Case number: 1302827/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Urwin

Respondent: Communities Academy Trust

Heard at: Birmingham Employment Tribunal

On: 2-6, 9 and 11 December 2019, 13-17 and 20-21 July 2020

Before: Employment Judge Cookson sitting with Mr. T Liburd and Mr. P Wilkinson

Representation
Claimant: In person supported by his sister, Ms J Urwin
Respondent: Mr J Gidney (counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. As conceded by the respondent, the claimant was unfairly dismissed contrary to s94 of the Employment Rights Act 1996 (ERA).

2. The claimant caused or contributed to his dismissal and a reduction of 25% will be applied to the compensatory award when determined in accordance with s123 (6) of the ERA.

3. In light of conduct of the claimant before dismissal, it is just and equitable to reduce the amount of the basic award by 25% in accordance with s122(2) of the ERA.

4. As conceded by the respondent, the claimant was disabled for the purposes of s6 of the Equality Act 2010 (EqA) at the relevant time by reason of his post traumatic shock disorder.

5. The claimant was not discriminated against by the respondent contrary to s15 EQA. That claim is dismissed.

6. The respondent did not fail to make reasonable adjustments in relation to the claimant's disability contrary to s22 and s21 of the EQA. That claim is dismissed.

7. The respondent did not harass the claimant for a reason related to his disability contrary to s26 of the EQA. That claim is dismissed.

8. The issue of remedy will be determined before the same tribunal at 10am on 1 October 2020.

REASONS

Introduction

1. The respondent in this case is a multi-academy trust. The claim relates to a primary school operated by the respondent, Grange Park Primary School, "the School".

2. Mr Urwin ("the claimant") is 49 years of age. He was employed by the respondent, laterally as a teaching assistant, from 1 November 2014 until his dismissal by reason for gross misconduct on 18 December 2017.

3. The claimant brought claims of unfair dismissal on 25 May 2018 following a period of early conciliation from 16 March 2018 until 30 April 2018. There was a preliminary hearing before Employment Judge Woffenden on 11 September 2018 which identified the background to the claims and made a number of preliminary directions. A further preliminary hearing was held on 3 January 2019 before Employment Judge Findlay, which recorded the claims the claimant had brought, and at which he was allowed to amend his claims following an application to amend dated 18 December 2018. Employment Judge Findlay made a number of directions for the substantive hearing. At the hearing before this tribunal the claimant was further allowed to amend his claims to reflect that he says that the things arising from his disability were, in addition to a stammer, what he described as his "indication of emotional and rageful outbursts".

4. When the hearing commenced on 2 December 2019 it came clear to the tribunal that reasonable adjustments would be required in light of the impact the claimant's PTSD had on his ability to cope with the hearing. A significant number of short breaks were required. Unfortunately, one of the panel members was also unwell during the hearing and the tribunal was unable to sit on one day. In consequence it provided necessary to adjourn this case part heard on 10 December 2019. The case was relisted to be heard in April 2020, but that hearing had to be adjourned in turn in light of the covid-19 pandemic. In part due to the pandemic, some evidence at the adjourned hearing in July was given remotely using the cloud video platform (CVP). The panel sat for deliberations without the parties on 17, 20 and 21 July 2020.

5. The tribunal panel acknowledges that at times it is clear that the claimant found the tribunal process to be difficult and stressful. We are grateful for the support he received from his sister and for the considerations shown by Mr Gidney and his instructing solicitors.

6. In reaching our judgment the employment tribunal has considered:

    a. a bundle of documents prepared by the respondent ("the Bundle");
    b. the evidence given in the claimant's witness statement ("C1") and his oral evidence;
    c. the evidence in witness statement and given orally by:
        i. Lisa Millington ("R1");
        ii. Nicky Brown ("R2");
        iii. Richard Thorpe ("R3");
        iv. Steve Carter ("R4");
        v. John Williams ("R5")
        vi. Samantha Sweet ("R6")
        vii. Katyryna Kamilinskyj ("R7").
    d. A cast list and chronology prepared by the respondent ("R8")
    e. An opening skeleton argument produced by Mr Gidney for the respondent ("R9");
    f. Written submissions produced by Mr Gidney for the respondent at the conclusion of the hearing ("R10") which were supplemented by oral submissions;
    g. the oral submissions of the claimant;
    h. written submissions of the claimant ("C3") which were sent to the tribunal after the panel had adjourned for deliberations; leave was granted for those to be considered subject to the respondent being allowed a right of reply;
    i. further written submissions of the respondent ("R11") responding to the written submissions of the claimant.

Findings of Fact

7. The tribunal's findings of fact. We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

8. The claimant's background and personal circumstances are relevant to the employment tribunal claim. Before working for the respondent, the claimant had worked for Royal Mail from 2001 to 2013. In 2010 the claimant witnessed his son fall from his bike and break his lower jaw and we understand from the claimant that as a result he suffered a severe trauma. In October 2011 the claimant was diagnosed with post-traumatic stress disorder (PTSD). Disciplinary issues arose which are beyond the scope of this employment tribunal, but, in short, the claimant left the employment of Royal Mail on grounds of ill-health on 18 December 2013. We heard evidence that the claimant then experienced a period of unemployment during which he continued to be unwell and was in receipt of cognitive behaviour therapy counselling.

9. The School is the school which the claimant's children attended. He began volunteering there in 2013. This went well and in September 2014 the claimant was offered part time employment. The claimant disclosed to Mrs. Nicky Brown, the Deputy Headteacher, that he suffered from anxiety and that he was receiving counselling, but he did not disclose to the School or her that he had

been diagnosed with PTSD, and he did not disclose the fact that at the time his employment began he was still taking anti-depressant medication. Relevant information was not included in a medical questionnaire and the monitoring form at pages 219 and 221 of the Bundle.

10. Under cross-examination the claimant's evidence was that he answered these questions as he did because he did not regard himself as disabled. As far as he was concerned he had recovered from the PTSD and he did not disclose that he was taking medication because he was weaning himself off the tablets he had been taking and by that stage was only taking a sliver of a tablet a day. Those are not satisfactory explanations. The tribunal finds that the claimant, by his own admission, provided misleading information to his new employer. The employment tribunal found the claimant's assertion of his belief that he did not have to disclose information about his medical condition because he regarded his PTSD as "cured" was unconvincing at best. Even if he was fully recovered the claimant should have answered the questions about past illness honestly. In any event the contents of the information before the tribunal in the form of a request for information from the Jobcentreplus Disability Employment Adviser, sent to the claimant's GP in September 2014 show that the claimant did consider that he was still suffering from PTSD and had ongoing mental health issues (p1105A and 1106 of the Bundle). The respondent was not made aware of this.

11. The claimant's employment as a teaching assistant appears to have gone well. The tribunal heard evidence from the claimant himself and respondent witnesses that suggests that he was generally well thought of. The claimant clearly enjoyed his work and he felt positive about his future. He attended college to gain English and maths qualifications and achieved good results in the exams which he took. He had begun to think about undertaking teaching assistant qualifications. In 2016 the claimant was offered a full-time role as a year six teaching assistant.

12. The employment tribunal heard evidence from Mrs Brown, Mrs Lisa Millington and Mr Richard Thorpe, the Headteacher, about incidents where it had been felt that the claimant had overstepped the mark in terms of physical interventions with children. These incidents are significant because the respondent witnesses pointed to them as evidence that the claimant had been provided with guidance and instructions which are relevant to the incident which led to his dismissal. However, the tribunal found the evidence which we received on these incidents from the respondent's witnesses lacked credibility in some respects, and do not provide the corroboration suggested. Our ability to assess what happened was severely impacted by the failure on the part of the respondent to properly document these incidents.

13. In January 2017 a child ran past the claimant and Mr Thorpe when it was wet outside and the floor surface was slippery. The claimant says he put out a hand to slow the child down. This does not appear to have been a serious matter and indeed Mr Thorpe struggled to remember it at all. However, in her witness statement Mrs Millington told us that the claimant "had put his arm around the neck of a child to stop him running down the corridor". Her description of the incident suggests a matter which should have been properly investigated because of the obvious risk of harm and yet that incident does not even appear to have generated a file note. If her description of what happened was true, the

tribunal finds it implausible that Mr Thorpe would have forgotten about it. The tribunal considers Mrs Millington's evidence on this issue to be unreliable and the evidence of the claimant is preferred.

