EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Herry		**Dudley Metropolitan Borough Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 5 – 9, 12 – 16, 19, 20, 23 & 28 March 2018
16 April 2018 (Panel only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Miss SP Outwin
Mr PJ Simpson

Representation
For the Claimant: **In Person**
For the Respondent: **Ms S Garner (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 **At no time during the period 28 June 2014 – 23 March 2016 was the claimant a disabled person as defined in Section 6 and Schedule 1 of the Equality Act 2010. Accordingly, the claimant's claims for direct disability discrimination; a failure to make reasonable adjustments; and disability-related harassment are dismissed.**

2 **The claimant was fairly dismissed: his claim for unfair dismissal is not well-founded and is dismissed.**

3 **The claimant was lawfully dismissed in compliance with his employment contract: his claim for wrongful dismissal is dismissed.**

4 **The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of victimisation as defined by Section 27, and brought pursuant to Section 120 of that Act, is dismissed.**

REASONS

Introduction

1 The claimant in this case is Mr Damieon Herry: he commenced employment as a teacher at Hillcrest School in Dudley on 14 January 2008; on 16 June 2008 the claimant also commenced work for Dudley Metropolitan Borough Council as a part-time youth worker.

2 On 6 June 2010, the claimant commenced a period of sickness absence which was to extend until his dismissal from his teaching post allegedly for gross misconduct on 19 May 2015. The reasons for the claimant's absences as provided in sick notes from his GP were variously stress; fractured ankle; head injury; leg pain; work-related stress; and stress & anxiety. After the claimant's dismissal from his teaching post he resumed work as a part-time youth worker and that employment is continuing.

3 From late 2010, the claimant's relationship with Hillcrest School has not been a happy one: he believes that the Principal of the school, Mrs April Garratt and latterly, a member of the HR team at the respondent, Mrs Jo Martin have treated him unfairly.

4 On 17 December 2012, the claimant presented a claim to the Employment Tribunal (the 1st claim): the claim was for unlawful discrimination and/or harassment because of the protected characteristics of sex and/or race and for victimisation. The claims were heard by a panel presided over by Employment Judge Dean on multiple dates between 3 February and 18 July 2014; following extensive deliberations in chambers, Judge Dean issued a judgement which was promulgated to the parties on 21 October 2014; the claims were dismissed in their entirety.

5 On 17 July 2014, the claimant presented his 2nd claim: this included claims for direct discrimination and/or harassment because of the protected characteristics of disability and/or sex and/or race and for victimisation. On 24 April 2015, Employment Judge Goodier considered as a preliminary issue the question of whether or not, at any time material to that claim, the claimant was a disabled person as defined in the Equality Act 2010. After a single day's hearing, Judge Goodier issued a judgement which was promulgated to the parties on 24 April 2015: he determined that the claimant had not been a disabled person during the material period which was 4 April to 27 June 2014. A necessary consequence of this decision was that the claimant's claims for disability discrimination were dismissed; the remaining elements of the claim were then considered by a panel presided over by Employment Judge Dimbylow over

several days in May 2015: the claims for sex and race discrimination, harassment, and victimisation were dismissed.

6 Save for a successful appeal against the quantum of a costs order made by Judge Dean, the claimant's appeals to the EAT against those previous determinations have all been unsuccessful; we understand that further appeals to the CA and the CJEU are ongoing. Crucially, Judge Goodier's decision on the question of disability was upheld by a division of the EAT presided over by HHJ Richardson in a judgement handed down on 16 December 2016 following a hearing at the tribunal on 29 July 2016.

7 This panel is currently trying the claimant's 3rd and 4th claims. Claim 3 was presented on 12 October 2014: the claimant brings claims for direct discrimination because of the protected characteristic of disability; a failure to make reasonable adjustments; disability-related harassment; victimisation; and unfair and wrongful dismissal. Claim 4 was presented on 21 January 2016 and is a claim for victimisation.

8 To assist the claimant in presenting his claim in person the tribunal adjusted its normal requirements: -

(a) The claimant was permitted to make an audio recording throughout the proceedings: this was on condition that the recording was to be used for his own preparation purposes only; and that, if any part of the recording was transcribed for any purpose, a copy of the transcription would be made available to the panel and to the respondent.
(b) The claimant was commuting to the tribunal each day from his home in London: there were some days that he experienced travel delays; the tribunal adjusted its sitting hours accordingly.
(c) The hearing of evidence in the case was concluded on Tuesday 20 March 2018: the claimant asked for time to prepare his closing submissions; initially time was granted until Friday 23 March 2018; but, on that day, the claimant requested further time; which was then allowed until Wednesday 28 March 2018.

9 It is the claimant's case that, notwithstanding the determinations of EJ Goodier and HHJ Richardson, during a period after 28 June 2014 he was and remains a disabled person as defined in the Equality Act 2010. The material period for consideration in these Claims is 28 June 2014 (before which date there is an unassailable determination that he was not disabled) and 23 March 2016 (the last alleged act of discrimination/harassment in Claim 3/4 as amended).

The Disability Issue

10 For the purposes of Claims 3 and 4 there has been no preliminary hearing to determine the issue of disability: it has been left for this panel to consider disability within the substantive hearing. Today is day 8 of 15 days for that hearing: we have heard the entirety of the claimant's evidence; we have been directed by the parties to documents in the bundle specifically relevant to the question of disability; and we have heard detailed written and oral submissions on the question of disability. We will now rule on whether, at the material time, the claimant was a disabled person; after which we will go on to hear the respondent's evidence on the questions of dismissal; discrimination; harassment; and victimisation as appropriate.

The Law relating to the Determination of Disability

11 **Equality Act 2010**

Section 6: Disability

(1) A person (P) has a disability if—

(*a*) P has a physical or mental impairment, and
(*b*) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1: Disability Supplementary Provision
Part 1: Determination of Disability

1 Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2 Long-term effects

(1) The effect of an impairment is long-term if—

(*a*) it has lasted for at least 12 months,
(*b*) it is likely to last for at least 12 months, or
(*c*) it is likely to last for the rest of the life of the person affected.

4 Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(*a*) measures are being taken to treat or correct it, and
(*b*) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

12 **Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)**

Part 2: Guidance on matters to be taken into account in determining questions relating to the definition of disability

Section A: The Definition

Main elements of the definition of disability

A1. The Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (s 6(1)).

A2. This means that, in general:

- the person must have an impairment that is either physical or mental (see paragraphs A3 to A8);
- the impairment must have adverse effects which are substantial (see Section B);
- the substantial adverse effects must be long-term (see Section C); and
- the long-term substantial adverse effects must be effects on normal day-to-day activities (see Section D).

This definition is subject to the provisions in Schedule 1 (Sch 1).

All of the factors above must be considered when determining whether a person is disabled**.**

Meaning of 'impairment'

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement (see paragraph B24). It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced.

A5. A disability can arise from a wide range of impairments which can be:

- sensory impairments, such as those affecting sight or hearing;
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;
- progressive, such as motor neurone disease, muscular dystrophy, and forms of dementia;
- auto-immune conditions such as systemic lupus erythematosis (SLE);
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease;
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;
- learning disabilities;
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;
- mental illnesses, such as depression and schizophrenia;
- produced by injury to the body, including to the brain.

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition. (See also paragraph A12 (exclusions from the definition).)

'A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.

A man has a borderline moderate learning disability which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.

It is the effects of these impairments that need to be considered, rather than the underlying conditions themselves.'

A8. It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

Section B: Substantial

This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at s 212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'.

The time taken to carry out an activity

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

'A ten-year-old child has cerebral palsy. The effects include muscle stiffness, poor balance and unco-ordinated movements. The child is still able to do most things for himself, but he gets tired very easily and it is harder for him to accomplish tasks like eating and drinking, washing, and getting dressed. He has the ability to carry out everyday activities such as these, but everything takes much longer compared to a child of a similar age who does not have cerebral palsy. This amounts to a substantial adverse effect.'

The way in which an activity is carried out

B3. Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

'A person who has obsessive compulsive disorder (OCD) constantly checks and rechecks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.'

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is

important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.

'A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.'

B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term, **see Section C**.

'A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.'

Effects of treatment

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The

practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch 1, Para 5(1**)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (**Sch 1, Para 5(2)).** In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (**See also paragraphs B7 and B16**.)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.

'A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.'

B15. The Act states that this provision does not apply to sight impairments to the extent that they are capable of correction by spectacles or contact lenses. (Sch 1, Para 5(3)). In other words, the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used). This does not include the use of devices to correct sight which are not spectacles or contact lenses.

B16 Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For

example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain. (**See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment**.)

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past. (**See paragraph A16**.)

Section C: Long-term

This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

Meaning of 'long-term effects'

C1. The Act states that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected (**Sch 1, Para 2**).

