at the resumed appeal hearing on 30 January 2015. It is hard to see what Ms Wilson failed to do here, if anything. We have satisfied ourselves that the risk assessment was necessary. It was carried out. It was professional and, given the factual background, was realistic. The tribunal do not find any impermissible reasoning or motivation. The risk assessment is entirely self-explanatory in its own terms.

216 The claimant had no right to be involved in the compilation of that risk assessment. This complaint exemplifies the claimant's mistaken belief that he had to be actively participating in compiling all reports and assessments which concerned him. That is not how it works, and not how it should work. (Dr Rost permitted the claimant's involvement in compiling occupational health reports but that was exceptional. She did not have to. Arguably, she should not have done so, given her unique relationship between the respondent and the claimant). The hearings and the case conference were the claimant's opportunity for participating, not the preparatory documentation of the employer. He could prepare his own documentation and obtain and submit his own medical evidence (as he did with the Chad report).

Failure to provide the support recommended in the risk assessment

217 The next matter complained of is said to be an act of disability discrimination because of something arising from disability under section 15 EQA (sic). It sounds more like a complaint of failure to make reasonable adjustments, but the claimant has made his choice. It is not clear what was needed or mandated which was not provided. The claimant is not specific. It seems a general allegation. The claimant was given a tour of the centre in Saturn on 6 February when he attended a return to work meeting. He was given time to read the policies one morning and an hour a day for the remaining days of the week. He knew how to access them from a computer. He was allocated 1:1 teaching duties, with a senior staff member Kevin Bainbridge supporting him right there on hand in the same room. His workload was gradually increased. The pace of return was adjusted when it was appreciated that it had been too fast for the claimant to cope. He was teaching Maths and English. Maths was relatively new to him. He had previously taught English when he was working in OPAL. We cannot see what the respondent did that was not appropriate. Even if this were a reasonable

adjustments claim rather than a s 15 claim, the claimant is not saying which adjustments were needed which were not provided, which he needs to do for the purposes of these proceedings (see *Project Management Institute v Latif* [2007] IRLR, 579, EAT).

Gary Fitzgibbons

218 As a complaint of disability discrimination because of something arising from disability under section 15, next the claimant complains that the respondent should have engaged Garry Fitzgibbons of Fitzgibbons Associates to provide "autism awareness" and appropriate reasonable adjustments. The name was mentioned by the claimant in his grievance letter on 27 February 2015. It was mentioned only once. In fact what he was suggesting in the 27 February letter was not that Garry Fitzgibbons ensure that they, the respondent, were autism aware but that he, the claimant, should have a consultation with Garry Fitzgibbons of Gibbons and Associates and that the school pay for that as a reasonable adjustment. He never reiterated this request and the request itself was made late in the process.

219 This was never raised directly with Ms Wilson, as his manager, and as the person who had oversight of the return to work process, it was simply part of his complaint to the governing body. (We recall Ms Wilson was openly upset and disappointed with him, so soon after his return to work, that he should choose to escalate something like this to the governing body without attempting to sort it out with her, as management). The tribunal consider that, as a complaint under section 15 of the Equality Act, it is misconceived. It is a category error. The complaint cannot succeed. Even if this were a reasonable adjustments complaint, the tribunal would have had to hear evidence of any benefits which would have accrued from such a consultation, and that the respondent had actually failed or refused to make what was put to them, at the time as a reasonable adjustment.

Being required to work as other teachers

220 Next complaint is another section 15 complaint. This is the complaint about being required to work as other teachers which the claimant thinks goes against the spirit of reasonable adjustments apparently although he brings this claim as a section 15 claim. It is linked to requiring him to work in the Saturn and Galaxy centres, despite the centres exacerbating his anxiety. This over-simplifies and exaggerates the respondent's approach in order for the claimant to castigate it.

221 In fact what has happened was that the claimant was asked to work with significantly adjusted duties i.e. on a one to one basis in an area in a centre where he could receive significant support should there be any untoward behaviour, as he was returning to work after a whole year away from any teaching. The claimant never accepted what was repeatedly stated that a fast track return to OPAL was impossible. The arrangements in the Saturn and Galaxy centres were thought to be the only way practicable to reintegrate the claimant into CSS. Unfortunately events proved the respondent wrong. Even that was impracticable. There is no factual basis for this contention, which must fail.

Mary Mylott & OPAL management

222 The next complaints are also section 15 complaints that the claimant was denied continuity of line management from the OPAL team (Mary Mylott). He was denied the opportunity to shadow or be shadowed by a member of the OPAL team. Ms Wilson raised concerns about personal health and safety and the claimant's ability to drive as an objection to his returning to the OPAL team.

223 We cannot fault Ms Wilson's decisions in this respect. Mary Mylott could not have been the claimant's manager while he was, in the immediate present, working within the Saturn centre and sometimes Galaxy. The only appropriate way to have line management was from someone within that centre; Mary Mylott did not work at the centre. She worked in the OPAL team.

224 The ultimate failure of the respondent to put the claimant and Mary Mylott together was in fact caused by Ms Mylott's strong opposition to such a course. She did not wish to speak to the claimant. She made this quite clear to Sharon Wilson. She did not want him back. Initially Ms Wilson kept this fact from the claimant thinking that it would upset him too much and cause him even more stress, perhaps hoping Ms Mylott might change her mind.