14. In March 2017 an incident occurred between two boys during a football match at lunchtime. As part of his job as a teaching assistant, the claimant undertook supervision duties during break times. It was alleged that the claimant had shoved a pupil. The claimant had a meeting with Mrs Millington and Mrs Brown about this in which the claimant says he was told that "we don't touch the children". The claimant was told that he should "hand situations over to senior management". The claimant was issued with what the respondent relies on as an informal disciplinary warning after that meeting (p312 of the Bundle). The notes prepared at the meeting with the claimant failed to accurately record what was discussed at the meeting (p311 of the Bundle). The letter issued to him, which the respondent sought to rely on as evidence of clear instructions, fails to record what the claimant has actually done wrong. The letter says that there would be a meeting to review training and any further support required.

15. The claimant says that he was confused by the letter and the instructions he had been given. The claimant says that he struggled to understand what he was supposed do in terms of supervision when it was usually only him and another teaching assistant supervising children during breaks and there would be no senior managers to "hand situations off to". Mr Thorpe told us he disputed that that the school "was like the Wild West" which is how he says the claimant has described the playground during breaks. He says the need to physically intervene would be rare and the tribunal accepts that. However, at a primary school where children are playing outside during breaks it seems to the tribunal that it is inevitable that there will disputes and tumbles where a potential need for some sort of intervention from those supervising will be required, perhaps urgently. A reasonable employer might be expected to provide guidance to an employee who was unsure what to do and keep a clear record of what that guidance is. The claimant told us that he asked Mr Thorpe for further guidance and he was not provided with anything meaningful. That evidence is accepted by the tribunal because Mr Thorpe did not provide us with a satisfactory explanation of the guidance he provided to the claimant about what the claimant would be required to do in urgent situations. That fact that such situations would only arise rarely is not a satisfactory response.

16. It is relevant at this stage to note that the claimant had attended Multi-agency public protection arrangements ("MAPPA") training on dealing with aggression in November 2016. The claimant's evidence was that the use of physical invention in some circumstances was accepted. That appears to be consistent with the Department for Education advice discussed further below.

17. In Mrs Millington's statement she also refers to an incident in 2016 where children were enacting a WW2 evacuation. She says the claimant "had been rough" with a child. Mr Thorpe refers to an incident when the children made air shelters, which appears to be the same incident, but says the claimant had sworn at the child. Mrs Brown says that she was aware of "previous" incidents involving the claimant, but was unaware of the details. We were not shown any notes or evidence of discussions with the claimant about this incident. We find the respondents' witnesses evidence that any noteworthy incident happened at this time is unconvincing.

18. It appears to the tribunal that the senior managers had jointly arrived at a view of the claimant which was based on a notion that he has not behaving properly. However, it is not clear that the tribunal that this was a fair view, at least in terms of the evidence presented to the tribunal. It seems to the tribunal that this case shows why concerns should be properly documented because what has happened in the past is vaguely remembered. When that influences how new incidents are regarded there is a risk of substantial unfairness. That may be what happened here. Our finding is that the respondent has failed to show that the concerns which the senior managers told us they had were reasonably held. Those beliefs were not based on any attempt to properly investigate what had happened.

19. These incidents, such as they were, happened when the claimant felt well and happy and the respondent's witnesses were entirely unaware of any mental health issues. We accept that the perceptions of the claimant were genuinely held by Mr Thorpe, Mrs Millington and Mrs Brown, although those perceptions may have been unfair. Their origin can be seen in the notes of the football match incident. Insofar as it is relevant, we are therefore satisfied that these perceptions of the claimant being "too physical" were not related to his mental health issues in any way.

20. The tribunal was troubled by the insistence of the senior managers of the School that the School had a "hands off" policy and the failure of the witnesses to offer a satisfactory explanation to the tribunal of how this related to the Department for Education ("DfE") "Use of reasonable force" advice to headteachers, staff and governing bodies issued in July 2013 (p334). It is striking that although this is referred to in the dismissal letter, none of the respondent's witness refer to this guidance in their witness evidence. It does not appear to have been considered at the disciplinary hearing or in the deliberations.

21. The DfE advice states that "schools should **not** [DfE emphasis] have a no contact policy because of the real risk that such a policy might place a member of staff in breach of their duty of care to a child". The advice notes that the governing body should notify the headteacher that it expects the school behaviour to include a power to use reasonable force. That advice document does not have statutory force, but it was not disputed by the respondent's witnesses that this document correctly summarises the legal position in relation to the reasonable use of force and what a school's competing duties of care are.

22. The DfE advice is clear that reasonable force means "no more force than is necessary" and that the decision whether or not to physically intervene is down to the professional judgement of the staff member concerned and should always depend on the individual circumstances. The advice also states that the power to use reasonable force applies to any member of the staff of the school or those temporarily put in charge of pupils such as unpaid volunteers or parents accompanying a school trip.

23. It may be that with their professional training, qualifications and years of experience, the senior managers regarded it as self-evident that their "hands off" policy meant, in fact, use no more force than is necessary, and that they

considered the boundaries of when to intervene or not were clear. However, the claimant did not have those professional qualifications and years of experience. The claimant was confused by what he was told about hands off on one hand and the conflict between what he felt his duty of care was and what the MAPPA training had told him on the other. He had asked for help and that was not provided. This was to prove significant in terms of what happened next. The tribunal finds that more attention should have been paid to this in the disciplinary process.

24. In May 2017 the claimant attended a residential trip with the year six students. That trip went well.

25. On 18 July 2017 the school held an end of year performance. This was held on the stage of the neighbouring high school. There was a performance in the afternoon and in the evening for the parents of year six students and others. We heard that teaching assistant staff and teachers were positioned around the wings to help ensure that children did not miss their cues and to manage behaviour. It was common ground of the witnesses that the claimant and another teaching assistant, Ms Sam Trevor were on one side of the stage, and Mrs Brown and Mrs Millington were on the other side of the stage. A third teacher, Mr Williams, told us that he was generally going between both sides of the stage to keep matters progressing smoothly.

26. At the time we are concerned with the claimant was standing behind two boys in the wings. One of those boys was a child the claimant had worked with closely as a teaching assistant, referred to throughout this judgment as "A". During the performance there was an altercation between the claimant and A, witnessed by Mrs Millington which was to become the subject of the disciplinary proceedings which led to the claimant's dismissal. Significantly the tribunal heard conflicting and at times confused evidence and has found it extremely difficult to make findings about what happened. The difficulty we have faced arises at least in part from the failure of the respondent to properly investigate the incident.

27. A was standing next to another boy, RW. In simple terms they were messing about. A said they were playing pirates which would have been consistent with the theme of the school performance. The claimant says that he thought A was going to hit RW. The tribunal was particularly troubled by the poor evidence on this very significant matter. The tribunal's findings about the evidence of the children is set out below. Our findings are that the evidence of RW is so brief and recorded in such a way it cannot be given any weight and insufficient attention is given to the claimant saying he perceived a risk which RW seemed to be oblivious to and that that, in essence, was part of the problem. There is a clear risk that A may not be honest in what he says, and his evidence should not have been accepted uncritically. The tribunal recognises that the respondent may have carried out further investigations and still not been in position to offer any more evidence than it does. However, the tribunal finds that proper and reasonable steps were not taken to investigate this incident and they should have been.

28. We accept the claimant's evidence that he moved RW to one side with one arm and turned A round to face him. Words were exchanged and A turned back to the stage. The claimant accepts that at this moment Ms Trevor appeared and

led RW away by the hand. That meant the immediate risk to RW had passed. Putting it in neutral terms, the claimant then turned A again to face him and leant in towards him. At some point Mrs Millington became aware of something happening from across the stage. We find it is likely that the claimant looked extremely cross, although it seems unlikely that Mrs Millington could see A's face when he was turned towards the claimant. The claimant sought to enact or recreate for us what had happened many times. He did that to show us that the incident had not been significant, but even on his version of events, the claimant's irritation and annoyance are apparent. To that extent the claimant's account is consistent with Mrs Millington's account and the brief account of A. The claimant admitted that he was annoyed at "being shown the back of A's head". This all happened very quickly.

29. We do not think that any of the accounts we have been given or read are complete or wholly accurate. Mrs Millington and Mrs Brown have both used emotive language to describe how the claimant turned A around. At various points in the evidence both suggest that the claimant "swung" A round suggesting very considerable force, although this word is not used in Mrs Millington's initial statement (which is at p266 of the Bundle) where she says the claimant "grabbed" and pulled A. The claimant seeks to suggest that he "guided" A round (p301). A says that the claimant "grabbed him by the shoulder" and pulled him round. The claimant describes A as the largest boy in the class. Words had already been exchanged and it seems reasonable to suppose a certain amount of belligerence on A's part given his own description of his reaction. The tribunal finds that the claimant did more than "guide" A and he used some force to turn A. We consider that saying A was "swung" is an exaggeration based on what A said happened, but we believe that the claimant has been disingenuous in the statements he gave to the respondent which suggest a very gentle action.