Meaning of 'likely'

C3. The meaning of 'likely' is relevant when determining:

- whether an impairment has a long-term effect (**Sch 1, Para 2(1), see also paragraph C1);**

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an

effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

Section D: Normal day-to-day activities

This section should not be read in isolation but must be considered together with sections A, B and C. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

D1. The Act looks at a person's impairment and whether it substantially and adversely affects the person's ability to carry out normal day-to-day activities. Meaning of 'normal day-to-day activities'

D2. The Act does not define what is to be regarded as a 'normal day-to-day activity'. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

'A person works in a small retail store. His duties include maintaining stock in a stock room, dealing with customers and suppliers in person and by telephone, and closing the store at the end of the day. Each of these elements of the job would be regarded as a normal day-to-day activity, which could be adversely affected by an impairment.'

D4. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

D6. Also, whether an activity is a normal day-to-day activity should not be determined by whether it is more normal for it to be carried out at a particular time of day. For example, getting out of bed and getting dressed are activities that are normally associated with the morning. They may be carried out much later in the day by workers who work night shifts, but they would still be considered to be normal day-to-day activities.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would not be reasonable to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment.

D13. The examples of what it would, and what it would not, be reasonable to regard as substantial adverse effects on normal day-to-day activities are indicators and not tests. They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different activities, and the cumulative effect could amount to a substantial adverse effect. (**See also paragraphs B4 to B6 (cumulative effects).**)

D14. The examples in this section describe the effect which would occur when the various factors described in Sections A, B and C have been allowed for, including for example disregarding the impact of medical or other treatment.

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the

substantial adverse effect of the impairment on normal day-to-day activities is long term.

In the following examples, the effect described should be thought of as if it were the only effect of the impairment.

- Difficulty in getting dressed, for example, because of physical restrictions, a lack of understanding of the concept, or low motivation;
- Difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence;
- Difficulty preparing a meal, for example, because of restricted ability to do things like open cans or packages, or because of an inability to understand and follow a simple recipe;
- Difficulty eating; for example, because of an inability to co-ordinate the use of a knife and fork, a need for assistance, or the effect of an eating disorder;
- Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability;
- Difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods;
- Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability;
- Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way;
- A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue;
- Difficulty entering or staying in environments that the person perceives as strange or frightening;
- Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places;
- Persistent difficulty crossing a road safely, for example, because of physical restrictions or a failure to understand and manage the risk;
- Persistent general low motivation or loss of interest in everyday activities;
- Difficulty accessing and moving around buildings; for example because of inability to open doors, grip handrails on steps or gradients, or an inability to follow directions;
- Difficulty operating a computer, for example, because of physical restrictions in using a keyboard, a visual impairment or a learning disability;
- Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand;

- Inability to converse, or give instructions orally, in the person's native spoken language;
- Difficulty understanding or following simple verbal instructions;
- Difficulty hearing and understanding another person speaking clearly over the voice telephone (where the telephone is not affected by bad reception);
- Persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment, or learning disability, or a visual impairment (except where that is corrected by glasses or contact lenses);
- Intermittent loss of consciousness;
- Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions;
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;
- Persistent difficulty in recognising, or remembering the names of, familiar people such as family or friends;
- Persistent distractibility or difficulty concentrating;
- Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term.

- Inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley;
- Experiencing some discomfort as a result of travelling, for example by car or plane, for a journey lasting more than two hours;
- Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile;
- Minor problems with writing or spelling;
- Inability to reach typing speeds standardised for secretarial work;
- Inability to read very small or indistinct print without the aid of a magnifying glass;
- Inability to fill in a long, detailed, technical document, which is in the person's native language, without assistance;

- Inability to speak in front of an audience simply as a result of nervousness;
- Some shyness and timidity;
- Inability to articulate certain sounds due to a lisp;
- Inability to be understood because of having a strong accent;
- Inability to converse orally in a language which is not the speaker's native spoken language;
- Inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road;
- Inability to sing in tune;
- Inability to distinguish a known person across a substantial distance (e.g. across the width of a football pitch);
- Occasionally forgetting the name of a familiar person, such as a colleague;
- Inability to concentrate on a task requiring application over several hours;
- Occasional apprehension about significant heights;
- A person consciously taking a higher than normal risk on their own initiative, such as persistently crossing a road when the signals are adverse, or driving fast on highways for own pleasure;
- Simple inability to distinguish between red and green, which is not accompanied by any other effect such as blurring of vision;
- Infrequent minor incontinence;
- Inability to undertake activities requiring delicate hand movements, such as threading a small needle or picking up a pin.

13 **Decided Cases**

Kapadia –v- London Borough of Lambeth **[2000] IRLR 699 (CA)**

The burden of showing disability lies squarely on the claimant. Disability is an issue of fact to be determined by the tribunal on the balance of probability.

Woodrup -v- Southwark LBC **[2003] IRLR 111 (CA)**

The claimant is required to prove his/her alleged disability with some particularity.

Goodwin -v- The Patent Office **[1999] IRLR 4 (EAT)**

The tribunal is required to look at the evidence by reference to 4 different conditions: -

(a) Does the claimant have an impairment which is either mental or physical?
(b) Does the impairment affect the claimant's ability to carry out normal day-to-day activities? The focus should be on the things the appellant either

cannot do or can only do with difficulty rather than on the things that the individual can do.

(c) Is the adverse effect substantial? Substantial means more than minor or trivial rather than "very large". The tribunal may take into account how the claimant appears to the tribunal to "manage": although, it should be slow to regard a person's capabilities in the relatively strange adversarial environment as an entirely reliable guide to the level of ability to perform normal day-to-day activities.

(d) Is the adverse effect long term?

Morgan -v- Staffordshire University **[2002] IRLR 190 (EAT)**
McNicol -v- Balfour Beatty Rail Maintenance Limited **[2002] IRLR 711 (CA)**
McKechnie Plastic Components –v- Grant **UKEAT/0284/08 (EAT)**
J –v- DLA Piper UK LLP **[2010] IRLR 936 (EAT)**

A claimant is not required to demonstrate a clinical psychiatric disorder in order to qualify for a finding that they suffer from and impairment.

In ***Morgan*** the claimant failed to establish that she had a "mental impairment" notwithstanding that she had provided copies of medical notes which referred to "anxiety", "stress" and "depression". The occasional use of such terms, even by medical men, will not amount to proof of a mental impairment within the act.

Vicary –v- British Telecommunications Plc **[1999] IRLR 680 (EAT)**
Leonard –v- Southern Derbyshire Chamber of Commerce **[2001] IRLR 19 (EAT)**
Ekpe -v- Commissioner of Police of the Metropolis **[2001] IRLR 605 (EAT)**
Ahmed –v- Metroline Travel Limited **[2011] EqLR 464 (EAT)**
Aderemi –v- London and South East Railway **UKEAT/0316/12 (EAT)**

Substantial adverse effect, means an effect which is more than minor or trivial; it is a relatively low standard. The focus should be on what an employee *cannot* do, or can only do with difficulty; and not on what they *can* do easily. A tribunal should look at the whole picture; but it is not a question of balancing what an employee can do against what they cannot do. If the employee is substantially impaired in carrying out any normal day-to-day activities - then the employee is disabled notwithstanding their ability in a range of other activities. However, where there is a factual dispute as to what a claimant is asserting that he/she cannot do findings of fact as to what claimant actually can do may throw significant light on the disputed question of what he/she cannot do. The fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability.

Ginn -v- Tesco Stores Limited **UKEAT/0197/05/MAA (EAT)**
Patel -v- Oldham Metropolitan Borough Council **[2010] IRLR 280 (EAT)**

Where there are two or more impairments, the combined effect of both must be considered by the tribunal in determining what the adverse effect is and whether the claimant is disabled or not**.**

Law Hospital NHS Trust –v- Rush **[2001] IRLR 611 (CS)**

Evidence of the nature of the claimant duties at work, and the way in which they are performed, particularly if they include "normal day-to-day activities", can be relevant to the assessment which the tribunal must make of the claimant's case.

Herry -v- Dudley Metropolitan Borough Council **UKEAT/101/16/LA**

Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.

Paterson -v- Commissioner of Police of the Metropolis **[2007] IRLR 763 (EAT)**

A police officer who suffered from dyslexia was disabled as the fact that he required 25% extra time to carry out an assessment pursuant to the process for determining promotion to superintendent was a substantial adverse effect on normal day-to-day activities.

PP -v Leicester Grammar School **[2014] UKUT 520 (AAC)**

In considering whether an impairment consisting of mild dyslexia and visual stress had a substantial adverse effect on the ability of a schoolgirl to carry out her normal day-to-day activities the correct comparison is not that between the individual and members of the population at large it is the difference between what the individual could actually do and what he/she would be able to do without the impairment.

Evidence relating to Disability

14 The claimant has provided two lengthy witness statements: one dealing with his claims at large; and the other specifically dealing with his claimed disability and the effects of his claimed impairments upon him. He has been cross-examined at length; and we have had the opportunity to ask questions.

15 The claimant told us of his initial diagnosis of dyslexia in 1996; his period of study at the University of East London until 1999 where he was awarded a 2:2 Degree in Architecture; his subsequent study for a PCGE; and his early employment at Whitfield's school. Thereafter he gave evidence about events which he claims to have happened to him since commencing employment at Hillcrest; and concentrates particularly on how he claims that Hillcrest's treatment of him has adversely affected him because of his dyslexia and later because of suffering with stress and depression. The claimant provided no evidence as to how his claimed conditions of dyslexia and depression adversely affected his ability to carry out normal day-to-day activities.