225 The option of shadowing within OPAL was premature at this stage. The respondent was trying to deal with the current everyday situation. The claimant was fixated on returning to OPAL and it was distracting him from the work he first had to do in the centres to show the respondent he was fit to return at all, let alone to OPAL. We cannot find anything wrong with management's reasoning here and there is absolutely no room to infer unjustified discrimination of any description. It was a proportionate means of achieving a legitimate aim if it was because of something arising out of disability.

New contract

226 The complaint about being "required" to sign a new contract is put as a whistle-blowing detriment complaint, victimisation, and direct disability discrimination. The claimant's situation was unusual. He had been away for so long that his PAYE reference had expired; payroll got the wrong end of the stick. The mistake was admitted as soon as it was realised. Nobody suffered any detriment. The claimant did not have to sign any new contract. The claim is misconceived.

227 The claimant also imagined dark consequences if he had signed the contract, like the avoidance of the public sector equality duty under section 149 of the Equality Act and the spectre of no back-pay if he had signed it on the basis that he was a new starter. The claimant says that he was astute to realise their intentions and right not to sign the contract.

228 The claimant has dreamt this up. It is his construct out of what was a miscommunication with payroll - a mistake by the respondent. We do not consider there was anything sinister going on whatsoever. The claimant was given all the contractual entitlements he should have had consequent upon a reinstatement

following a successful appeal against dismissal. We have already cited the email from Jayne Bowers correcting the error. There is no factual basis left for this complaint.

Separate risk assessment not done for Galaxy Centre

229 This complaint is one of whistle-blowing, victimisation and direct discrimination. The tribunal agree with Ms Wilson that the risks in Saturn were so similar to the risks in Galaxy that there would be a read-across from the one to the other.

230 This was not the only instance of the claimant purporting to know more about the CSS organisation than its head - Ms Wilson. He had a highly idealised view of the work of the OPAL team on which he based his determination to return there. The tribunal accept Ms Wilson's evidence that the claimant's view did not reflect the reality of the OPAL team's work. All it would have achieved for him would have been a relative absence of group situations which the respondent fully appreciated was a PTSD trigger for the claimant.

231 For some reason the claimant had the idea that behaviour within Galaxy was worse than it was in Saturn. Ms Wilson did not share that view at all. The students were not sorted to go into one or the other on the basis that the students with most challenging behaviour should be sent to Galaxy, not a bit of it. Although the claimant says that incident of throwing the marker pens would not have happened at Saturn, the respondent, and Ms Wilson, disagree with that assertion.

232 The claimant may have a lesser point in saying that he did not have full continuity of support because the staff at Galaxy were different. There were Rochelle Bone and Jo Barak instead of Kevin Bainbridge and Tim Moynihan. The other member of staff he was with - Kate Smith, the head of English, taught both in Saturn and Galaxy.

Change of curriculum

233 On his return to work the claimant needed to be observed in maths rather than English. This is put as a whistle-blowing detriment and victimisation complaint.

234 The tribunal note that the claimant had a degree in economics and had taught maths in Ireland in 2002 before he came to the UK. He had expressed a willingness to teach mathematics and had stated at the return to work meeting that he felt comfortable with teaching maths and being observed. Therefore at some point he apparently changed his mind. One of the reasons he was allocated to maths was that Kevin Bainbridge was a maths teacher as is evident from his report of 18 March 2015 (the "secret" report) and there was no sufficiently senior member of staff in the English department. He did return to teaching some English. In Galaxy he was allocated to literacy teaching (Kate Smith was a less senior teacher than Kevin Bainbridge). Rochelle Bone is an English teacher but she was not permanently classroom-based. Kate Smith was the teacher who spent most time in the classroom actually teaching and therefore was the one in closest proximity to the claimant in Galaxy.

235 The complaint about a change of subject appears to have been an afterthought in these proceedings. The tribunal cannot find even a detriment here, let alone for the

reasons we are invited to find such a detriment to have been imposed. The complaint cannot possibly succeed.

Failure to inform Galaxy staff of the claimant's mental impairments

236 The next complaint is said to be a whistle-blowing detriment and victimisation, and yet it seems that it would have been logically more apt as a claim for failure to make reasonable adjustments. The claimant has made this list of issues as part of these proceedings. It has been agreed and we should not depart from it at the final hearing stage. However, even if it had been a reasonable adjustments claim we would not have upheld it. The complaint fails.

237 The claimant contends that Sharon Wilson should have told the staff at Galaxy the he had had depression, currently had PTSD and autism, and that he was subject to a risk assessment for this. The claimant considers that had Kate Smith had such knowledge she would not have left the claimant alone on 28 April. However, Ms Wilson states that she did make staff aware that the claimant had mental health difficulty with Rochelle Bone, Jo Barak and Kate Smith. She did not give full details, but she emphasised the need for support. She told the tribunal it was not stipulated as part of the risk assessment that the claimant should never be left unaccompanied in a room. That would have been an unworkable stipulation. Kate Smith only went out for a short moment. The situation between the claimant and the two boys T and C escalated quickly, as these things can do. It is also interesting that such a prolific writer of grievances did not raise this complaint in the course of any of his grievances. That suggests it was an afterthought and was not felt at the time.