30. We accept that Mrs Millington saw something that worried her. Something happened that was sufficient for A to mention it to his mother when he got home. If what the claimant had done was as innocuous as he suggests, A would not have mentioned it. The claimant was insistent that he had a very good relationship with A and that this was a boy he had to speak to about his behaviour frequently. He also says that he often used physical intervention with A. If what the claimant said about that is true, it is difficult to see why A would have mentioned anything at home. The claimant's account contains internal inconsistencies. However, we accept that the claimant genuinely felt that he should do something to respond to the behaviour in front of him, in part because he thought there was danger of disruption to the performance, even after the risk to RW had passed. Acting in response to that risk was also consistent with the DfE advice document and that does not appear to have been considered by the respondent. We think it is likely that Ms Millington jumped to conclusions and that it is likely that the perception she held of the claimant, described above, coloured what she thought about what she had seen. This is significant because of the influence Ms Millington had on how Mr Thorpe and Mrs Brown assessed what had happened.

31. Ms Millington and Mrs Brown both say that A was visibly distressed on stage but that is not mentioned at all by A and, perhaps even more significantly, it is not mentioned by the mother in her complaint. It is not mentioned by any other witnesses. We find it implausible that A was visibly distressed on stage, but

this was not noticed or commented on by anyone in the audience, including the boy's grandmother and father. Mr Thorpe did not notice the child was upset and neither did Mr Williams. The tribunal prefers the claimant's evidence on this issue.

32. After the performance Mrs Millington raised concerns about what she had seen with Mr Thorpe and Mrs Brown. It was agreed that further action would be taken in the morning after guidance from the respondent's HR department had been sought. The claimant says that if the respondent was genuinely concerned that what had happened was gross misconduct they would have been compelled to act that evening and the fact that they did not shows there was not in fact any grounds for action at all. We disagree. There were adults and children milling around. Mrs Millington does not suggest she thought that the claimant presented a continuing predatory or violent risk to A, which is how the claimant tries to present the nature of the concern subsequently raised. That is not what Mrs Millington had alleged. The children would be back quickly with their parents once the props were tidied away. The tribunal finds that it was reasonable for the senior managers to leave deciding what should happen to the next day. The claimant made much of the fact that Mr Thorpe would later say that the children went straight home when in fact it is now accepted that the claimant went back to the School with some of the children. We accept that Mr Thorpe made an innocent mistake in his recollections and in any event find that nothing turns on this.

33. The following day the year six children had a school trip. The claimant was due to accompany them. Mr Thorpe was not on site as he was attending another school. The tribunal accepts his evidence that he was in contact with school by telephone that morning. Mrs Millington and Mrs Brown discussed what they had seen the previous evening. A's mother came into school and met with them to make a complaint about the claimant's conduct the night before (p265). She had not been at the performance herself but made a complaint based on what she had been told by A.

34. A decision was taken that there had to be an investigation into possible misconduct by the claimant. The tribunal finds that was a reasonable and proper thing for the respondent to do.

35. Mrs Brown was appointed to investigate the case. Mr Thorpe would be involved in any disciplinary outcome and Mrs Millington was the key witness. There were limited options in terms of which of the School's senior managers could investigate impartially, but the respondent was not limited to the School's senior managers in dealing with this incident. It had other options available to it. It appears that no one involved in that decision paid any attention to the fact that Mrs Brown was not impartial. She spoke to Mrs Millington on the evening and more importantly gives evidence in her witness statement about A's demeanor which she relies on in the investigation (paragraph 8 in R2). The risk she was not an appropriate choice should have been obvious, if not on that first morning then as the investigation progressed. A decision to appoint Mrs Brown to investigate was not within the range of reasonable responses.

36. When the claimant arrived at school, he was called into a meeting with Mrs Millington and Mrs Brown and asked to give an account of what had happened the night before. The notes of that meeting are wholly inadequate despite being

described somewhat strangely by Mrs Brown as a "report" (p267 of the Bundle). The tribunal finds it surprising that an experienced and senior manager like Mrs Brown did not prepare a proper record of that meeting. However of more significant concern is that fact that Mrs Millington, the person who had raised concerns about the claimant's conduct, was also present and such notes as the tribunal is presented with in relation to that meeting suggest she was the one who led that important initial fact-finding meeting with the claimant. Mrs Millington should not have been involved in that meeting and that should have been obvious to both Mrs Millington and Mrs Brown.

37. It is clear the accusations made against him came as an enormous shock to the claimant. He became distressed. The claimant gave a vivid account of how he felt that his world had been turned upside down by the accusations made against him. In particular, reference was made to the police being involved in the investigation. This was the cause of very significant distress and anxiety to the claimant. The evidence of all the witnesses before the tribunal was that following this meeting the claimant showed signs of increased stress which would only worsen over time and that meeting does seem to have been a turning point.

38. However, we find that claimant's evidence that Mrs Brown and Mrs Millington were "panicking" is not credible. In his witness statement he says that Mrs Brown said "*you should have let him hit him no don't be stupid you couldn't do that*". We accept the respondent witnesses' evidence that that did not happen. We do not accept that Mrs Brown and Mrs Millington decided the claimant had to be dismissed because of his behaviour at the meeting itself, which is what the claimant alleges, or that it was in an way inappropriate for them to decide to investigate the complaint by A's mother The school had received a serious complaint from a parent and it was appropriate for them to investigate that.

39. The claimant has shown a tendency at times to offer colourful evidence on matters of which he has no direct knowledge. In his witness statement he states that A's mother "ranted" at Mrs Millington and Mrs Brown (paragraph 9 of C1). He was not there and he cannot know that. The claimant says that the mother had threated to "bring the boy's father down to beat [the claimant] up". She did not. She says that was why A did not tell her what happened at first but there is no threat. She does not threaten to bring in the police, as the claimant alleges, she says that "we" (presumably her and her husband) had "talked about doing that". The tribunal finds that the claimant has embellished an account of this meeting in his statement to support his contention that Mrs Brown and Mrs Millington were panicking when he met them. The claimant's misrepresentation of what the notes tell us happened is revealing. It shows that he has imagined what he thinks happened to fit with his own narrative. That is not to say that we think he has deliberately lied or sought to mislead the tribunal because from the claimant's answers and demeanor we doubt he realises that is what he is doing, but it means we have had to approach his evidence with caution and we must take into account what he tells us is not always reliable. Equally however, we do not consider that this means that all his evidence is unreliable and we also had concerns about the reliability of the respondent's witnesses' evidence.

40. Conflicting evidence was given to the tribunal about whether the claimant was simply sent home at this point because he was so distressed, or whether he

was suspended. The tribunal does not consider that anything turns on this. What is clear is that a decision was made that the claimant would not accompany the school trip as planned and that he went home in considerable distress. Whatever was said, he was effectively suspended. A decision was taken that day that the claimant should be formally suspended and a letter was prepared by the HR department to send to the claimant (p270/271) which was delivered to the claimant at his home address by the School's business manager, Ms Lisa Dugmore.

41. That letter amongst other things tells the claimant that he "*must not contact….any work colleagues or staff, students, parents or any members of Grange Park Primary School on any work matters or matter in connection with your suspension or the investigation*" and that he could not attend the School premises. The claimant told us that he was later criticised for attending school to pick up his daughter and this was not disputed by the respondent. The impression the claimant had was that he could not interact with other parents or the School at all. The respondent should have been clearer about how a work suspension would interact with the claimant's rights as a parent of a child at the school. We were not addressed on the lawfulness of this, but it is an issue which should have been obvious to the respondent and should have been addressed. The claimant's evidence was that this increased the stress and anxiety he felt.

42. Ms Dugmore produced a note describing how she found the claimant when she delivered the letter. Although that was on 19 July the note is dated 27 September and refers to various matters over a period of time. Ms Dugmore did not appear before the tribunal to give evidence and this is not a contemporaneous statement. We can only attach limited weight to that document but its contents are consistent with the claimant's evidence of his feelings and emotions at that time Ms Dugmore describes the claimant on that day as being "very upset and in an anxious state" she also says that he was quite confused at times and rambled, often repeating himself.

43. Although Ms Dugmore describes someone who is clearly anxious and stressed, she does not refer to PTSD. The claimant did not tell her that he had suffered from PTSD in the past. The tribunal does not find that the behaviour of the claimant which Lisa Dugmore describes means that she or the respondent ought to have realised that the claimant had PTSD at that time.