Medical Evidence

16 We considered the following medical evidence: -

(a) Dyslexia Notification and related documents from Mary Rooney – Chartered Psychologist dated 25 November 1996.
(b) A report addressed Hunters Solicitors for an unspecified purpose by Peter N Gilchrist – Consultant Educational Psychologist dated 19 October 2001.
(c) Letter from Tarun Limbachya – Psychological Wellbeing Practitioner to the claimant's GP dated 21 October 2014.
(d) Letter from Abigail Moss - Psychological Wellbeing Practitioner to the claimant's GP dated 21 November 2014.
(e) Letter from Dr B Fashola (GP) to the tribunal dated 25 November 2014.
(f) OH Report from Dr G Suveizdis dated 17 March 2015.
(g) Letter – to whom it may concern – Dr B Fashola GP dated 28 May 2015.
(h) Assessment Form – Camden Listening and Counselling Service dated 19 August 2015.

(i) OH Report from Dr G Suveizdis dated 28 September 2015.
(j) Session notes from Camden Listening and Counselling Service 9 September 2015 – 28 October 2015.
Letter from Dr Marisa Dunn GP to the tribunal dated 15 January 2015.
(k) Letter from Camden Listening and Counselling Service to Claimant's GP dated 18 January 2016.
(l) Letter – to whom it may concern – Dr B Fashola GP dated 7 February 2016.
(m) Report from Carol Amos – Chartered Educational Psychologist dated 11 February 2016. (*The purpose of this report is unclear the claimant referred himself for the assessment stating that he wished to more fully understand his learning needs. It is clear that Ms Amos was unaware of any intention for the report to be used for the purposes of litigation it does not contain the required certificate from an expert witness as to their awareness of their duty to the court*.)
(n) Letter – to whom it may concern – Dr B Fashola GP dated 28 February 2016.
(o) Letter Dr Alina Radu – Counselling Psychologist to claimant's GP dated 4 April 2016.
(p) Report – to whom it may concern – from Dr Marc Balint – Clinical Psychologist dated 17 November 2016. *(The purpose of this report is unclear. It is clear that Dr Balint was unaware of any intention for the report to be used for the purposes of litigation; it does not contain the required certificate from an expert witness as to their awareness of their duty to the court and the report is unsigned*.)
(q) Report – to whom it may concern – from Dr Marc Balint – Clinical Psychologist dated 17 November 2016. *(The purpose of this report is unclear. It is clear that Dr Balint was unaware of any intention for the report to be used for the purposes of litigation; it does not contain the required certificate from an expert witness as to their awareness of their duty to the court and the report is unsigned*.)
(r) The fit-notes provided by the claimant's GP during the period 08/03/2010 – 10/10/2016.

17 In addition to the medical evidence, we have considered correspondence and decisions made by the DWP regarding the claimant's entitlement to Employment Support Allowance and the decision of the First-tier Tribunal (Social Entitlement Chamber) regarding the same.

The Facts (Disability)

18 The claimant suffers from an impairment - the learning disability of dyslexia: this condition was 1st diagnosed in 1996; although it has probably been with the claimant throughout his life; it is permanent; there is no evidence of any

deterioration or improvement in the condition; but its effects are exacerbated during periods of stress and anxiety. The respondent concedes that the claimant's dyslexia is an impairment for the purposes of the Equality Act 2010.

19 The position is less clear regarding the claimant's claimed impairment of depression: there is no definitive diagnosis of depression but several of the medical documents referred to above refer to *depression* or *the symptoms of depression.* At its height, the claimant's depression is said to be moderate. On 21 October 2014 there was a reported improvement in the symptoms of depression and on 21 November 2014 the claimant was discharged by Abigail Moss (although he was subsequently re-referred). Not one of the fit-notes provided to the claimant make any reference to depression.

20 There is no evidence before us as to precisely what the claimant can and cannot do: we know that although he was diagnosed with dyslexia during his student years, he did not disclose his dyslexia (although he did disclose as he considered himself to be disabled) to Hillcrest School when his employment commenced; further during the early years of that employment he did not require or request any adjustments; and did not disclose his dyslexia to the school or to professional colleagues. Despite his dyslexia, it is his case, acknowledged by the respondent, that he was a highly effective and successful teacher.

21 The report from Carol Amos referred to earlier provides a comprehensive list of activities which the claimant told her gave him difficulty. There were no specific details of those difficulties; and certainly nothing which he seemed unable to do. The list read as a general list of the likely effects of dyslexia.

22 Before Judge Richardson it was argued on the claimant's behalf that the fact that he had been medically certified as unfit to teach for a very prolonged period was sufficient proof of disability. Whilst a highly demanding profession , teaching also involves many activities which would be regarded as the normal day-to-day activities of a professional person. And it was argued that the fact that for a period of years he was unfit to carry out such activities demonstrated that he was a disabled person.

23 The claimant did not specifically make that argument for himself before us but we have nevertheless considered it - and there is certainly force in it. But the difficulty is that the evidence provides us with no information as to why he was unfit to teach - but there is clear evidence that the OH physician considered him fit to work and identified ongoing relationship difficulties between himself and Mrs Garratt as the principal obstacle to his return – this was echoed in a fit-note from the claimant's GP on 31 March 2015.

24 Regarding his life outside school, there are a number of general assertions by the claimant that he no longer enjoys his social life and similar but again absolutely no specific detail and no supporting evidence.

25 Against this we have had to balance the fact that we are aware that since 2012 the claimant has conducted a relentless course of complex litigation which has involved many days appearances before the Employment Tribunal as an unrepresented litigant; many days before the Employment Appeal Tribunal usually unrepresented and further appearances before the Court of Appeal we understand that he has also prepared and lodged an appeal to the Court of Justice of the European Union. In addition, we have seen numerous FOI and SAR requests addressed to Hillcrest and to the respondent; detailed and complex correspondence between the claimant and the Information Commissioner and the Independent Press Regulator.

26 The claimant lives in London and to make his many appearances before the tribunal he travels each day by train he attends court hearings on time and has told us that he needs to book tickets in advance to secure the cheapest travel options; he also told us that he plans and takes holidays abroad. As recently as September 2015, in an application for employment claimant described himself as “honest; fearless; organised; enthusiastic; competent; adaptable; creative; dedicated; punctual; reliable determined; engaging; inspirational; joyful; passionate; resilient; patient; and resourceful”.

27 The claimant is clearly able to prepare lengthy and complex documents; present lengthy and complex (although sometimes misguided) legal arguments; to withstand lengthy cross-examination; and to undertake lengthy cross examination.

Conclusions on Disability

28 Applying the analytical approach required in the case of ***Goodwin*** we have concluded that at the material time the claimant undoubtedly suffered with the impairment of dyslexia - this inevitably has some adverse effect on his ability to carry out normal day-to-day activities - and such effects are undoubtedly long term - the issue for consideration is whether the adverse effects are substantial.

29 So far as depression is concerned, we are not satisfied that the claimant has discharged the burden which is upon him to demonstrate that at the material time he was suffering from depression as opposed to merely showing symptoms of depression as a reaction to life events including the perceived unfair treatment he received from Ms Garratt; his dismissal; and the untimely death of his sister.

30 Notwithstanding our inability to conclude that the claimant suffered from the impairment of depression, applying ***DLA Piper***, we have nevertheless gone on to consider the effects on the claimant of his dyslexia in combination with the stress and anxiety and alleged depression from which he was suffering. We appreciate that the focus must be on those things which the claimant cannot do or can only do with difficulty rather than on those things which he can do. The problem for us is there is no specific evidence from any source of any activity domestic; professional; or otherwise which the claimant cannot do or can only do with difficulty. We have therefore considered the list of activities prepared by Carol Amos which the claimant told her gave him difficulty - and which are activities in which a dyslexic person may have trouble. However, all the evidence we have is that the claimant copes well with literacy; numeracy; the specific requirements of teaching; planning; organising; addressing the tribunal and so on.

31 Accordingly, we find that the claimant has not discharged the burden which is upon him to prove that the effects of his dyslexia in combination with any mental health problems he may suffer have an adverse effect on his ability to carry out normal day-to-day activities which can properly be described as substantial.

32 This means that we find that within the definition contained in Section 6 and Schedule 1 of the Equality Act 2010, at the material time, the claimant was not a disabled person.

33 From this it follows that the claimant's claims for direct disability discrimination; a failure to make reasonable adjustments; and disability -related harassment are dismissed.

34 The tribunal will now consider the respondent's evidence on the claims of unfair and wrongful dismissal and victimisation.

The Evidence

35 In addition to the claimant himself the tribunal heard evidence from five witnesses called by the respondent: -

Mrs Jo Martin:	HR Specialist Team Manager.
Mrs April Garratt:	Principal of Hillcrest School.
Mrs Imelda Gilhooly:	Chair of Governors at St Peter's Hill Primary School.
Mrs Gillian Withers:	Governor, Hurst Green Primary School.
Mr Lewis Bourne:	Principal Information Security Officer.