Lack of guidance on reading policies and prioritisation

238 The next complaint is put as whistle-blowing detriment, victimisation, and direct discrimination. The complaint, however, is factually demonstrably wrong. The claimant was clearly told that the staff handbook is the most important. He was told this clearly soon after he returned to work. He was told it at 6 February at his return to work meeting. The advice as described was reiterated by email which we have seen in the clearest of terms (quoted in the narrative above).

239 We have already dealt with the push/pull controversy about the claimant thinking he had to slavishly work his way through all the policies and not be selective, rather than to have an overview which is what Ms Wilson urged. The claimant adopted an absurdly over-literal stance for himself. It was not what he was told to do. It was symptomatic of ASD. The complaint could not possibly succeed. It is based on a false premise in fact.

Management not addressing the claimant's correspondence

240 These are put as whistle-blowing detriment, victimisation and direct discrimination complaints. This is a non-specific portfolio complaint of staff not addressing letters and correspondence from him. The respondent has attempted, despite the generality of this allegation, to mention some examples, taking its cue from the claimant's preoccupations as they perceived them to be.

241 The claimant sent many emails to Jayne Bowers to be forwarded to the management committee/board of governors. As we have previously said, she justifiably and correctly did not obey that instruction. It was not appropriate for the wider board of governors to be aware of all the claimant's grievances. In addition it was going to cause the same problem that we saw when the claimant was running out of people on the management committee not in some way disqualified from hearing either grievance hearings or conducting appeals under the absence review procedure. Generally Ms Bowers forwarded the claimant's grievances to Ms Wilson if the claimant had not already included her (she was after all a governor too).

242 There was one email on 11 February (the "non-grievance") where he requested written copies of all policies and procedures. This was obviously not an appropriate request to be addressed to the management committee. In fact this request was made after Ms Wilson had already dealt with the query. On 9 February 2015 she stated:

> "Dear Oliver
>
> I understand you printed some policies today. The reasons we have all the policies on cloud base is so that they don't have to be printed using up both printer ink and paper. The policies are available to view from any computer so you can access them at home so there is no need to print them.
>
> Thank you for your cooperation
>
> Sharon"

243 One of the claimant's problems here was what he calls his "sensory overload". He explained it to the tribunal. He never explained it in the work place. He addressed a letter to the management committee suggesting that he was expected to read policies in a noisy place. He was making problems for himself there. He did not have to read the policies there in a noisy place. Like many of his letters, this one had a tone of outrage and demand rather than saying "I get sensory overload" which would have been more helpful. Management could have looked into this for him if he had given some information about his problem.

244 What he stated was: "CSS has conceded I am a disabled employee within the definition of the Equality Act 2010." He does not explain how this might have been a reasonable adjustment to accommodate autism, PTSD, or depression - his known disabilities. Many people with autistic tendencies often find working with computers and screens is something which plays to their strengths. Many rise to advanced levels in IT.

245 On the subject of this specific complaint, it was clearly not appropriate to circulate matters of day-to-day management to the governing body or Essex County Council. The treatment of all the claimant's correspondence was professional and fully justified in employment terms. There was no less favourable treatment on any grounds and no detriment. It appeared that the claimant was attempting to circumvent Ms Wilson and raise the profile of his unhappiness with her management. The tribunal has seen no evidence of actual detriment or less favourable treatment in fact, let alone on prohibited grounds.

Failure to investigate whistle-blowing email of 3 August 2015

246 There was a further complaint arising out of the email of 3 August 2015 to Helen Simpson at Essex Legal Services which attached a long general whistle-blowing complaint with copious and obscure legal references (which did not advance the claimant's cause and looked intimidating). It was sent during the school holidays. Sharon Wilson, to whom it was also addressed, had not only left the school, but she had retired generally. It was also copied to Jayne Bowers FAO the management committee (but was misaddressed to the wrong email address for her, as it happened).

247 The letter referred to the conduct of his tribunal litigation and the alleged "costs threat" and was sensibly addressed to the person who was dealing with the tribunal litigation that is Helen Simpson of Essex Legal and that is where it was referred. However it was sent to many others in Essex County Council at large. This is another example of the claimant seeking gratuitous illegitimate publicity for his complaints by addressing complaints, in the first instance, to many individuals who were not responsible for dealing with them, and in no position to respond (the governors and Sharon Wilson). What was the wider Essex County Council supposed to do about it? It was a matter for the legal department who were conducting CSS's tribunal defence.

248 Apart from anything else the mention of adverse costs orders to a litigant is part of the everyday stuff of litigation. When employees litigate, the time for saving their feelings is past. That is the tribunal's experience, and the tribunal's finding.

249 Due to an oversight, as we accept, there was no response until 10 March 2016. That was from Emma Thomas the Head of Employment. She had investigated the file and the impugned "without prejudice" correspondence from Helen Simpson. She concluded that it was standard litigation practice, neither exceptional nor inappropriate. It was not an attempt to "cloak" discriminatory conduct. She rejected the claimant's accusations of improper conduct.