44. It was now very close to the end of term. Mrs Brown did begin some investigations but the time she had was limited. Ms Trevor was asked to produce a statement of what she had seen. It does not seem that she was interviewed by Mrs Brown nor was she asked any particular questions about what had happened. The document Ms Trevor produced is of little use in terms of determining the truth of the accusations against the claimant (p269 of the Bundle). She simply says "*On Tuesday evening while behind the scenes at the year six play, I looked up to see Mrs Millington looking horrified at something, so I went to see what was going on. As I look behind the curtain I saw Mr Urwin with his hand on A's T-shirt pulling him back. I asked RW who was there to come with me as I presume they had an argument, I took RW [by - sic] his hand and took him with me*".

45. Given that Ms Trevor is the only apparent neutral adult witness to what happened, Mrs Brown's failure to interview her to clarify her evidence and to try and resolve the conflict of evidence is a serious failing. The tribunal considers that the most likely explanation is that Mrs Brown has prejudged the investigation. She has already decided that she accepted Mrs Millington's account of what happened.

46. Mrs Brown interviewed A and the other child who had been involved in the incident at the side of the stage. There is a note of what A said at p268 of the Bundle. A says that he was grabbed by the claimant and he felt the claimant had had no reason to behave in the way he did. The note taken of that meeting fails to record all of the questions that A was asked but Mrs Brown does not appear to ask A about if and why he was upset. The tribunal accepts that it would not be proper to subject a child to a detailed investigatory meeting, but no satisfactory explanation was offered to the tribunal as to why clearly relevant questions could not have been asked in a way which would be appropriate for a year 6 child. This failure is consistent with Mrs Brown having prejudged the investigation.

47. Mrs Brown's note of a conversation with RW is at p303 in the Bundle. There is no record of the questions asked. In this statement RW provides no useful information at all. The statement says "*didn't see A can't remember anything – nothing. I think Ms Trevor took my hand. Didn't do anything*." The tribunal accepts that it would not be proper to subject a child to a detailed investigatory meeting but again no satisfactory explanation was offered to the tribunal as to why clearly relevant questions could not have been asked in a way which would be appropriate for a year 6 child. This failure is consistent with Mrs Brown having prejudged the investigation.

48. Mrs Brown interviewed the claimant again on Friday 21 July 2017. Notes were taken by a member of the HR team, Ms Hinds, and the interview this time was led by Mrs Brown and the notes are at p283 of the Bundle. The claimant was accompanied by Mr Williams. The tribunal finds from the questions asked by Mrs Brown further evidence that she had prejudged the investigatory process and her mind had already been made up that the claimant was guilty of gross misconduct, based on what she had been told by Mrs Millington.

49. At question 16 of the notes Mrs Brown says "I understand from the witnesses that this pupil was very upset. Do you have an understanding of how traumatised this pupil was?". The only witness who refers to A being visibly upset in the statements in the investigation is Mrs Millington. The premise of the question is misleading and the question itself presupposes that A was "traumatised". A's mother did not describe her son as traumatised. She says the evening was ruined for her son, but she does not that use that term and she does not say anything which allows Mrs Brown to judge how upset he was except that. Either the notes of the meeting with the mother are incomplete or Mrs Brown has made assumptions. A is not asked about being upset and says nothing about that. Mrs Brown also says to the claimant *"I will also share with you that A was very upset by your behaviour. Can you share with me why he should feel that way?"*. This question suggests to the claimant that Mrs Brown had direct evidence from A about his feelings. She did not. This was a loaded question and it is doubtful that a genuinely open-minded interviewer would ask such a question.

50. The claimant had prepared a diagram of the stage and a statement about events which he later updated very slightly (pages 289, 290/1 and 301/2 of the Evidence Bundle). He presented that to Mrs Brown. The tribunal does not find that statement entirely convincing. The tribunal finds that the claimant plays down the force he used and that he exaggerated the events and A's actions. The claimant's account requires a much longer amount of time than the accounts of anyone else involved.

51. It would appear from the interview notes with the mother and A, that at least one other student had witnessed what had happened (N) and it seems to be suggested that he posted information about this on Instagram. Inexplicably Mrs Brown does not interview N or look at what has been posted. She also failed to interview or take statements from any other members of staff who were present that evening either behind the stage or in the audience.

52. There was a second interview with the mother also held on Friday 21 July (p304 – 306 of the Bundle). There is a curious similarity between note of this meeting and the notes of the first meeting with the mother. The claimant seems to suggest the notes have been faked or there is some other impropriety. We can see why he finds the notes to be rather odd, but the tribunal accept the notes as a broadly accurate record of the mother's complaints.

53. The mother says in that interview that A was pushed into the stage curtain. This has not been referred to by anyone else and is not mentioned by A. She also refers to a previous serious sounding incident between the claimant and A which she says she told Mr Thorpe about and which had happened in the previous few days. Curiously Mr Thorpe does not mention the incident which he was told about at all in his witness evidence. Mrs Brown does not seem to investigate these allegations of things which have happened in school at all, although she later refers to them under the heading of "finding" in her investigation report.

54. Mrs Millington is also reinterviewed (p307 – 310 of the Bundle). The purpose of the reinterview is not clear given her first statement. She is asked to "tell me again" what she saw by Mrs Brown. This time Mrs Millington uses the words "swung" in addition to the word grab. Mrs Brown does not ask her anything about the claimant's written account of the evening. Mrs Brown does not ask Mrs Millington anything about what the claimant has said were his reasons for intervention. There is a failure by Mrs Brown to engage critically with Mrs Millington. That supports the appearance that the investigation has been prejudged.

55. The school broke up for the summer holidays on 21 July 2017. Mrs Brown was going away on holiday and no steps were taken to progress the investigation for a few weeks. The claimant's evidence was that this delay in the investigation caused him further significant distress and anxiety. The tribunal has sympathy with the claimant's feelings, but accepts that, having made the flawed decision to have Mrs Brown investigate at all, a delay because of holiday was inevitable in light of the time of year. The tribunal is satisfied that Mrs Brown did not delay the investigation for longer than was appropriate given her holiday or that the reason for the delay was intended to make matters more stressful for the claimant.

56. Before the term restarted Mrs Brown continued work on her investigation report. On 14 August 2017 she contacted the Local Authority Designated Officer ("the LADO") who deals with safeguarding issues. The LADO should have been contacted sooner in the process and this suggests Mrs Brown was not paying close attention to safeguarding procedures.

57. The claimant was concerned that the notes of his meeting with Mrs Brown didn't make sense and contacted Lisa Dugmore and Mrs Brown about this. The claimant was interviewed again on 6 September 2017. He attended the interview with Mr Williams as his companion. The notes of that meeting are found at p313 and following. The notes taken by Ms Dugmore are accepted as being an accurate account of the meeting. Similar questions to those previously asked were posed, but the notes show the claimant gave some longer and more detailed answers. He submitted a third and slightly longer written statement of the evening of the incident.

58. At the start of the following term, Mrs Brown's son began temporary employment at the School. The claimant says that the son was given "his" job. The tribunal accepts that the son's employment was not improper despite the assertions made by the claimant and that this did not unduly influence Mrs Brown.

59. Mrs Brown completed her investigation report (the body of the report is found at p257-263 of the Bundle). The tribunal found the way the investigation was conducted was unsatisfactory. The report itself is also of a poor quality. The introduction says that the allegation made by A's mother was that A was physically assaulted. That word has not been used by A or his mother. Mrs Brown gives no indication that she has looked at the criminal or dictionary definition of the word "assault" or what she means by it. Justified physical intervention which uses no more force than is necessary is lawful and would not be an assault, but there is no evidence that this was considered at all. There is an allegation that the claimant has damaged the reputation of the school. There is nothing in the investigation report that suggests actual damage to reputation has occurred nor is any evidence referred to in the report to support that allegation. Indeed, the allegation of damage to reputation is not referred in the investigation meetings nor meaningfully in the report despite this allegation being found to be upheld and apparently later taken into account in the decision to dismiss.

60. There are bullet notes under the heading "context". Insofar as these purport to provide a timeline, they seem to be somewhat inaccurately presented. For example, there is reference to Mrs Brown meeting A's mother and then reference to Mrs Millington also raising concerns as if these are entirely unconnected events, and yet Mrs Millington was in the meeting with A's mother.

61. Under the heading "findings", Mrs Brown says "the above allegations have been based on the following" and then sets out another list of bullet points. It is not clear if she means these are her factual findings or these are reasons for the formulation of the allegations. Logically they must be the former despite the wording used, but there is no explanation of why or how these findings have been reached. Reference is made to the previous apparently un-investigated allegations made of previous inappropriate intervention by A's mother. There is

no reference to the DfE advice referred to above and no explanation of findings made about the claimant's reason for acting the way he did.