36 We were provided with two bundles of documents: the first, running to approximately 1500 pages was the "agreed trial bundle" prepared by the respondent in accordance with Case Management Orders made by Employment Judge Broughton; the second, running to a little under 800 pages, was prepared by the claimant. The claimant had been given permission to prepare a second bundle when he expressed concern and disagreement with the contents of the first bundle. He was given such permission expressly on the basis that he would need leave from the panel to refer to any of the documents in the second bundle: in the event, such leave was rarely sought; and was never refused.

37 Without exception, we found the respondent's witnesses to be clear, compelling, consistent, and truthful in the accounts they gave. We have no hesitation in accepting them as reliable witnesses. The claimant was a less satisfactory witness: we do not find that he was dishonest or told deliberate lies; but he was unreasonable in his interpretation of events; and pedantic in his explanations. For example, the claimant insisted that his *persistent failure* to cooperate in obtaining his CRB check did not amount to a *refusal* to cooperate. Similarly, whilst the claimant acknowledged that his employers required him to submit for their inspection "original copies" of his GP fit notes, his claimed interpretation was that this did not require him to send the *original* but that a *first copy* (*original copy)* would suffice.

38 The essential facts of the case are not actually in dispute: but, where there is a conflict in the factual evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence of the respondent's witnesses.

The Facts

39 On 4 January 2008, the claimant commenced employment at Hillcrest as a teacher of Design and Technology. In June 2008, the claimant also commenced employment directly with the respondent as a part-time youth worker - two evenings per week. During the hearing before us, it became a contentious issue as to who actually employed the claimant (in many respects this was a moot point because by the time of the hearing Hillcrest did not exist as an entity and all of its outstanding liabilities, including any liabilities to the claimant, had been accepted by the respondent). Ultimately, it was common ground that the claimant was employed by the respondent; but, pursuant to Section 35 of the Education Act 2002 and the School Standards and Framework Act 1998, the school governing body was in control of the appointment and dismissal process. If the governing body of a school determines that the teachers employment should cease their obligation was to notify the local authority who should then terminate the teachers employment with or without notice as applicable In any event, the claimant and the respondent both relied on policies and contractual documentation specifically controlling the claimant's teaching

contract: this documentation could not, on any view, govern the claimant's employment as a part-time youth worker. Accordingly, the position appears to be that the claimant had to separate and distinct contracts with the same employer: the teaching contract was terminated by dismissal; the youth worker contract is ongoing.

40 As early as 26 May 2010, following a period of illness which was unrelated to the claimant's dismissal, Mrs Garratt wrote to the claimant to remind him that the school required sight of original fit notes from his GP in respect of periods of absence from work. Between then and May 2011, there was extensive communication between the claimant and Mrs Garratt relating to the requirement for the claimant to comply with Hillcrest's absent management policies which included the provision of original fit notes; contacting the school to advise of unscheduled absence; and notifying the school in advance of anticipated absence for medical appointments and the like.

41 On 6 June 2011, the claimant commenced what was to become a prolonged period of sickness absence. He did not return to work prior to his dismissal more than four years later, on 19 May 2015.

42 On 22 November 2011, there was a reconvened Stage 2 Grievance Hearing chaired by Mrs Fullwood. The substance of that grievance is not material to the present claim, but during the hearing the claimant's trade union representative made allegations of race discrimination against the school managers including Mrs Garratt. On 12 December 2011, the claimant issued a Stage 3 Grievance Appeal – again, the substance of the grievance is not material to this claim; but, it also included an allegation of race discrimination.

43 On 2 January 2012, Senior HR Assistant Melanie Whitehead wrote to the claimant advising him that his CRB check was due for renewal; and asking him to complete the relevant sections of an attached disclosure application form. The claimant did not initially respond; and was later chased by Mrs Jayne Fellows who was Mrs Garratt's PA. Eventually, on 6 March 2012, the claimant stated that he would bring the relevant documents to school "when he is next in".

44 On 18 June 2012, the claimant attended a welfare meeting - having now been absent for more than 12 months. The claimant was asked to attend an OH examination: appointments were arranged for 16 July 2012 and 7 September 2012; the claimant did not return the required consent form; and did not attend the appointments. On 18 October 2012, Principal HR Officer Laura Round advised the claimant that this was deemed as a failure to adhere to a reasonable management request. Eventually, the claimant attended for an appointment and an OH report was prepared. When discussing that report, on 28 February 2013,

the claimant informed Ms round that he would not be returning to work until "mediation is concluded" this was a reference to his ongoing grievance.

45 On 17 December 2012, the claimant presented his first claim (1317426/2012): this was a claim for sex and/or race discrimination and victimisation. That claim was heard over a 45-day period between 3 February 2014 and 30 September 2014. The claimant represented himself and attended tribunal every day during this period he remained off sick from work. Mrs Garratt gave evidence and was subject to many allegations of discriminatory conduct; she was cross-examined by the claimant at length. The claim was dismissed by a panel chaired by Employment Judge Dean the judgement was promulgated on 21 October 2014.

46 On 17 July 2014, the claimant presented his second claim (1303533/2014): this was a claim for sex and/or race and/or disability discrimination and victimisation. The substance of this claim was determined by a panel chaired by Employment Judge Dimbylow over a four-day hearing in May 2015. The claims were dismissed by a judgement issued on 22 May 2015 written reasons were provided later. Once again, Mrs Garratt gave evidence and was subject to allegations of discriminatory conduct; she was again cross-examined by the claimant. The claimant attended tribunal on each day and represented himself.

47 In December 2013, the claimant had been continually absent from school for two and a half years; Mrs Garratt was concerned as to the situation; her concerns were: -

(a) The length of the claimant's absence; and the fact that it was continuing apparently indefinitely.
(b) That the last fit-note received from the claimant had expired on 1 December 2013.

48 Hillcrest's disciplinary policy provides for the Headteacher or a designated Officer of the school to consider initial concerns and determine whether to undertake a preliminary investigation. Following such preliminary investigation, it is for the Headteacher to determine whether a full and thorough investigation is required - ordinarily this would be conducted by a member of the Senior Leadership Team.

49 In December 2013, the hearing of the claimant's first claim was imminent; Mrs Garratt was aware of the allegations against her and against some of her colleagues; she therefore decided that it was appropriate for her to side-step any investigation that may be required into the claimant's absence or his failure to comply with absence management policies. With the agreement of the school

governors, Mrs Garratt spoke to the HR Department to ask if they could consider the situation.

50 The Head of HR at the time was Ms Sharon Harthill: she delegated Mrs Garratt's enquiry to Mrs Martin. Although employed by the respondent in its HR Department, Mrs Martin had no previous involvement with schools and was not known to the claimant; Mrs Garratt; or any other member of staff at the school prior to commencing her investigation. Between January and April 2014, Mrs Martin undertook what the panel would describe as a "scoping exercise" - looking at what needed proper investigation. The following matters were of concern to her: -

(a) The claimant had now been absent from work since June 2011: the last sick note received was dated 1 October 2013 covering the period of sickness until 30 November 2013.
(b) Over the period of the claimant's absence, the way in which he submitted his sick notes and varied: sometimes he sent them direct to Hillcrest; other times he would send them to HR; often he submitted his sick notes electronically and these proved difficult to read; it had frequently been necessary for HR to chase the claimant for sick notes.
(c) The claimant had exhausted his entitlement to sick pay: Mrs Martin was curious as to where the claimant was now deriving any income; she contacted Audit Services to enquire if there was any information to suggest that he had other employment interests or activities. She was provided with information from Companies House confirming that the claimant was a director of, and apparently had an interest in, two registered companies. This raised the possibility that the claimant was working for those companies whilst off sick from Hillcrest which would have been regarded as a serious breach of his employment contract.
(d) Although the claimant's entitlement to sick pay was exhausted, the respondent had received no request for information from DWP as Mrs Martin would have expected if he was now in receipt of benefits.

51 Mrs Martin reported to her superiors that clearly there were matters which warranted proper investigation. For such an investigation to proceed, HR required the authority of the school and its governing body. Mrs Garratt was asked to provide a formal letter of engagement: and, after consultation with the governing body, on 4 April 2014, she formally wrote to the new head of HR - Ms Lisa Morgan-Danks commissioning her HR team to undertake the required investigation. In her letter she makes it clear that her reasons for proceeding in this way is to ensure complete transparency and independence. (By this time the claimant's first tribunal claim was part-heard – there had been several hearing dates in February 2014 and the hearing was set to resume in June.)

52 On 4 April 2014, Mrs Martin wrote to the claimant inviting him to a preliminary investigation interview. The interview was fixed for Friday 11 April 2013 at 11am: the claimant was told of his right to be accompanied; it was made clear that this was an investigation and not a disciplinary hearing. The claimant was told that the matters under investigation were: -

(a) Information received regarding additional work activities.
(b) Serious breach of policy and procedure in relation to his continued sickness absence.
(c) Trust and confidence in the workplace.

53 On 10 April 2014, the claimant responded to Mrs Martin stating that he was declining the invitation to interview for several reasons including a false allegation which had been made against him sometime before (wholly unrelated to the current investigation). He also stated that he was waiting to hear from his union representative. The meeting was therefore rescheduled for 1 May 2014 Mrs Martin pointed out to the claimant that he was required to attend under the disciplinary policy.