The reason for the delay was Ms Thompson assumed that she had responded to this complaint after she had investigated it. However, nothing had been sent to the claimant at the time. Her letter of 10 March rightly apologised for the delay.

250 Oddly the claimant's drafted list of issues makes the allegation of failure to investigate and not the delay in responding. We are restricted to deciding the issue which has been identified. We find the complaint fails on its facts. There was no failure to investigate this complaint.

Martin Coulson's sifting of the claimant's grievances

251 This is put as an allegation of whistle-blowing, victimisation, direct discrimination and discrimination because of something arising from disability.

252 Acting on advice from HR and legal services Mr Coulson winnowed out all the complaints that he considered were either repeated grievances or, in the majority of cases, subject to the Russell tribunal's hearing. The only one which furnished the appeal against his ultimate decision was paragraph 6. That was a general complaint of

victimisation without particulars - no factual allegations. If the claimant really needed to clarify this properly he should have raised it at the hearing before Mr Coulson but did not. It is another instance of the claimant not explaining himself. His meaning became lost in rhetorical legal generalisations, over-simplications, and outrage.

253 The tribunal cannot find that this was an objectionable procedure. It was sensible and proportionate to the task in hand. There was no less favourable treatment and no detriment, let alone on prohibited grounds.

Mr Coulson did not provide notes of the grievance hearing

254 This complaint is a technical procedural complaint of victimisation. The hearing was on 19 May, and the outcome letter was dated 7 July following extra investigations. The outcome letter stated a copy of the notes was attached. If they were not attached, the claimant never said so. Had he done so, they would have been provided as they have been for this tribunal hearing. There was no detriment suffered here whatsoever not least because, again, unbeknown to everybody, the claimant had recorded the entire meeting and had a full transcript. There is nothing in this complaint. There was no detriment.

Delay in sending the grievance outcome letter

255 This complaint is put as a whistle-blowing detriment. The delay between the hearing on 19 May and the outcome letter on 7 July was 7 weeks. The claimant was warned that the outcome would take some time. In the meantime Mr Coulson asked questions of Sharon Wilson, Jayne Bowers and Rochelle Bone. He held a meeting with Leah Knowles who was appointed to assist him and then he had to draft the letter and get approval. The delay was not exceptional at all in the tribunal's experience. The tribunal can see no room to infer any prohibited reasoning on the grounds of whistle-blowing in this delay (see also the passages below on the alleged protected disclosures). The logic of the claimant's choice of jurisdiction is utterly baffling.

Ms Shepherd's dismissal of the claimant's grievance appeal – 14 July 2015

256 This is a complaint of whistle-blowing, victimisation and direct discrimination.

257 Essentially Mr Coulson by his letter of 5 May 2015 had said he would not deal with the victimisation complaint. It was pre-sifted out of the grievances he addressed. It was never dealt with. The claimant never tried to resurrect it at the 19 May Coulson grievance hearing. Ms Shepherd was simply reiterating the original logic. The victimisation complaint was not followed-up because it was a pure statement of law without factual particulars. The claimant complains that he was shut down by Martin Coulson but his own transcript does not bear that out. Interestingly, at this hearing, the claimant had hardly any cross-examination for Mr Coulson. He made this allegation about being shut down in closing submissions after Mr Coulson was gone.

258 There is no less favourable treatment or detriment here. It was a non-complaint. Management was given nothing to go on.

Sharon Wilson instructing Kevin Bainbridge to write his formal report - 18 March 2015

259 The "secret" report was specifically requested by Ms Wilson. It referenced the teaching standards. This is brought as a complaint of whistle-blowing and victimisation detriments.

260 It is yet another manifestation of the great theme that the claimant expected to be involved in the compilation of all reports involving him. We have already described this as a mistaken belief above. He felt the same about Sharon Wilson's initial risk assessment based upon her attendance at the case conference on 12 December 2014. Kevin Bainbridge had misgivings about the claimant's return to work. He made it the subject of a formal report to Ms Wilson to help her decision-making because she had ultimate oversight of the return to work process. It was Ms Wilson who had requested that he compiled this report. This "secret" report was a fair process. There is no logical reason why the claimant or any employee should have been involved in the composition of such a report. We have already referred to the destructive effects of involving the claimant in compiling reports, notably Dr Rost's examination and report where her hands were tied by following the claimant's intervention. Ultimately a picture was drawn which was not adequately informative.

261 There could have been no question of the claimant suffering any "detriment" as a result of this report without a chance to address it after the report has been written rather than to be involved in its composition. The same would have been done for any employee, disabled or otherwise, in similar circumstances. The logic of Ms Wilson was self-evidently correct. This was a routine and typical management process. There is no room to infer any impermissible reasoning or motive let alone on grounds of whistle-blowing, victimisation or discrimination direct. The tribunal comes back time and again to the legal principle in *Shamoon v CC of the Royal Ulster Constabulary* [2003] IRLR, 285, HL. An unjustified sense of grievance cannot be a "detriment".

The respondent did not provide notes of supervision – 6 February and 6 March 2015

262 This is raised as whistle-blowing and victimisation complaints. Sharon Wilson and Tim Moynihan did not provide the claimant with notes of their supervision meetings on 6 February 2015 and 6 March 2015 respectively. We know the claimant took covert recordings of them and made transcripts. It is true that, at the conclusion of those meetings, Sharon Wilson and Tim Moynihan undertook to provide copies of the notes and subsequently did not. It was never agreed in advance that these would be provided and it is unfortunate that on both of those occasions management gave an undertaking to do something which they did not intend to do. There was therefore arguably a detriment.