62. Under the hearing "conclusion" there is a list of things which are said to be corroborated. One of these is that the claimant's comments in relation to previous incidents involving A, corroborate previous incidents of concern as described by A's mother. It is wrong to categorise them as corroboration. The claimant explained to Mrs Brown that there were times when he had had to intervene with A when A had been violent towards other pupils. Intervention in those circumstances would be consistent with DfE advice and the schools' duty of care. A's mother made allegations of conduct which would be unlawful, but there is the obvious risk that A had told her about interventions without telling her that he had hit or fought another child and that was the reason for the intervention. If Mrs Brown was going to place reliance on these things she should have investigated them or at least sought to balance what she had been told. Her use of the term "corroborated" suggests that they have been investigated and they have not.

63. Another "corroborated aspect" is that there were no difficulties or upset between A and RW as confirmed by "LM, A or RW" but Mrs Millington ("LM") does not claim at any point to have seen what happened before the claimant has hold of A. It would be surprising if A would volunteer that he had being going to hurt RW if what the claimant said was true, and given that the notes of the meeting with RW say "he doesn't remember A" when everyone else says they were standing together, it is not clear what reasonable weight could be attached to that evidence at all. None of this is corroboration. There is then a list of "aspects that cannot be corroborated" without any indication of what Mrs Brown has concluded about those things and how much weight, if any, has been attached to them. There is also a recommendation that there should be a disciplinary hearing.

64. In straightforward terms the tribunal finds that investigatory report is inadequate as the basis of any disciplinary action, let alone a report to form the basis of disciplinary action for gross misconduct which also could affect the employee's future career, as is clearly the case in allegations of gross misconduct involving assault for an individual working with children and which may, as here, result in a referral to the Disclosure and Barring Service.

65. In light of the flaws in the investigation the tribunal considered whether there was evidence of an ulterior or improper motive on Mrs Brown's part. The tribunal finds that Mrs Brown did not investigate what happened at the school performance with an open mind. She did not engage with what the claimant said and there was a lack of critical thinking on her part. The claimant was frustrated because he perceived that Mrs Brown was not paying any attention to what he said. Those concerns were well founded. The claimant links that that to his disability, but the tribunal accepts the evidence of those who came into contact with the claimant in the investigation process, that the claimant did not behave in a way which was out of the ordinary for an employee being investigated for gross misconduct. If Mrs Brown thought that there were no grounds to dismiss the claimant and she was trying to falsify a reason to dismiss him it might be expected that she would do a better job of the investigation report. The tribunal finds that the most plausible explanation for the superficial investigation carried out is that it was prejudged. Mrs Brown had made up her

mind up that the claimant was guilty of gross misconduct from the very start and she could not see that the incident she was to investigate could be viewed in any other way or that there was anything else to consider. The tribunal finds that the report was biased in the sense that Mrs Brown did not investigate this matter with an open mind, but it is not biased because of the claimant's disability nor was it "conducted in a degrading manner" which is how the claimant framed his allegation.

66. By this stage the claimant was too unwell to return to work. He had told Mrs Brown and Ms Dugmore that the process was taking its toll on him and he was feeling very emotional and stressed. He was signed off sick by his GP and the sick notes state that the reason for absence is stress. No mention is made on sick notes of PTSD. The claimant also began counselling which was made available through his employer, as is often the case, and made the respondent aware of that. The tribunal finds there was nothing about the sick notes, the fact that the claimant was receiving counselling or his behaviour at the meeting on 6 September, which ought to have made the respondent aware he was suffering from PTSD. The tribunal accepts that what the respondent's witnesses, including Mr Williams acting as the claimant's companion, observed was consistent with someone who was stressed and anxious about an on-going disciplinary process, but there was no reason to suspect this was anything other than short term reactive anxiety and stress.

67. A decision was made to refer the claimant to an occupational health provider to understand his fitness to attend a disciplinary hearing. A form was completed which sets out a number of standard questions for the school to choose to receive advice. One of the questions selected asked was whether there was any significant underlying or ongoing health problem prior to the disciplinary process starting, another was whether the health problem was work related. Advice is also sought about fitness to attend a disciplinary hearing and whether there is an underlying health condition that would require adjustment for the hearing. The tribunal accepts that this shows the respondent was alive to the fact that the claimant may have mental health issues and had shown signs of stress and had sought to find out more. The steps it took were reasonable.

68. It is suggested by the claimant that the respondent should have done more at this point in time. That is not the finding of the tribunal. The respondent had no knowledge that the claimant had suffered from PTSD in the past because he had chosen not to tell them. The respondent was aware that the claimant had been very upset by his suspension and was finding the disciplinary process stressful and difficult. That is confirmed by the fit note signed by the general practitioner. The steps taken by the respondent at that time were entirely consistent with good employment practice.

69. The occupational health referral form (p357 of the Bundle) was prepared and was signed by Mr Thorpe. The form suggests that the contents of the referral have been discussed with the claimant. That was not true, but the tribunal does not find that this was a deliberate attempt to mislead the OH practitioner or the claimant. This was a standard form which Mr Thorpe signed because he was directed to by the HR Department and it appears to the tribunal that he paid little attention to what the form said.

70. The claimant was sent a copy of the form by Lisa Dugmore and the claimant was asked to attend a meeting with an occupational health advisor on 14th November 2017. The advisor was a Gill Bowie employed in a service run by Telford Council.

71. The occupational health advisor sent a short report by letter on the day she saw the claimant. This is found at p367 of the Bundle. The report confirms that the claimant has given verbal consent for the report to be provided. The report confirms that the claimant has reported no underlying or ongoing health problems and that his health problem is entirely work related. Once the disciplinary process is concluded the advisor expects the claimant to be able to return to work after a period of adjustment, perhaps with a phased return. The claimant is assessed as fit to attend the disciplinary hearing and it is advised that disciplinary process should be completed as soon as possible. In the tribunal's experience that is common advice where a disciplinary process is causing reactive stress and anxiety. The advisor does say that the claimant should be allowed time to consider questions and allowed breaks.

72. The claimant saw that report. He did not object to what it said. He did not say to the OH advisor or the respondent that the statement that he does not have an underlying health condition was in any way inaccurate. The claimant sought to explain this by suggesting that he did not regard himself as being ill at this time but that statement is inconsistent with the case that he presents to the tribunal. The respondent received the occupational health report which advised that the claimant was finding the disciplinary process stressful and took the recommendations on board. The tribunal finds that the respondent acted entirely reasonably in this regard.

73. Lisa Dugmore visited the claimant the following day for a welfare visit, as shown by notes following the OH report (p370 of the Bundle). That note suggests she met with someone who seemed less emotional and happier. Combined with the OH report the tribunal finds that there was nothing which ought to have made the respondent aware of the claimant's PTSD in November 2017. There was nothing which suggested specialist medical advice was required. That was confirmed in the respondent's mind when the claimant informed Mrs Brown that he was no longer signed off sick from 27 November 2017.

74. The respondent began to make arrangements for the disciplinary hearing. They had been advised to do this as soon as possible and a desire was expressed to complete the process by the end of term. A new HR advisor had taken over from Ms Hinds, Miss Sam Jenkins (now Sweet). Under the respondent's procedures the hearing would require a disciplinary panel compromised of the headteacher, Mr Thorpe, and two school governors. Not surprisingly this required a little arranging. A disciplinary hearing was arranged for Friday 8 December 2017. The claimant had told the respondent he was well enough to return to work and there was nothing improper in inviting him to a disciplinary hearing in light of that.

75. Mr Williams continued to act as the claimant's companion and spoke to him by phone throughout the period between hearings. Mr Williams struggled in cross examination to remember very much of the discussions which he had had with the claimant around this time. He believed the claimant was finding the process very stressful and indeed at one point was sufficiently concerned to ask the

claimant if he intended to harm himself. However, the claimant did not tell him that he was suffering from PTSD and Mr Williams' evidence was that he had no reason to believe that this was anything more than the inevitable stress and anxiety caused by facing possible dismissal. The tribunal accepts Mr Williams' evidence in that regard.

76. Unfortunately, there was a spell of severe winter weather in the early part of December 2017. The disciplinary hearing had to be cancelled and rearranged on a number of occasions, including at short notice. The claimant found this very stressful. The tribunal finds that stress understandable. Any employee in the claimant's circumstances would have found that very difficult, but there is no evidence that the respondent did this to unsettle or increase the stress which the claimant suffering, quite simply the circumstances were unavoidable due to the weather.