54 On 25 April 2014, the claimant emailed Mrs Martin stating that he would not be attending as he had not received five days' notice. He stated that he was also awaiting information which he had requested; he attached a letter accusing Mrs Martin of bullying and harassing him and threatening Employment Tribunal proceedings. Eventually, the investigation meeting took place on 7 May 2014; the claimant was accompanied by Mr Dave Allchurch - NASUWT Representative.

55 At the meeting, the claimant admitted that there were two companies registered to him at Companies House; he confirmed that he was a director of the two companies; he stated that the companies were not trading. But, when asked what the purpose of would be of registering the two companies at a time when he was in employment for the respondent, he declined to answer the question - stating that it was not relevant. He did state that he had not been working whilst off sick. Mrs Martin then raised the question of the claimant's obligations with regard to sick notes: she pointed out that he had been reminded many times to provide is sick notes in a timely manner; she provided a number of examples of correspondence between Hillcrest; HR; and the claimant when he had been asked to provide sick notes. The claimant's view throughout was that the responsibility was with Hillcrest to remind him that a sicknote was due; Mrs Martin pointed out that this was not the case - responsibility was with him. Mrs Martin also pointed out that some sick notes had been submitted in electronic form but the respondent required sight of the original sicknote which could be returned to the claimant if required for other purposes.

56 Between May and September 2014, there was ongoing correspondence between the claimant and Mrs Martin regarding the timely provision of original sicknotes. Despite all that had previously been said, on 21 May 2014, the claimant emailed Mrs Martin querying the need for the original sicknote. The claimant continued to send copies of sick notes which were of poor quality and difficult to read. Examples of these were provided to the panel in the bundle.

57 During her investigation, Mrs Martin became aware of the position regarding the claimant's DBS renewal: he had originally been requested to undertake this in February 2012; and then again in March 2012; April 2014; and May 2014. The DBS renewal application was eventually completed in March 2015.

58 Mrs Martin remain suspicious that the claimant was engaged in alternative work whilst off sick; she did not feel that his answers given at the investigation meeting were at all persuasive. She sought authority to instruct enquiry agents to maintain observations of the claimant's activities whilst off sick; Hillcrest school agreed to contribute a proportion of the cost. The instruction of the enquiry agents and the receipt of their report was dealt with by the respondent's Audit Department. The enquiry agents undertook surveillance of the claimant over two days on 25 and 26 September 2014. The information fed back to Mrs Martin was to the effect that nothing of relevance had been observed.

59 During the investigation meeting, the claimant had repeated some of the allegations previously made of bullying; harassment; and ill-treatment by Mrs Garratt and others at the school. These allegations had little relevance to Mrs Martin's investigation but nevertheless she was concerned to see what the tribunal findings would be. Employment Judge Dean's judgement on the first claim was issued on 21 October 2014: the claimant's allegations were dismissed.

60 On 4 December 2014, Mrs Martin wrote to the claimant asking him to attend an investigation meeting on 18 December 2014. The claimant did not respond; nor did he attend the meeting or provide any reason for his absence.

61 Mrs Martin wrote to the claimant on 6 January 2015 inviting him to attend an investigation meeting on 19 January; he was advised that if he did not contact Mrs Martin regarding the matter or attend the planned meeting then this of itself may be a disciplinary issue. The claimant did contact Mrs Martin but declined to attend the meeting. Eventually the required investigation meeting took place on 23 February 2015: the claimant was again accompanied by Mr Allchurch; the claimant was specifically told in writing that the following matters remained under investigation: -

(a) His registration of two companies at the time that he was absent from work due to ill-health.
(b) Breaches of the sickness absence policy in that he had not provided sick notes in a timely manner not provided original sicknotes. And, the claimant did not give consent to an OH referral promptly. (This was requested in September 2014; he provided the consent in January 2015.)
(c) He had not complied with a request to complete a renewed DBS check.
(d) Trust and confidence in the workplace.

62 According to notes of the meeting seen by the panel, the registration of the two companies and potential other activities were not discussed on 23 February 2015. The claimant's attitude so far as the sicknotes are concerned was again to question why the respondent wish to see the originals; he confirmed that he had all the missing originals in his possession but he had not brought them to the meeting as he had not been requested to do so. So far as the DBS renewal, is concerned at first the claimant denied having received correspondence about this; you and later claimed that all necessary information had been provided to Jayne Fellows. Again, he was asked if the required documents and information were in his possession he confirmed that they were but that he had not brought them to the meeting as he had not been asked to do so. When it was pointed out to the claimant that he was in breach of policies and procedures, he and Mr Allchurch embarked on a series of criticisms of the school and the respondent stating that they too had not always followed procedures. When asked, the claimant refused to confirm that, in future, he would follow the relevant procedures regarding the production of original sicknotes.

63 Having concluded her enquiries, Mrs Martin believed there was evidence that the claimant had repeatedly failed to comply with the respondent's policies for Managing Sickness Absence and Disclosure, Barring & Safeguarding. She concluded that the claimant's failure to provide sicknotes in a timely manner was a serious breach of the school's policy; and that there was a case to answer which should be presented to a panel at a disciplinary hearing.

64 In Hillcrest's Disciplinary Policy it states that all disciplinary powers have been delegated by the governing body to the headteacher. It would follow that a disciplinary hearing should be conducted by Mrs Garratt. HR advised (and Mrs Garratt had in any event concluded) that, in view of the ongoing tribunal proceedings, it would be unwise for Mrs Garratt to have any personal involvement in the disciplinary process. The advice given to Mrs Garratt was that the disciplinary procedure should be handed over to an independent panel of school governors - but not governors of Hillcrest. Mrs Garratt and the governors of Hillcrest both agreed to this process; and agreed that they would consider themselves bound by any decision taken by the independent panel.

65 On 30 April 2015, Mrs Martin wrote to the claimant advising him that he was required to attend a disciplinary hearing with the Staff Dismissal Committee appointed by Hillcrest school on Friday 15 May 2015. He was told that he faced the following allegations of gross misconduct: -

(a) Serious breach of the Managing Sickness Absence Policy.
(b) Serious breach of the Disclosure & Barring Policy.
(c) Serious breach of trust and confidence in that he could not give assurances that he would follow policy; and there is historic non-compliance with policy.

66 Mrs Martin had concluded that there was no case to answer following her investigation into the concerns that the claimant had been working elsewhere whilst off sick. When giving evidence, Mrs Martin acknowledged that it would have been appropriate for her to make clear that such a charge was not to be pursued. In our judgement however, what was important was that the charges which were to be pursued were properly set out - which they were.

67 The disciplinary panel comprised Mrs Gilhooly; Mr G Moffitt; and Mr B Hutchinson; who were all school governors within Dudley Metropolitan Borough Council but none of them had any prior connection to Hillcrest or to the claimant. The panel was chaired by Mrs Gilhooly; the management case was presented by Mrs Martin; HR and legal support was provided by Ms R Sidaway and Ms S Khan-Hussein respectively; and Ms F Perrett provided HR support to Mrs Martin. The claimant attended accompanied by a trade union representative Mr Lawrence Shaw.

68 In accordance with the respondents procedure, when invited to the disciplinary hearing, the claimant had been advised that any documentation to which he wished to refer at the hearing should be sent to Carol Fletcher, Governor Support Officer at Westox House, 1 Trinity Road, Dudley DY1 1JQ such that it would be received at least three working days before the hearing.

69 At the outset of the hearing reference was made to a substantial bundle of documents which had been received from the claimant the previous day at 4pm; and thus, had not been tendered in the manner and at the time requested. The panel gave consideration as to whether the bundle should be admitted: the bundle comprised more than 400 pages; and when given the opportunity the claimant did not direct the panel to essential documents within the bundle which could be read and absorbed quickly. The documents appeared to relate to the claimant's many and various complaints against Mrs Garratt and Hillcrest rather than to the disciplinary charges. The claimant had also belatedly requested facilities to play a DVD to the panel: enquiries were made as to the content of the DVD and why it was relevant to the disciplinary process; it transpired that the

DVD was the surveillance footage obtained by enquiry agents in September 2014 as part of the investigation as to whether the claimant was engaged in employment elsewhere. This footage had been disclosed to the claimant in connection with the then current tribunal proceedings. The potential disciplinary charge under investigation when the surveillance footage was obtained was not one which now featured; and the footage appeared to have no relevance. To have accepted the late material would have jeopardised the hearing proceeding on its allocated day; and as the material appeared to have no direct relevance to the issues; and as the claimant had not complied with the procedure; the panel declined to consider it. (During his evidence to this panel, the claimant confirmed that the 400-page bundle which he wished to rely on was effectively his bundle for the part-heard tribunal proceedings much of which is also contained in the claimant's bundle before us. The material relates to the claimant's complaints against Mrs Garratt; there was little or nothing within it which had relevance to the disciplinary charges.)