263 Their position, however, has been amply justified at this hearing. We are not upholding this complaint because we see no connection or causation between any detriment and whistle-blowing or with any disability discrimination complaint. It is a technical complaint, because the claimant had the best record possible – the transcripts of his secret recordings.

264 Ms Wilson explained that she did not provide the supervision notes because she

thought they might cause more controversy and correspondence. She perceived, rightly in our view, that the claimant had a tendency to be obsessed with process over substance. It was impeding his ability to get on with teaching and return to work. The whole return to work process was becoming an end in itself, and a distraction from the teaching the claimant was meant to be doing. It has found its ultimate expression for the claimant in these tribunal proceedings.

Ms Wilson not sharing her concerns over the claimant's demeanour and appearance

265 Sharon Wilson did not share her reservations with the claimant about his demeanour and appearance following his return to work on 9 February 2015. She later communicated these concerns to occupational health in her referral of 29 April 2015, the day after the Galaxy incident when she decided to medically suspend the claimant. However, in the tribunal's view, it was a good judgment call on her part not to mention these. This in itself would have turned into a running controversy and would have been more likely than not to spawn a further grievance to the management committee given the claimant's previous history. These concerns were best not addressed head on, but rather indirectly, if at all . This tribunal would have done as she did if we had been managing this process.

266 The problem she had was that all the concerns about appearance, conduct, uncommunicativeness were in fact symptomatic of serious underlying illnesses. That is why it was not suitable to address it head on. She knew him. She knew that he was not always like this, when he was well. It is not as if the claimant did not have a chance to challenge these concerns through the occupational health referral appointment, the absence review meeting, and in this hearing. The claimant was given a copy of the occupational health referral which simply justified the medical suspension. She had to mention these concerns in order to get a fully informative occupational health report, this time.

267 The tribunal accepts Ms Wilson's evidence. We do not accept the claimant's theory, as he stated at the end of the absence review meeting, that this was just one of the many ways in which she was trying to bring about his dismissal.

268 It is therefore the tribunal's view that this was not a detriment. The claimant's view of it as such is not a reasonable one, as per *Shamoon*.

Payments – after 9 February 2015

269 This complaint is put as whistle-blowing, victimisation and disability discrimination because of something arising from disability, over payments made to the claimant.

270 These were quite technical. We did not deal with it in the narrative above. There was a complex enquiry which resulted in the claimant being paid £1,377 as a result of an incorrect payment over his phased return to work in 2015. Helen Simpson from Essex Legal considered that sickness periods had been correctly recorded in the period 2014 following 9 May GP fit note. The sickness at that time had been correctly stated as period of sickness absence, as the respondent considered the claimant was not fit to work despite the GP signing him fit to work and the "fit with caution" occupational

health report. However, it was different on the phased return i.e. the more recent payments. The respondent went into fine detail over how many sick pay days had been used at full and half rate so an extra payment was made. The £1,377 related not to the period from May 2014, but the period from 9 February 2015 when the claimant was due sick pay for the unworked days on his phased return, but it had not been correctly calculated because of the reinstatement etc. His sick pay was recalibrated and he had a fresh start on his sick pay entitlement (which had otherwise exhausted the previous year). Ultimately the correct payments were made.

271 To the extent there was ever an underpayment in this complex and unusual situation, even if there was a detriment, or less favourable treatment, the tribunal could not come near to finding it by reason of whistle-blowing or disability victimisation. It only arose from disability in the remotest sense. It was not caused by disability. Underpayment was not the proximate cause (*Charlesworth v Dransfields Engineering* UKEAT/0197/16). To the extent that the error arose from disability at all, it was justified i.e. was a proportionate means of achieving a legitimate aim (making a few understandable errors on the way to making the correct payment). The complaint is dismissed.

Ms Wilson's refusal to consider medical reports more than 6 months old

272 This is put as a victimisation complaint. The claimant characterises Ms Wilson as refusing to take into account older medical reports more than 6 months old but the claimant has completely misunderstood her stance on this, and has misquoted her. In fact what she stated was:

> "The medical reports you've submitted are over 6 months old. I am happy to consider this but would ask if you have any more recent medical evidence which indicates you are well enough to teach successfully at CSS, you submit this for consideration as soon as possible."

273 We also note that the report from the claimant's doctor Dr Chad was paid for by Essex County Council. That was the report dated September 2014 from Dr Chad, a psychiatrist based at the Priory Hospital. Ms Wilson's stance was absolutely reasonable. The picture was changing. The most up to date information is the most helpful. The claimant could have produced the transcript of his interview with Dr Rost but wisely did not do so (until this hearing).

274 This complaint cannot be upheld. The factual basis for it is wholly wrong.

Sharon Wilson's decision to dismiss the claimant – 26 June 2015

275 This is the claimant's central complaint. It is put as whistle-blowing detriment, victimisation, reasonable adjustments, and direct discrimination by Sharon Wilson. This is also the claimant's unfair and automatically unfair dismissal complaint.