77. The disciplinary hearing went ahead on 18 December 2017 shortly before the beginning of the Christmas holidays. Again, the claimant gave us vivid evidence of how difficult he found that hearing and how extreme his feelings were both in the period running up to the hearing and during the hearing itself. Tribunal has no reason to doubt the evidence which the claimant gives in that regard, but it also accepts the evidence of the respondent's witnesses, including Mr Williams, that the extreme feelings which the claimant was experiencing were not apparent to the respondent. There was a recognition that the claimant was finding the process upsetting, but it is fair to say that this was almost certainly expected due to the real possibility of dismissal. The respondent's witnesses saw nothing to suggest to them that there was any underlying medical condition involved which was exacerbating the impact on the claimant and the tribunal accepts that the respondent had no reason to be on notice of the claimant's PTSD at the time of the disciplinary hearing.

78. One point during the disciplinary hearing the claimant became particularly distressed and was offered a break. The occupational health report had advised that the claimant should be offered breaks, clearly indicating they may be required. The tribunal notes that Mr Thorpe makes a point of stressing at the beginning of the hearing that if a break is needed the claimant need only ask. As the claimant left the disciplinary hearing for the break, he threw his water bottle down the corridor. The tribunal accepts the evidence of Mr Williams that, whatever the claimant was feeling inside and however difficult he was finding it to express himself at times, that momentary expression of anger was not consistent with how he had behaved in the hearing itself. The tribunal finds there was no impropriety on the part of the respondent in terms of the number of breaks offered at that hearing.

79. A notetaker was present during the disciplinary hearing and the tribunal accepts that the notes in the Evidence Bundle at p397 and following as a broadly accurate account of the hearing. The claimant had come to the hearing with a prepared statement which he read out. The statement refers to the counselling sessions and says that the claimant's mental and physical heath have been deeply affected by how long the process has taken. The claimant explains he has started to stammer due to stress and he also refers to anxiety. Nowhere does he refer to PTSD.

80. The hearing discussed the incident itself and there is brief reference to the previous incidents referred to in the report. It can be seen that the panel does seek to understand what led up to the intervention involving A in a way that Mrs Brown had not done in the report. The claimant repeatedly reiterates that he intervened because he was concerned about RW's safety.

81. In cross examination the claimant challenged Mrs Sweet about her level of involvement in the hearing which she was attending as a HR adviser. The notes show that she did ask a lot of questions. The tribunal accepts that she stepped in because she wanted to ensure that all relevant information was drawn out for the benefit of the panel and that this was done partly to assist the claimant. The tribunal accepts her evidence.

82. The claimant at one point, just before the conclusion of the disciplinary hearing, sought to draw the panel's attention to the use of the DfE reasonable force advice. One of the governors appeared to dismiss any discussion about that saying that the panel are "experienced educators, we are aware of this document". The tribunal finds that the claimant should have been allowed to make all of the representations that he wished to about that document. This was matter of unfairness which went to the heart of the allegations being considered. The panel should have recognised the significance of what the claimant was trying to raise and should have listened to him. However, the tribunal does not find that was in any related to the claimant's disability, rather it appears like Mrs Brown, the panel had already made up its mind.

83. At the conclusion of the disciplinary hearing the claimant and Mr Williams left and the panel deliberated over their decision. The notetaker recorded those deliberations in a document which is found in the Evidence Bundle at p405 and following. The claimant sought to criticise the respondent for failing to provide him with a note of those deliberations. It is the experience of the employment tribunal panel members that it would be extremely unusual for an individual to be provided with a note of a disciplinary panel's deliberations. In fact, it is not common for a note to made of deliberations at all.

84. The notes of the deliberations show the panel did ask themselves some of questions a reasonable employer might be expected to ask itself. They considered what triggered the incident. It is clear that they were significantly influenced by the fact they consider that the claimant had "a history of incidents", the fact that "he acted inappropriately bordering on aggressively" and he "had been in receipt of warnings previously". Those conclusions are based on the flawed investigation and the tribunal finds they are conclusions that no employer acting reasonably should have reached. The panel should have recognised at least some of the issues with the investigation report that the tribunal has previously identified and taken steps to ensure that their decision was based on a reasonable and fair investigation. It is difficult for the tribunal to understand why the panel did not refer at all to the DfE advice the claimant had tried to draw to their attention. The tribunal finds that perhaps the most telling part of Mr Thorpe's evidence was when he told us that he trusted what Mrs Millington said and her assessment of the claimant. The tribunal finds that Mr Thorpe was biased in his unquestioning and unwavering acceptance of Mrs Millington's opinion. It is likely that the other disciplinary panel members were heavily influenced by what Mr Thorpe said. It appears that the disciplinary

panel did little more than rubberstamp Mrs Millington's flawed assessment of the claimant's conduct.

85. That was substantially unfair. The panel should have been alert to the fact that their disciplinary findings could have significant implications for the claimant's future employment working with children. They should have recognised the possible gravity of their decision and taken more care in their decision-making. These were serious failings.

86. During the deliberations one of the disciplinary panel members said that she was "deeply concerned about the claimant's mental health". Mrs Sweet explained that the context of that note was that the panel member in question, Ms Davies, had been concerned by the proximity of dismissal to Christmas, especially as they were aware that he was obviously upset. The tribunal accepts that the disciplinary panel had been mindful that dismissing somebody just before Christmas is likely to cause particular distress and that the comment of the panel member reflected that. It is consistent with that that the panel decided to pay the claimant for notice he was not entitled to. The tribunal does not criticise the disciplinary panel member for the comment nor does it attach the weight to the comment which the claimant did. The tribunal does not find that this comment suggests that the disciplinary panel were in any way motivated to dismiss by concerns they had about the claimant's mental health or were on notice of his PTSD.

87. The decision to dismiss was confirmed by letter dated 21 December 2017 (407/408 of the Bundle). That letter says that the allegations against the claimant are upheld. The letter refers to two allegations, so the reason for dismissal appears to relate to both allegations, which are the allegation of assault and the allegation of unprofessional behaviour which has damaged the school's reputation even though damage to reputation has not been mentioned anywhere in the note of the disciplinary hearing or in the deliberations. It would appear that that allegation has been included to "bolster" the seriousness of the reasons given for dismissal but without the disciplinary panel having seemed to express any views on this at all. The tribunal finds that was a matter of serious and substantial unfairness.

88. After dismissal, the HR responsibility for the claimant passed to Ms Katyryna Zamulinskyj who was then Head of Human Resources at the respondent.

89. One of the first matters she dealt with was advising on making a referral to the Disclosure and Barring Service ("the DBS"). That was something which would have to be considered in any dismissal of this nature for someone working with children. The tribunal was given evidence on the contents of the DBS referral which the claimant criticises. The respondent admits that it did not keep a record of what was sent to the DBS. However, the tribunal finds this was simply an administrative error. It appears the respondent should have taken more care of the referral, but the tribunal does not find that there is evidence that this was motivated by the claimant's disability.

90. Over the weeks leading up to the appeal hearing, Ms Zamulinskyj had a number of long conversations by telephone with the claimant and exchanged emails with him. The claimant seeks to suggest that the level of engagement was because Ms Zamulinskyj was aware of his PTSD. The employment tribunal

accepts her evidence she was not aware of his medical condition and she had no reason to believe that he was suffering from PTSD.

91. The tribunal accepts that Ms Zamulinskyj thought she was dealing with somebody who was finding his dismissal stressful and who was anxious. She was aware that he had been stressed during the disciplinary process. Ms Zamulinskyj explained to us that the claimant did stammer noticeably on occasions and she wondered if he might have a speech impediment. However, in light of the OH report she had no reason to suspect there was an underlying condition and the tribunal finds that was a reasonable position for her to take. The tribunal is also satisfied that Ms Zamulinskyj dealt with the claimant in a kind and sensitive way. She explained that many of their telephone conservations were very long because of the claimant's stammer and that she responded by giving him the time to express himself and not seeming to rush him.

92. The claimant submitted his grounds of appeal by letter on 16 January 2018 (p421 in the Bundle).

93. The appeal panel appointed to consider the appeal was chaired by Stephen Carter, Executive Headteacher of Telford Park School and Telford Langley School. He headed a panel which was compromised of a governor of the School who had not previously been involved and the chair of governors of Telford Park School and Telford Langley School. In preparation for the appeal the claimant and the appeal panel were provided with packs of relevant documents by Ms Zamulinskyj.

94. The claimant was unsettled because he was told that he would not be allowed to pursue one of his grounds of appeal. Ms Zamulinskyj's evidence was that this was because she understood him to be seeking to appeal against the warning given about the football match incident. It was clearly much too late for him to do that. In order to be helpful to the claimant, Ms Zamulinskyj informed the claimant that although he could not pursue this as a separate ground of appeal, he could use this as evidence to support one of his other grounds. The tribunal accepts that Ms Zamulinskyj did that in order to be helpful to the claimant and she did not do so maliciously or to cause the claimant any upset.