70 Much of the time of this panel was spent in the claimant seeking to establish that he had in fact sent the bundle within the time stated in the policy. Eventually (after all evidence had been concluded but prior to submissions), he produced proof of posting at 16:41 hours on 11 May 2015. Even assuming next day delivery, in our judgement, the claimant had failed to provide the information three working days before the hearing. But, much more importantly, the documentary proof of posting relied upon by the claimant established that he had sent the bundle to an incorrect address. This would inevitably cause delay in the bundle reaching those responsible for the disciplinary hearing. The claimant could provide no explanation for this action (no doubt the address to which the bundle was sent was an address connected to the respondent; but inevitably the respondent has many departments and staff; if the bundle was not correctly addressed the claimant could not reasonably expect it to reach the correct destination in time).

71 Having heard the management case and the claimant's response, Mrs Gilhooly's panel found all three disciplinary charges to have been proven against the claimant: -

(a) It was evident that there had been repeated occasions where the claimant had not submitted sick notes promptly; and where those submitted were in electronic form and illegible. Indeed, it was only at the start of the afternoon session of the disciplinary hearing that the claimant presented the panel with an original sicknote for the period 5 July 2013 - 30 September 2013 which had until then been missing. The panel concluded that despite the time and effort taken by Hillcrest and the respondent the claimant appeared to have learned nothing and seemed unwilling to comply with the policy.

(b) Regarding the DBS issue, the panel concluded that the claimant's failure to renew his certificate with the result that the school did not hold the DBS certificate for him for three years was a serious and inexcusable breach of teaching requirements. The panel did accept in mitigation of this charge that during the relevant period the claimant had had no contact with children as he was off sick, and that the DBS process had been completed by the time of the hearing.
(c) Of most concern to the panel was allegation three: the panel concluded that the evidence before them clearly demonstrated that the claimant had still not taken on board the school's concerns and he seemed unwilling to confirm that in the future he would comply with the relevant policies. The panel was satisfied that Hillcrest and the respondent had offered the claimant as much reasonable support and assistance as they could but he had chosen to ignore that. In view of historic failures, they had no confidence that the claimant would comply with relevant policies in the future.

72 The panel concluded that, taken together, the proven allegations amounted to gross misconduct. They concluded that summary dismissal was the appropriate sanction in the absence of any assurances from the claimant that his behaviour and attitude would change. The panel's decision was communicated to the claimant in writing in a letter signed by Mrs Gilhooly on behalf of Hillcrest dated 19 May 2015; the claimant was advised that his employment was terminated effective from 15 May 2015; he was advised of his right to appeal.

73 By a letter dated 27 May 2015, the claimant lodged an appeal. He cited five grounds for appeal as follows: -

(a) Procedural failure.
(b) Invalid reasons given for dismissal.
(c) Unreasonable investigation.
(d) Detrimental treatment for raising a formal grievance.
(e) Decision to dismiss disproportionate.

74 The respondent's procedure provides for a governors' committee to consider a letter of appeal and decide whether the appeal should proceed by way of an "appeal" (which we interpret as a reference to a review procedure) or as a complete rehearing. In his letter, the claimant made clear that he wished there to be a rehearing.

75 By letter dated 5 June 2015, the claimant was advised that the initial governors' meeting was scheduled for 7 July 2015 and it was unnecessary for him or his representative to attend.

76 The appeal panel comprised Mrs Withers together with Mrs H Hughes and Mr P Harrington: again, these were independent governors from within the respondent local authority who had no previous connection to Hillcrest or to the claimant. The panel convened on 7 July 2015 and was supported by Mrs K Jessen from HR and by Ms Khan-Hussein from legal services. When the appeal panel met on 7 July 2015, they did not simply decide whether the appeal should proceed by way of review (appeal) or rehearing; they considered the claimant's letter of appeal; the notes of the dismissal hearing; the dismissal letter and other paperwork provided to them; and concluded that there was no merit in the appeal and dismissed it. In evidence, Mrs Withers told us that she was advised by HR and legal services that this approach was within her panel's powers under the procedure. The panel's decision was communicated to the claimant in a letter dated 7 July 2015 and signed by Mrs Withers on behalf of Hillcrest.

77 When asked by this panel what points the claimant believed he could reasonably have made at an appeal hearing, he referred only to the fact of his ongoing employment as a youth worker; and to his grievances against Mrs Garratt and Hillcrest. He would have produced the 400-page bundle which related mainly to matters which were at that time current before the Employment Tribunal in Case 1.

78 Following the claimant's dismissal, it was necessary to replace him as a Technology and Design Teacher. Hillcrest delayed in advertising for a replacement until the beginning of the new school year; an advertisement was placed in the Times Educational Supplement and elsewhere on 18 September 2015; with a closing date of 5 October 2015. Four applications were received: one of which was from the claimant himself. Mrs Garratt took the decision to reject this application at the initial sift stage for the simple reason that the claimant had been dismissed from the vacant post just five months earlier for gross misconduct. She felt that it would have been totally inappropriate; and would have undermined the dismissal procedure; and indeed, would have contravened the undertaking given to the independent governors; had she invited the claimant for interview. In the event, none of the four applicants were shortlisted or interviewed.

79 In the period 2013 – 2017, the respondent and/or Hillcrest have dealt with approximately 60 Freedom of Information (FOI) and/or Data Protection Act (DPA) requests for information from the claimant. Wherever possible, these requests have been responded to: but there have been occasions where the respondent has declined the request for one or more of the permitted reasons - which include the belief that a request is vexatious. Such requests are dealt with by Mr Bourne in his capacity as Principal Information Security Officer.

80 On 15 July 2015, the respondent received an FOI request from the claimant which Mr Bourne concluded was vexatious. The request was refused. Ultimately, the respondent was asked to provide an explanation to the information Commissioner: in a letter to the Commissioner dated 24 March 2016, Mr Bourne made the following statements: -

(a) "Mr Herry has subsequently issued to further ET claims following unsuccessful appeals in the first two claims"
(b) "Mr Herry lodged his first claim despite his legal advisers advising him that there was no case to answer and which resulted in the tribunal making an adverse costs order against Mr Herry for the way in which he conducted the proceedings"
(c) "The tribunal has subsequently found cause to warn Mr Herry about his conduct."

It is the claimant's case that the statements are untrue and that the making of them was an act of victimisation.

81 The factual position as at 24 March 2016 is that appeals against the Employment Tribunal decisions in the first two cases had been rejected by the EAT at the sift stage, but the claimant had later made applications under Rule 3(10) for an oral hearing which were outstanding. The statement referred to in Paragraph 79(b) above is taken from the judgement of Employment Judge Dean in Case 1 and is substantially accurate. And the statement referred to in Paragraph 79(c) is a reference to a letter dated 3 March 2016 sent by the tribunal office to the claimant on the direction of Employment Judge Goodier - it contains the following paragraph: -

> "*The Judge (who is about to retire) suggests that you cease to bombard the Employment Tribunal with these futile applications. If you are dissatisfied with his decision your proper remedy is by way of appeal*."

The Law

Unfair Dismissal

82 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) ……where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

83 **Cases on Unfair dismissal**

British Homes Stores v Burchell **[1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to

sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

Taylor -v- OCS Group Limited **[2006] IRLR 613**

In determining whether an employer has followed a fair procedure the tribunal should consider the procedure as a whole if one element of procedural unfairness is identified the question is whether there was impact on the fairness or otherwise of the dismissal process overall

84 **The ACAS Code**

We considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

Wrongful Dismissal

85 The wrongful dismissal claim is a simple claim under the law of contract. The claimant's case here appears to be that because Hillcrest did not follow the disciplinary procedure his dismissal is invalid (although he does not appear to be arguing that his employment is continuing). It is certainly his case that he is entitled to a period of notice and that because the disciplinary procedure was not followed the respondent cannot lawfully dismiss him summarily.

86 The legal position is that even if the claimant can establish that he was entitled to a period of notice he will not be permitted to enforce the contract in his favour if he himself is found to have been in fundamental breach of it.

87 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether the claimant had acted in repudiatory breach of contract.

88 **Cases on Wrongful Dismissal**

Boston Deep Sea Fishing and Ice Company v Ansell **(1888) 39 Ch.D. 339**
Cavenagh v William Evans Ltd. **[2013] 1 W.L.R. 238**

An employer may terminate an employee's contract of employment without notice in circumstances where the employee's conduct amounts to a sufficiently serious breach of a term of the contract of employment such that the conduct amounts to a repudiation of the contract. Further, the employer may justify summary dismissal by reference to such conduct even if the conduct was not known to the employer at the time of termination but was discovered only subsequently.

Tullett Prebon plc & ors v BGC Brokers LP & ors **[2011] IRLR 420 (CA)**
British Heart Foundation v Roy **UKEAT/0049/15 (EAT)**

In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is himself in breach of contract and that breach is repudiatory.

Williams –v- Leeds United Football Club **[2015] EWHC 376 (QB)**

An employer and a wonderful dismissal damages claim on the basis of the employee's gross misconduct, even if the employer was unaware of the misconduct at the time of the employee is dismissal.