276 At the stage where Ms Wilson decided she had to dismiss the claimant from the service, occupational health had come to the same conclusion that the role of a teacher could not be adjusted in order to accommodate the claimant. There was no fast track to OPAL. The only way in was through the centres. Further, despite the claimant's (unshakeable) belief, OPAL was not a practicable placement for him anyway

given his current state of health.

277 The final incident on 28 April 2015 confirmed the correctness of these views. The claimant's reaction to not particularly remarkable misbehaviour from T and C at Galaxy was alarming.

278 Generally he did not look smart, but more importantly he was sullen and uncommunicative which meant that he was not engaging with the children. He was damaging morale generally in the PRU. He was absenting himself without telling people, showing a lack of responsibility. It was symptomatic of illness-induced panic on his part. He was refusing to undergo an observation after a discussion of the phased return to work; his stress levels went sky high and he needed to pull off the A127 as he drove home. It was the meeting at which he had used the extreme analogy of a soldier who lost his limbs. That analogy was correct, ironically. He could not continue in the service.

279 There was no suggestion at the time that Ms Wilson dismissed the claimant that there was any realistic prospect of his situation improving. There was no practicable fast track to OPAL. Supervision would have been impracticable. He had not carried out any substantial teaching duties since 16 April 2013.

280 The claimant has supplied much of the evidence against himself, disclosing the transcript of his examination by Dr Rost and in his artless way seemed to concede teaching in OPAL would be difficult, when teaching anxious school refusers. He himself acknowledged, as everyone else did, that students would have to be cherry-picked and that would not always have been possible. In the nature of it some of the more unpredictable students are within the OPAL side of CSS. That is why they are in it.

281 This finding is the same finding as we make on the claimant's main unfair dismissal complaint section 98. The reasons for dismissing the claimant, and the process leading to it, were overwhelmingly fair under s 98 of the Employment Rights Act 1996.

282 Further there is no room whatsoever to infer that they were taken on a prohibited ground to found a complaint under s 103A of the 1996 Act. As the reasons for an automatically unfair dismissal, under s 103A of the Employment Rights Act 1996, have to be the principal reason at least, these complaints cannot succeed, and see also below the tenuous basis for the protected disclosures themselves to found any such claim, which likewise apply to all the foregoing s 47B whistle-blowing detriment claims.

Public Interest Disclosures

283 As a general point, the public interest requirement in s 43B(1) of the Employment Rights Act 1996 only applies to disclosures made after 25 June 2013.

284 The claimant relies upon 7 alleged protected disclosures of which the respondent accepts 2 as amounting to public interest disclosures. The first was an old disclosure on 7 June 2010, a complaint made to Councillor Aldridge. There was no

PPA available for teaching staff at Leverton House (PPA is teacher's preparation time). PPA (planning, preparation and assessment) is apparently a legal obligation in education.

285 The second protected disclosure which the respondent accepts as such was also old. It was a 31-page letter sent to Joanna Killian describing alleged health and safety breaches in the educational sphere. It was dated 23 November 2012 at which stage the claimant had only been working at CSS in a substantive post in CSS since April 2012, (although he had been seconded there before (after the Leverton assault)). The focus of that long letter was, again, Leverton secure. It referred back to the previous complaints made to Councillor Aldridge and dealt more with the aftermath of the assault at Leverton.

286 The tribunal accept the logic of the respondent that the remaining alleged public interest disclosures do not qualify for protection. The most recent one was on 23 March 2014 in a letter to Joanna Killian where he said that he was being subjected discrimination and victimisation. He attached copy of his ET1 claim to the tribunal and asks for the matters to be fully investigated. It does not engage the public interest. The claimant cannot have believed it did for the purpose of s 43B of the Employment Rights Act 1996. Further it is allegations rather than "information" (*Cavendish Munro PRM Ltd –v- Geduld* [2010] IRLR, 38, EAT.

287 The earlier alleged protected disclosure of 4 November 2010 could not be found anywhere. The claimant no longer relied on it

288 That of 8 February 2011 was a letter objecting to the Essex informal capability procedure being implemented against him by Ms Ferns (his line manager at the time). At this stage he had been seconded to CSS for 2 months. It does not fall within any of the categories mentioned in section 43B(1)(a-f) to be a qualifying disclosure.

289 The letter of 4 July 2011 to Mr Burfield, challenging the claimant's assessment on the performance and capability process by Ms Ferns, is, similarly, not in the categories in section 43B ERA. The respondent's argument is accepted.

290 What can be seen from that review of the claimant's alleged protected disclosures (arising from his previous post in Leverton secure) is they are a long long way removed in time from the events of 2014 and 2015. It was a different place with different managers. There is no logical link either with individual managers or with the events surrounding the claimant's sickness absence and return to work at Galaxy, Saturn and OPAL. It strains credibility beyond breaking to say there could have been any link there whatsoever. The claimant suggests no such link in fact or theory. The entire whistle-blowing claim is doomed. It is simply a retrospective theoretical construct which the claimant has wrapped around his unfair dismissal claim with the benefit of his new-found legal knowledge in this area. No credible or logical factual explanation is given for how these remote and old disclosures could have affected the managers or governors in this set of proceedings. Protected disclosures for s 43B of the Employment Rights Act 1996 have to be the "ground" for any detriment.