95. The claimant was provided with some comments from the School on his grounds of appeal before the hearing. The tribunal finds nothing improper in that. The answers to the points raised are rejected or disputed by Mrs Brown and Mr Thorpe. That is not surprising, and the notes show that at this stage the claimant on one side, and Mrs Brown and Mr Thorpe on the other, are increasingly entrenched in their positions. Those notes were also provided to the appeal panel.

96. The appeal hearing was held on 28 February 2018. Notes were taken of the appeal hearing and the tribunal accepts that they are a broadly accurate record of what happened at the hearing (p487 and following of the Bundle).

97. The tribunal accepts Mr Carter's evidence that whilst he observed a very anxious and stressed individual, he had no reason to believe the claimant was suffering from an underlying medical condition or mental impairment.

98. The first issue which was discussed at the appeal hearing was whether the investigatory outcome had been prejudged and Mr Carter asked the claimant about what he thought the School's motivation for that might have been. The claimant's answer refers appeasing the student's family. The claimant makes clear that he thinks insufficient attention was paid to A's behaviour and there is a discussion about this. Nowhere does the claimant suggest that he thinks the decisions taken by the school were motivated by his PTSD. In the discussion which follows there is a single reference to discrimination but this seems to refer to discrimination in a colloquial sense, that the claimant felt disadvantaged and treated unfairly because other people were interviewed before him in the disciplinary investigation. There is a discussion about the claimant's state of mind in which reference is made to the claimant appearing to be very upset. The claimant fails to mention his PTSD, make clear that he has an underlying medical condition or that he feels the disciplinary investigation was influenced by his stammer or what he describes as emotional and rageful outbursts.

99. The tribunal did not find that Mr Carter refused to allow the claimant to rearrange his notes nor did Mr Thorpe say "how can you be expected to remember correctly" in the discussion about the claimant's length of service. The tribunal also accepts that Mr Carter would have allowed the claimant a break if he had asked for one and that Mr Carter had not seen anything in the claimant's behaviour to suggest he should insist there should be a break.

100. The claimant alleges that a number of things happened at the appeal hearing which were related to his disability. The tribunal accepts that Mrs Brown may have misquoted Ms Trevor's evidence, but accepts that if this happened it was a mistake. Likewise, the tribunal accepts that when Mr Thorpe told the panel that no one went back to the primary school after the play this was genuine slip of the mind. He did not lie about that as alleged by the claimant.

101. The appeal panel reconvened for deliberations on 6 March 2018. There are notes of those deliberations at p594 and following of the Bundle. These show the panel did not uphold any of the grounds of appeal. The discussions noted under the heading of ground 5, support the evidence given by Mr Carter that for the appeal panel the two most significant matters where the fact that the claimant had shown no remorse for his actions and that he appeared to show a personal dislike of A as evidenced by the statement at p347 which was presented to the disciplinary panel by the claimant.

102. There is an email in the bundle of documents recording that A was sanctioned by his school for bullying the claimant's son. Undoubtedly this complicates matters as the claimant's personal view of A at the time of the incident and by the time of the disciplinary hearing and the appeal hearing will have been impacted by this. The respondent's witnesses, and Mr Thorpe in particular, denied that A behaves in the way that the claimant describes. The tribunal finds it highly likely that the claimant is biased and exaggerates what he says. However, there is evidence in the bundle that A had bullied the claimant's son so Mr Thorpe's evidence which suggested that what the claimant said in this regard was without any real basis in fact at all must also be questionable. The tribunal has felt uncomfortable making any findings about this matter. We find it sufficient to observe that the degree that A's behaviour, intentional or otherwise, could have been a threat to other children was relevant

in looking at how the incident at the school performance started and it should have been properly investigated. The fact that it was not is a serious failing.

103. The notes of the appeal deliberations support Mr Carter's evidence about the significance in the panel's view of the statement about A. The employment tribunal accepts that the tone and contents of that document would properly cause concern to the appeal panel and that the appeal panel was entitled to find these were not appropriate.

104. The employment tribunal also finds that it was proper for the panel to express concern about the claimant's insistence that he would do the same thing again.

105. The appeal panel confirmed their decision to uphold the claimant's dismissal by letter dated 12 March 2018 (p608 of the Bundle). The tribunal accepts that the comments made by the panel about the claimant's suitability to work with young people were related to their concerns as noted in paragraphs 103 and 104 of this judgment.

106. After he received the appeal outcome the claimant wrote a strongly worded open letter making accusations about the governance of the school and Mr Thorpe which he posted on Facebook, "tagging" the school in so that his comments were visible to other parents. He purported to do that as a "concerned parent". His post attracted comments from other parents including the mother of A who accused him of being a bully.

107. The claimant argues that the school should have intervened and written to the mother of A to tell her to take down the post and that this open letter should have been treated as a formal complaint about the school. The employment tribunal considers that the claimant's expectations of the response in this regard were unrealistic, but in any event his complaints about this are about how the respondent dealt with a complaint purportedly from a parent. That falls outside our jurisdiction. The tribunal had little sympathy with the claimant's apparent complaint that Mr Thorpe should have taken action in relation to the comments from A's mother because that was directed towards him as a former staff member. The claimant's "open letter" make serious accusations about the senior managers of the school. If the claimant did not like the responses, he received from other parents he could have deleted his original post removing the entire thread from Facebook or complained to Facebook. In any event by this time the claimant was no longer employed by the respondent and the respondent could hardly be expected to become involved in defending a former staff member making what could be regarded as potentially defamatory comments about the School. In any event this was unconnected to the claimant's disability, Mr Thorpe's actions were motivated by the hostile comments made by the claimant in his open letter.

The law

Unfair dismissal and reductions to compensation

108. Unfair dismissal in this case is conceded and therefore it is unnecessary to set out the law in relation to the fairness of the dismissal.

109. It is submitted by Mr Gidney that compensation should be reduced under the relevant statutory provisions, particularly the "Polkey principle" (s123(1) of the ERA) to reflect what he says is the inevitably that the claimant would have dismissed if a fair procedure had been followed, and under s123(6) of the ERA on the ground that the claimant contributed to his dismissal because of his conduct.

"Polkey reduction"

110. A 'just and equitable' reduction under S.123(1) ERA should be applied where the unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed *(Polkey v AE Dayton Services Ltd* 1988 ICR142, HL). This reflects the basic principle that *'it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed'* (*W Devis and Sons Ltd v Atkins* 1977ICR 662, HL). The burden for proving that an employee would have been dismissed in any event was on the employer. If a reduction is made, the tribunal must explain its reasons.

111. If there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. However, if what went wrong was more fundamental, it may difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to 'embark on a sea of speculation'. (*King and ors v Eaton Ltd (No.2)* 1998 IRLR 686, Ct Sess (Inner House)).

112. It is important to acknowledge that does not mean that it will not be just and equitable to apply a Polkey reduction if there is substantial as well as procedural unfairness and the tribunal must have regard to all of the evidence, including any relevant evidence from the employee.

113. There is relevant guidance on how to approach this issue in *Software 2000 Ltd v Andrews and ors* 2007 ICR 825, EAT. There may be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made, but the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

114. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Contributory Conduct

115. S123(6) of ERA states "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall*

reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

116. If an employee's conduct has been shown to have caused or contributed to the dismissal for the purpose of S.123(6), a tribunal has no option but to make such a reduction. The tribunal has discretion to determine the amount of the reduction, which must be 'such proportion as it considers just and equitable' having regard to the finding that the employee caused or contributed to his or her dismissal'.

117. In *Nelson v BBC (No.2)* 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

i. the relevant action must be culpable or blameworthy

ii. it must have actually caused or contributed to the dismissal

iii. it must be just and equitable to reduce the award by the proportion specified.

118. There is an equivalent provision for reduction of the basic award contained in S.122(2) although the wording is slightly different and gives a broader discretion to make a reduction to a basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal.

Disability Discrimination

119. The claimant has brought claims under s15 EqA (discrimination arising from disability), s20 and s21 EqA (reasonable adjustments) and s23 EqA (harassment.)

120. Discrimination arising from disability

S15 provides

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

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

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

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

121. The duty to make adjustments comprises three discrete requirements, any one of which will trigger an obligation on the employer to make any adjustment that would be reasonable. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person — S.21. Significantly however an employer is *"not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know… that an interested disabled person has a disability and is likely to be placed at a*

disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid" (para 20(1)(b) Schedule 8 of the EQA)..