Victimisation

89 **The Equality Act 2010 (EqA)**

Section 27: Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 39: Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 123: Time limits

(1) …proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(1) This section applies to a
ny proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

90 **Cases on Victimisation**

Burrett –v- West Birmingham Health Authority **[1994] IRLR & (EAT)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
St. Helens MBC –v- Derbyshire **[2007] IRLR 540 (HL)**

The fact that a claimant honestly considers that he has been less favourably treated or subject to detriment does not, of itself, established that there has been less favourable treatment or detriment. Whether there is detriment is for the Employment Tribunal to decide.

Detriment exists if a reasonable worker would or might take the view that treatment was in all the circumstances to his or her disadvantage. An unjustified sense of grievance cannot amount to a detriment.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**
Martin –v- Deveonshires Solicitors **[2011] EqLR 108 (EAT)**

If protected acts had a significant influence on the outcome, victimisation is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Victimisation may be conscious or sub-conscious.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more,

sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**

In a case involving several potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why the treatment occurred?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to consider evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

The Claimant's Case

91 At a Preliminary Hearing conducted by Employment Judge Broughton on 13 February 2017, a list of issues was agreed between the parties which provide a helpful structure to how the claimant puts his case. The list of issues was attached as an Annex to Judge Broughton's Case Management Order and sets out the issues in the following way: -

Unfair Dismissal

(a) What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for Section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
(b) Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
(c) Was there a reasonable investigation? The respondent did argue before EJ Hughes that res judicata must apply in relation to the Tribunal's findings in respect of allegations about the disciplinary investigation process which ultimately resulted in the claimant's dismissal. She accepted that this must be correct as regards Judge Dimbylow's Tribunal's findings made in relation to the investigation process. In summary, they did not criticise the way it was handled up to and including 23 February 2015 as unfair or unreasonable treatment and concluded it was not discriminatory. In EJ Hughes judgement those findings implicitly amounted to a conclusion that the process up to that date was within the band of reasonable responses. Consequently, there is issue estoppel in respect of the disciplinary process up to 23 February 2015 which means that the findings of the Tribunal in Claim 2 will be binding in relation to the unfair dismissal claim in Claim 3 and cannot be relitigated.
(d) Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
(e) If the dismissal was unfair, did the claimant contribute to the dismissal by any culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant was responsible for the conduct alleged. If so, by what proportion should the compensatory award be reduced as a result?
(f) Was the claimant's conduct prior to notice of termination being given such that it would be just and equitable to reduce the basic award? If so, by how much?
(g) Can the respondent prove that if it had adopted a fair procedure the claimant would/may have been fairly dismissed in any event? If so to what extent and when?

Victimisation

(h) Has the claimant carried out a protected act and/or did the respondent believe that the claimant had done or may do a protected act? The claimant relies upon the following which are admitted:

    (1) His stage 2 grievance from 22 November 2011

(2) His stage 3 grievance from 12 December 2011
(3) His first claim 1317426/2012
(4) His second claim 1303533/2014

(i) Has the respondent subjected the claimant to any of the alleged detriments identified below because the claimant had done a protected act?

(1) Arranging for a private investigator to put the claimant under surveillance in September 2014.
(2) The claimant being under surveillance on 25 and 26 September 2014 and 27,28 and 29 October 2014.
(3) Making the allegedly untruthful detrimental comments in a letter of Mr Lewis Bourne to the ICO dated 24 March 2106 as set out in Paragraphs 79(a) – (c) above.
(4) On 30 April 2015 including the previous ET Judgment in claim 1 in the pack for the claimant's disciplinary hearing.
(5) On 15 May 2015 Jo Martin: -

(i) Not acting impartially or providing evidence available to her to support the claimant.
(ii) Stating falsehoods about the respondent's policies (DBS and sickness) and trust and confidence. Specifically, that she said that the claimant had refused to comply with the DBS process, that he was required to submit sicknotes within 3 days and that, as a result, he had breached trust and confidence.
(iii) did not inform the panel that all outstanding actions had been completed.

(6) Dismissing the claimant from his teaching role on 19 May 2015.
(7) Not allowing an appeal hearing in relation to the dismissal.
(8) Not inviting him to an interview in October 2015 following an application for his former role.

Breach of contract / wrongful dismissal

(j) It is not in dispute that that respondent dismissed the claimant without notice.
(k) Can the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed a fundamental breach of contract such as an act of gross misconduct.
(l) To how much notice was the claimant entitled?

Time/limitation issues

(m) The allegations from 2015 and 2016 all appear to be in time but those from 2014 are potentially out of time, so that the tribunal may not have jurisdiction.
(n) Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
(o) Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

92 The allegations which the claimant makes against Mrs Martin - set out at Paragraph 90(i)(5) above are that she failed to point out to the disciplinary panel that the claimant's conduct regarding sicknotes had been the same in relation to his employment as a youth worker as it had been in relation to his teaching post, and yet no disciplinary proceedings have been brought against him in respect of his youth work. The claimant insists that Mrs Martin has specifically referred to the requirement to produce original sicknotes within *three days*: this requirement was contained in a policy not brought into force until January 2015; the earlier policy required the production of sicknotes in a *timely* manner. Both Mrs Martin and Mrs Gilhooly were clearing their evidence that they had applied the earlier policy.

93 In presenting his unfair dismissal claim before us, the claimant also advanced to the case that the decision to dismiss him from his teaching post was perverse bearing in mind that his conduct had been the same in relation to his youth-work post where no disciplinary action was taken.

Discussion & Conclusions

Victimisation

94 The claimant relies on the four protected acts identified at Paragraph 91(h) above: the respondent concedes that each of these is a protected act for the purposes of Section 27 EqA.

95 We have considered the alleged detriments which the claimant claims he suffered because he had done one or more of the protected acts: -

Surveillance – Paragraph 91(i)(1) & (2)

(a) The claimant was placed under surveillance because the respondent had grounds to believe that he may be acting in breach of his employment

contract as a teacher by engaging in remunerative employment elsewhere whilst off sick. There were good grounds for this belief: the claimant had exhausted his entitlement to sick pay; the respondent had received no enquiries from DWP which would suggest that the claimant was in receipt of benefits; thus, he had no known source of income by which to sustain himself. Added to this, enquiries had revealed that he had established two limited companies: and the claimant was less than helpful (arguably evasive) when first questioned about this in May 2014. We are satisfied that the claimant was placed under surveillance only because of these concerns: the decision was wholly unrelated to any of the protected acts and could not therefore amount to victimisation.

(b) We are not persuaded that placing the claimant under surveillance amounted to detriment at all. There is no evidence that he was aware of the surveillance until the fact of it was disclosed to him in March 2015.

(c) The surveillance was instigated in early September 2014 and took place on 25 & 26 September, and 27 - 29 October 2014. Even allowing for the claimant having no knowledge of the surveillance until 6 March 2015, this claim is brought more than four months out of time the claim form having been presented on 12 October 2015. The claimant has advanced before us no explanation for his failure to bring this victimisation claim earlier; nor any basis upon which we might conclude that it was just and equitable to hear the claim presented out of time. In our judgement, bearing in mind that the allegation of working outside the terms of his contract was not pursued to a disciplinary hearing, it is simply not possible to conclude that the surveillance, even if it were an act of victimisation, is part of a series of acts. Accordingly, and in any event, the Employment Tribunal has no jurisdiction to consider this element of the claim.

Comments to ICO: 24 March 2014 – Paragraph 91(i)3 above

(d) In our judgement, Mr Bourne's comments to the ICO in his letter dated 24 March 2016 were substantially true. Certainly, they reflected the position as Mr Bourne understood it. The points made by Mr Bourne were made in support of the respondent's position which was that the claimant's recent FOI request was vexatious; and the respondent should not be required to respond to it. We are quite satisfied that Mr Bourne was in no way motivated by the claimant's protected acts. Indeed, save that he knew that Employment Tribunal proceedings had been dismissed, and he believed that appeals had been unsuccessful, it seems unlikely that he had any detailed knowledge of the protected acts at all. Bearing in mind that we find Mr Bourne's honestly believed in what told the ICO, we also find that this letter did not amount to detrimental treatment of the claimant in any event.

Disciplinary Process: 30 April & 15 May 2015 – Paragraph 91(i)4 & 5 above

(e) Mrs Martin explained in evidence, and we accept, that her reason for placing in the bundle for the disciplinary hearing extracts from the judgements of Employment Judge Dean in Case 1 and Employment Judge Dimbylow in Case 2 was that, during her investigation, the claimant had relied heavily on the allegations previously made of unfair treatment against Mrs Garratt and others at Hillcrest. Mrs Martin anticipated that these allegations would be repeated during the disciplinary hearing; and, in her judgement, it was therefore appropriate to ensure that the disciplinary panel had access to the findings of the tribunal panels on those matters (matters which Mrs Martin believed were of peripheral relevance to the disciplinary hearing). In our judgement, Mrs Martin behaved entirely properly by ensuring that this material was available to the disciplinary hearing. And, she judged the situation well: because it was the claimant's intention to repeat his many allegations against Mrs Garratt; and indeed, that was the purpose of the 400-page bundle which he lodged out of time.

(f) The proper presentation of potentially relevant material to a disciplinary hearing cannot, in our judgement, amount to detrimental treatment. But, in any event, Mrs Martin was not motivated by the claimant's protected acts - but by her duty to ensure that the disciplinary hearing had access to the full facts.