291 By the same reasoning, *a fortiori*, the dismissal complaint under section 103A Employment Rights Act 1996 is doomed, given that protected disclosures must be the

reason (or if more than one, the "principal reason") for the dismissal. It would impossible for the tribunal to find anything like that.

Disability discrimination

292 Coming to the disability discrimination, 4 species of such discrimination under sections 13, 15, 20 and 27 of the Equality Act 2010. In this narrative which we have listened to over many days can see no room for inferring anything other than conscientious management of an exceptionally difficult sickness absence and fraught attempt to return to work in one of their unit's teachers.

293 It has never been disputed in any way in the workplace or in these proceedings that the claimant had a qualifying disability. That is a non-issue.

294 Without going into finer detail, many individuals were not aware of the detail or even the fact of the claimant's tribunal litigation as far as victimisation was concerned despite he had been such a prolific claimant. That too should be stated. The respondent was quite discreet about the tribunal proceedings and the claimant's grievances.

Discrimination because of something arising out of disability – s 15 EQA

295 The disability discrimination because of something arising from disability is a better conceived complaint insofar as it refers to the claimant's dismissal simply because of his absence and then because of the breakdown of a return to work mandated by the appeal process from Stuart Freel's decision.

296 The change of line management from Mary Mylott was completely justified because the claimant was not working in OPAL team when he returned on 9 February 2015. It would have been utterly unworkable for him to have had the same line manager. This was a time when he needed a line manager who actually worked with him. He needed closer supervision than the average teacher at this point, as it was a difficult return to work to manage. That section 15 claim falls on the basis of justification in pursuit of a legitimate aim by proportionate means.

297 The tribunal was helpfully referred to the case of *Pnaiser v NHS England* [2016] IRLR 170 EAT the latest in a long line of authority on section 15 of the Equality Act 2010. The tribunal has already said that the original dismissal decision of Mr Stuart Freel was amply justified and the tribunal were surprised that the claimant's appeal was allowed. Ms Wilson was surprised too.

298 Had the claimant attended the original appeal meeting the appeal might well not have been allowed. Some of the comments he made at the Stuart Freel meeting actually reinforced the case for dismissing him although that cannot have been his intention. The decision to require him to work in the centre as an expedient to afford adequate supervision was inevitable. There was no alternative open to management nor has a credible alternative been suggested by the claimant. Telephone support was not a credible alternative. Being accompanied to student's homes by another teacher was not a viable alternative. It was a gross over-simplification to say this was just a matter of cost.

Reasonable adjustments – s 20 EQA

299 Coming to the reasonable adjustments claim. One complaint is that the claimant says that there should have been another case conference before it was decided to dismiss him finally. We remind ourselves that the last case conference which was on 12 December 2014 arose from the appeal hearing before the Hunter panel. Knowing what we know and what Dr Rost would have stated it would have done the claimant no good. It was originally convened in December 2014 to address what Ms Agland the HR adviser to the panel considered were inconsistent stances in the claimant's management by Sharon Wilson.

300 We heard general evidence that case conferences were extremely rare and they are by no means regularly mandated part of the process so, for the purposes of section 20, there was no provision, criterion or practice that in fact put the claimant at a serious disadvantage. He was at no disadvantage here at all because the case conference would have merely delayed the claimant's dismissal and it would have reinforced the reasoning for the claimant's dismissal. At this stage the respondent had assembled compelling contemporaneous evidence and there was a catalogue of events within CSS which had been observed which gave rise to concrete and not theoretical concerns about the claimant's safety and that of students.

301 The next complaint was the requirement to support employees. We have already stated that there is never a requirement for employers to initiate a Remploy referral. The claimant himself never pursued the Garry Fitzgibbons request beyond his grievance of 22 April, 27 February 2015 to the management committee. We were also helpfully referred to *Tarbuck v Sainsbury's Supermarket* [2006] IRLR 644 EAT which is authority for the proposition that failure to consult in itself does not amount to a failure to make reasonable adjustments for the purposes of section 20.

302 A more substantial complaint seems to be the expectation that all teachers should be able to work across any area of the CSS service. Stated as it is, there might be a failure to make reasonable adjustment by failing to reallocate certain duties to others. Reallocation of duties has always been envisaged, in principle, as a legitimate reasonable adjustment under disability discrimination legislation. The extent of any reallocation usually dictates whether or not the adjustment is reasonable. But in the events that happened the claimant only asked to teach one to one and not to teach groups. That adjustment was made

303 Sharon Wilson's risk assessment had basically ruled out as impracticable remote work in libraries and hospitals at that stage. The only place where support was practicable was in the centres. With a student group influx it would be impossible to give the claimant a stable group of compliant students in a service such as OPAL. It should have been self evident to the claimant but, for reasons which are probably symptomatic, was not. Even the claimant stated that "cherry picking" (he used the word), would have to be carried out to accommodate the restrictions he presented.

304 It would not have been a reasonable adjustment to assign him to Mary Mylott as a line manager given his current duties on the return to work in the centres. It could never have been such, leaving aside the fact that Mary Mylott wanted nothing to do

with this. This would have meant that the claimant fell into a vacuum as far as line management was concerned and nothing could have been more risky than that. This claim cannot possibly succeed.

305 We have already dealt with the complaint that the claimant should have been given an opportunity to shadow or be shadowed by members of the OPAL team. The claimant was getting ahead of himself constantly on the OPAL issue and perseverating over it. It was a fixation. Telephone support was totally inappropriate and inadequate. Personal support was impracticable, enormously complicated and took a teacher away from a team that was already working hard. The claimant seemed quite blasé about this aspect of it reasoning that the team had managed to absorb his duties during his long sickness absence.

306 The next claim was the expectation that the claimant teach maths. We have already stated the reason for that was that he needed supervision of a senior teacher Kevin Bainbridge. In some ways the subject seems to suit him well particularly with the more motivated students working at higher grades of GCSE.

307 The claimant never raised this before. It seems to have become a concern during these tribunal proceedings. The English teaching apparently took place mainly in Galaxy which the claimant considered was a more troubled environment to work in (it will be recalled that Ms Wilson completely disagreed with the claimant's assessment on this. There was no failure to make a reasonable adjustment. The claimant had expressly approved the teaching of maths at the time. How was the respondent to know that he would raise it as a complaint in these proceedings?

Reading Policies on the Cloud

308 The next alleged failure was the requirement to read the policies online. As previously stated however autism aware one is one would not necessarily know that the claimant had a particular problem with reading a computer screen and "sensory overload" as he explained to this tribunal but not to his management in the workplace.

309 There are 2 sides to this because first of all his desire to have a comprehensive set of policies would have taken time and expense to produce and would have given him a wholly disproportionate amount of reading to do, at disproportionately large expense, and Sharon Wilson had tried without being too prescriptive to get him started and said that staff handbook would be a good starting place in addition that he might want to read certain policies relating to certain relevant specialist departments e.g. maths, English/literacy.

310 The claimant never really abandoned his stated belief that he should comprehensively trawl through every single policy, all 3,000 pages. He did confess artlessly that it was an obsession with him. If he had said to management that he had sensory overload rather than just making blanket accusations of failure to make unspecified reasonable adjustments, perhaps some accommodation might have been made. It was not at all obvious. Whilst it is for the employer in the workplace to suggest reasonable adjustments it cannot be a reasonable adjustment when no reason is given making such an apparently unlikely and unnecessary adjustment.

Keys to Galaxy

311 The final failure to make reasonable adjustments alleged was the failure of the respondent to provide the claimant with his own set of keys to the Galaxy centre; these were just for the internal doors. Contrary to what the respondent's counsel seems to have been instructed, these were not fobs they were keys, as we now find. It is most unlikely that Mr Steve Turner would have offered to "cut" a set for the claimant; you cannot cut a fob. There is no evidence before this tribunal that they definitely were fobs. A lot of this we did not understand. What we did understand was that the claimant on arrival at Galaxy centre had to pass through the communal foyer. There would be groups of children.

312 He had to pass through swiftly and he had to sign in as is common in many educational premises. He could not simply enter and then make a b-line for the internal doors. Ms Wilson gave special instruction to the staff there when he was due to have the keys ready to hand him promptly. We do not accept the claimant's suggestion that they would simply be on the phone and leave him hanging there. The office was manned by more than one person.

313 Neither can we accept the respondent's counsel's submission which is largely based on there being a fob system for the internal doors.

314 However, the overriding point here is that if that scenario of passing through a foyer was going to put the claimant at a "substantial disadvantage", it raises the question of whether the claimant should have been teaching at all. On normal criteria such as there were would not qualify for his own set of keys, even Sharon Wilson did not have a set. She was there on 2 or sometimes 3 afternoons per week.

315 We cannot accept in reality that the claimant had to wait an unduly long time in the student foyer at any stage. That might have been his perception, but it was not one which the respondent had a legal duty to defer to.

316 Mr Coulson had partly upheld the claimant's grievance but only to the extent the key allocation policy needed to be revisited because he considered it was too lax. He considered control was not tightly enough overseen therefore it might have been even less likely for the claimant to have been issued with a set of keys given what was physically an easy entrance to the unit. It could be over in seconds.

317 As a specialist teacher in a pupil referral unit, paid accordingly, if this was a requirement in his case which put him at a substantial disadvantage the tribunal considers he was not fit to be at work at all. We consider we cannot uphold this part of the complaint and we are satisfied that Ms Wilson made an adequate compromise on this by giving special instructions to the staff about the spare keys. It was known when he would be arriving. It was timetabled.

318 For all these reasons none of the claimant's claims for unfair dismissal, automatically unfair dismissal under the public interest disclosure legislation, detriments under the public interest disclosure legislation or disability discrimination, direct, section 15, reasonable adjustments, section 27 victimisation succeed. This has not been a marginal decision of the tribunal. It was a very clear case of the claimant

being unfit to resume duties.

319 The difficulties were not theoretical but proven in fact and could have led to injury. The claimant had been very unwell and his illness persisted.

320 We hope that he finds more congenial and suitable work at some stage. The strong impression were left with, after many days of hearing this case that the claimant's determined return to work was doomed.

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Employment Judge Prichard

4 July 2017