(g) We therefore conclude that no victimisation claim is established by reference to the inclusion of this material in the papers for the disciplinary hearing.

(h) We do not accept the factual accuracy of the allegations set out in Paragraph 91(i)(5): Mrs Martin did provide to the disciplinary panel relevant evidence available to her to support the claimant. The disciplinary panel were well aware that the claimant was employed by the respondent as a youth worker and was not facing disciplinary charges in that employment; the panel were told that the DBS process was now complete; and we are satisfied that Mrs Martin presented the management case on the basis that the claimant had consistently failed to provide his original sick notes in a timely manner (or at all); she did not present the case on the basis that original sick notes were required within three days. In our judgement, the management case at the disciplinary hearing was presented fairly and in a professional manner: this cannot amount to detrimental treatment. In any event, the way Mrs Martin presented that case was not in any way determined by the claimant's protected acts.

(i) It therefore follows that, in our judgement, no victimisation claim is established by the manner of the presentation of the management case to the disciplinary hearing.

Dismissal: 15 May 2015 – Paragraph 91(i)(6) above

(k) Below, we deal in more detail with our findings as to the reason for the claimant's dismissal: but, we are satisfied that the reason for his dismissal, and the sole reason, related to his conduct. Mrs Gilhooly and her panel were in no way motivated by the claimant's protected acts; and thus it must follow that, in our judgement, the decision to dismiss the claimant was not an act of victimisation.

Appeal – Paragraph 91(i)(7) above

(l) At the meeting convened on 7 July 2015, Mrs Withers and her panel considered the claimant's letter of appeal and reached a genuine conclusion that the appeal was without merit and accordingly dismissed it. The way in which this occurred was in breach of the respondent's disciplinary policy: we consider below the extent to which this breach rendered the claimant's dismissal unfair. But, for the purposes of the victimisation claim, we are quite satisfied that the Withers panel reached a decision which they believed was open to them and dismissed the appeal based on merit as it appeared to them. This decision was in no way motivated or affected by the claimant's protected acts: the dismissal of the appeal without a hearing was not an act of victimisation.

Shortlisting: October 2015 – Paragraph 91(i)(8) above

(m) The claimant's case regarding his application for his former position in October 2015 is preposterous. Just five months earlier, he had been dismissed from the post for gross misconduct: the very suggestion that he might then be considered suitable for appointment to the vacancy thus created is utterly absurd. The claimant is an intelligent man: he must have fully understood the position when he submitted this application. In our judgement, he did so vexatiously and mischievously with the sole intention of creating embarrassment and conflict between himself and Mrs Garratt. Mrs Garratt acted entirely properly: it would have been quite perverse of her to shortlist the claimant bearing in mind his recent dismissal for gross misconduct: she was not in any way motivated by his protected acts. The failure to shortlist the claimant in the circumstances was not detrimental treatment; was not because of protected acts; and therefore, was not an act of victimisation.

96 It follows from our findings as set out above that we find that the claimant was not victimised. None of the conduct complained of was motivated by any of the protected acts. The claimant has not established facts from which we could

properly infer that he had been victimised. His victimisation claims are accordingly dismissed.

Unfair Dismissal

The Reason for the Dismissal

97 We are satisfied on the evidence of Mrs Gilhooly that the sole reason for the claimant's dismissal was a reason relating to his conduct this is a potentially fair reason for the purposes of Section 98(1) & (2) ERA.

98 Mrs Gilhooly and her panel genuinely believed that the claimant was guilty of the following serious misconduct: -

(a) His persistent failure to comply with Hillcrest's requirement to provide original sick notes in a timely manner during his sickness absence. Sick notes were presented late (sometimes several months late); they were presented in electronic form rather than originals; some of the electronic copies were illegible. At least one original was not produced at all until the day of the disciplinary hearing.
(b) Over a period of more than three years from January 2012 until March 2015, the claimant had failed to attend to the formalities of the renewal of his CRB check. Whilst he could not complete the renewal alone, Hillcrest and the respondent needed his cooperation and he persistently failed to cooperate.
(c) At both the second investigation meeting, and at the disciplinary meeting, the claimant was asked if he would undertake to comply with the absence management and the safeguarding policies in the future: the claimant failed to provide such an undertaking.

General Fairness

99 Mrs Martin conducted a thorough investigation into these matters and gave the claimant ample opportunity to explain matters and provide material to exculpate himself. At the outset, Mrs Martin was investigating further potential misconduct: that of engaging in work elsewhere whilst off sick, but, having evaluated the evidence available, she concluded that such a charge should not proceed. The investigation lasted from January 2014 until May 2015: this is a long time; but the lapse of time in this case did not create unfairness. Mrs Martin quite properly and generously did not require the claimant to attend meetings whilst his tribunal claims were being heard; and she awaited the issue of Employment Judge Dean's decision before reaching any conclusions regarding the claimant's many and various complaints against Mrs Garratt.

100 The report produced by Mrs Martin's investigation provided ample and adequate material for the conclusions reached by Mrs Gilhooly's panel as to the claimant's guilt of the alleged misconduct.

The Sanction of Dismissal

101 In our judgement, Mrs Gilhooly's panel were entitled to regard this misconduct as serious. The claimant had persistently failed to comply with the relevant policies over a period in excess of three years. A teacher is in a responsible position: it is essential that the headteacher and managers of a school can trust a teacher to behave responsibly. The claimant's persistent failure (despite much encouragement and opportunity to comply) was a gross breach of that trust. The claimant's refusal to give any undertaking as to future compliance (a wholly reasonable request) fundamentally undermined the implied term of trust and confidence.

102 In these circumstances, we are quite satisfied that the decision to summarily dismiss the claimant was well within the bounds of reasonable responses to the misconduct found by Mrs Gilhooly's panel.

Procedural Fairness

103 Although not strictly in accordance with the respondent's disciplinary policy, Mrs Garratt's decision to stand back in December 2013 and commission an independent investigation from the HR Department; and the later decision that Mrs Garratt and the governors of Hillcrest should stand back from the disciplinary process; are examples of conspicuous fairness on the part of Hillcrest to ensure that any potential conflicts of interest arising from the claimant's then ongoing tribunal claim did not prejudice either the investigation or the disciplinary process. No unfairness arose from the failure to follow the established procedure.

104 We spent a considerable amount of time considering the position regarding the appeal. The way in which the appeal was conducted was not in accordance with the disciplinary procedure even as modified by the steps taken to avoid conflicts of interest. The net effect of what happened was to deprive the claimant of an appeal hearing. But did this give rise to unfairness? Mrs Withers' panel properly considered all that had happened at the disciplinary hearing; and the claimant's grounds for appeal; they concluded that the grounds were without merit and the appeal was dismissed.

105 In reality, there was nothing the claimant could say in relation to the findings of misconduct. The facts were unarguable: he had not produced his sick notes in a timely manner; and he had failed for three years to cooperate in the renewal of the CRB. There was not a hint from the claimant that, had he attended

an appeal hearing, he would have modified his position as regards his future conduct and the provision of an undertaking as requested. And, in our judgement, this is all that could have realistically changed the position. The claimant confirmed that, if he had attended an appeal hearing, his energy would have been directed towards furthering his complaints against Mrs Garratt and the papers that he would have submitted were the very papers that had been before the Employment Tribunal in Claims 1 and 2.

106 Looking as we must at the disciplinary process overall, our judgement is that it was procedurally fair: and the manner in which the appeal was conducted does not render it unfair.

107 Accordingly, and for these reasons, we find that the claimant was fairly dismissed: his claim for unfair dismissal is not well-founded and is dismissed.

Wrongful Dismissal

108 The claimant's case is that the departure from the disciplinary policy taken by Mrs Garratt to avoid a potential conflict-of-interest was a breach of his employment contract and that he was therefore wrongfully dismissed at the end of that process. In our judgement, there is no merit in the case advanced: we reach this conclusion for two reasons: -

(a) The claimant is relying on the standard HR policy and procedures which have been adopted by Hillcrest - it is unclear from the document whether it has contractual force, but we will assume that it has. The document is essentially deficient: because, if the claimant's interpretation is correct, the effect would be that the school could never take any form of disciplinary action in respect of a teacher where the headteacher was in a position of conflict. This cannot give efficacy to the contract: it is necessary to read in a degree of flexibility to provide for the adoption of an alternative but fair procedure where the headteacher was personally conflicted. That is exactly what happened here.
(b) More fundamentally, we are satisfied on the evidence adduced before us that, at the time of his dismissal, the claimant was himself in serious breach of the employment contract by his failure to comply with the policies relating to Absence Management and Disclosure & Barring - coupled with his refusal to provide an undertaking as to his future conduct. It is trite law that, if the claimant himself is in fundamental breach of the employment contract, he cannot seek to enforce it to his own advantage.

109 Accordingly, we find that the claimant was lawfully dismissed under the terms of his contract: his claim for wrongful dismissal is dismissed.

110 For the reasons we have set out, the entirety of the claimant's claims for disability discrimination; victimisation; unfair dismissal; and wrongful dismissal are dismissed.

Employment Judge Gaskell
25 July 2018