122. Harassment (s26 EqA)

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Constructive knowledge of disability

123. The respondent concedes that the claimant was disabled at the relevant time for the purposes of this claim. However, it disputes that it had the necessary knowledge of the claimant's disability. The claimant acknowledges that he did not tell the respondent about his disability so the key legal issue is whether the respondent "could not reasonably have been expected to know" that the claimant was disabled by reason of his PTSD.

124. An employer cannot simply turn a blind eye to evidence of disability. There is no duty on employers to enquire about a person's possible or suspected disability, but the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

125. The following example is provided in the Code: 'A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened. The sudden deterioration in the worker's timekeeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason

for these changes and whether the difficulties are because of something arising in consequence of a disability' — para 5.15.

126. Knowledge of a disability which is held by an employer's agent or employee — such as an occupational health adviser, personnel officer or recruitment agent — will usually be imputed to the employer (see para 5.17 of the Code).

127. Further a failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry.

128. However, if an employer has made enquiries and an employee has not disclosed a disability that will be relevant. In *A Ltd v Z* EAT 0273/18 Z was dismissed by A Ltd due to her poor timekeeping and numerous sickness absences, which she explained by reference to various physical ailments. Her absences were actually due to mental impairments which amounted to a disability. An employment tribunal found that the employer had constructive knowledge of Z's disability because before dismissing her it had received GP certificates and a hospital certificate indicating that there was a real question about her mental health. The tribunal found that it was incumbent on A Ltd to enquire into Z's mental wellbeing and its failure to do so precluded A Ltd from denying that it ought to have known that Z was disabled. The EAT held that the tribunal had erred because it had not taken into account what the employer might reasonably have been expected to know had it made enquiries. The tribunal had found that Z would have continued to suppress information about her mental health problems, would have insisted that she was able to work normally and would not have agreed to any medical examination that might have exposed her psychiatric history. Therefore, A Ltd could not reasonably have been expected to know that she was disabled and, as a result, the EAT allowed the employer's appeal and ordered that Z's discrimination claim should be dismissed.

129. In *Department for Work and Pensions v Hall* EAT 0012/05 the EAT upheld an employment tribunal's finding of constructive knowledge based on the employee's refusal to answer questions about ill health and disability before starting the job, the fact that the employer was aware of the employee's very unusual behaviour once she started work, and the fact that her manager and the human resources department were aware of her claim for a disability tax credit.

130. In this case the claimant admits that only did he not inform the respondent about his disability, he failed to provide relevant information about his medical condition to the respondent and to the respondent's occupational health adviser. He did not simply refuse to answer questions like Mr Hall did. In the information he provided he had answered "no" to questions about whether he had a disability.

131. It is therefore relevant to consider whether a failure by an employee or job applicant to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did

not know, and could not be expected to know, that the employee or job applicant was disabled.

132. In *Cox v Essex County Fire and Rescue Service* EAT 0162/13 C had indicated on his pre-employment questionnaire that he suffered from mild depression but maintained that he did not have a health condition that affected his ability to carry out his normal day-to-day activities. The employer later became concerned that C was behaving in an inappropriate way towards colleagues and was becoming aggressive. An initial reference by the employer to occupational health resulted in an assessment that C was not disabled for the purposes of the DDA. C maintained that he did not need management support and blocked access to his medical records but later alleged, based on his own research, that his workplace accident had triggered bipolar disorder.

133. C was dismissed for threatening behaviour towards his colleagues. He alleged that the employer had failed to make reasonable adjustments, but an employment tribunal dismissed this claim. Although C was (by reason of bipolar disorder) disabled at the relevant time, the tribunal held that the employer did not know and could not reasonably have been expected to know this. The employer had asked all the right questions, but when it reached the decision to dismiss there was no 'definitive diagnosis' of C being bipolar. The EAT upheld this decision, stating that instead of actual knowledge, all the employer had was 'the claimant's own assertion that he was displaying conduct typical of the symptoms of some persons who suffered from bipolar disorder and his own self-analysis'.

Submissions

134. Both parties made written submissions. The claimant's written submissions were received while the tribunal was making its deliberations. The tribunal felt that as he was a litigant in person we should allow and consider these but the respondent should be allowed a right of appeal and this did cause some delay.

135. Mr Gidney's oral submissions at the conclusion of evidence expanded to some extent on his written submissions but not in any way which requires additional recording here.

136. The claimant's oral submissions were impressive for a litigant in person. Of particular relevance in our considerations was his emphasis on the flaws in the respondent's procedure and, in essence, he argued that we should draw an inference of an improper motive from those which could only be related to perceptions of his behaviour. The claimant argued that his behaviour was such that the respondent had to have been on notice of his PTSD.

Conclusions

Unfair dismissal

137. Unfair dismissal in this case was conceded. If that had not been conceded the tribunal would have found that the claimant's dismissal was substantively unfair.

138. It is accepted by the tribunal that the reason for dismissal was the claimant's conduct.

139. In his submissions Mr Gidney sought to suggest that the dismissal was procedurally unfair, but that the matters of unfairness are relatively trivial and that if a fair procedure had been followed the claimant would inevitably have been dismissed in any event. Mr Gidney suggested in his oral submissions that the reduction for this likelihood should be high as 100% because a fair dismissal would have been inevitable.

140. The tribunal cannot accept that submission. The burden on proof is on the respondent to show that the claimant would have been dismissed if a fair procedure had been followed and it has not discharged that burden of proof. As the findings of fact show, the failings of the respondent in the investigation of this case are such that the claimant's eventual dismissal was severely tainted by substantive unfairness. We asked ourselves if the respondent had established what chance there was that the claimant would have been dismissed:

a. if Mrs Brown had properly investigated what happened on the evening and had considered the DfE advice in the context of the claimant's judgement of A's behaviour;
b. if the disciplinary panel had not unfairly taken into account the assertions of past incidents for which there was no proper evidence;
c. if the disciplinary panel had looked critically at what is suggested is a warning letter but which fails to identify what it is that the claimant had done wrong, and looked at the failure of the respondent to provide the training and guidance to the claimant that he asked for;
d. if the disciplinary panel had allowed the claimant to make representations about the DfE advice in weighing up their assessment of the claimant's use of force and why he said it was reasonable and considered that before reaching their decision;
e. if Mr Thorpe's had not held an unreasonable belief that Mrs Millington's assessment that what the claimant had done amounted to gross misconduct was bound to be correct;
f. if the disciplinary panel had not upheld an allegation for which there was no substantial evidence at all (that the claimant had damaged the school's reputation).

141. Our conclusion is that the respondent did not provide us with sufficient evidence to enable this panel to find that the claimant would have been dismissed despite some or all of these flaws. The fact that many of those flaws go far beyond simple procedural slips or mistakes is relevant because to accept his submissions Mr Gidney requires the tribunal to speculate to a degree which we could not be reasonably be expected to do.

142. It appears to the tribunal that there must be a degree of likelihood that the claimant would not been dismissed at all if a fair procedure had been conducted. We find ourselves unable to assess what that likelihood is. It is likely that a report prepared to reflect a fair procedure would not have suggested that evidence was corroborated when this was untrue. This may

have led the disciplinary panel to require further investigations. It is likely that a fair report would have not referred to the previous incidents and that may have led the disciplinary panel to look at the incident which led to dismissal in a different light. What is more if the investigation had been fairly conducted the claimant may have behaved very differently. The tribunal was troubled by aspects of the claimant's conduct in the investigation process, but he was faced with a disciplinary investigator who had prejudged the investigation and a headteacher on the disciplinary panel who simply accepted what one witness said and was heavily swayed by what that witness thought whatever the claimant said. The tribunal found that the claimant had reacted negatively to the unfairness and unreasonable conduct of the respondent. That reaction may not always have been reasonable, but the fact remains if the respondent had handled this incident in a fairer way, the claimant may not have behaved as he did. If the process had been substantively fair the claimant may have received a lesser disciplinary penalty or none at all. In those circumstances no reduction under s123(1) ERA, the Polkey reduction, is appropriate at all.

143. We have also considered contributory conduct under s 123(6) of ERA. The claimant was not without blame in this process. The claimant had used some force to turn A and the tribunal was not satisfied that his actions were entirely justified and that he used no more force than was necessary. The claimant should have not refused to accept that the situation could have been handled differently and his refusal to acknowledge any fault on his part during the disciplinary process was wrong. His insistence he would "still do the same again" was wrong. The claimant should not have the used the language he did about A in the statement presented to the disciplinary panel and he should have not made what amount to psychological assessments of A he was not qualified to make. All of these things contributed to his dismissal because they contributed to the picture formed of the claimant and his attitude. The blameworthy and culpable conduct of the claimant was not trivial, and we cannot ignore that if the claimant had behaved differently the outcome may have been different. However we have also found that the respondent is partly to blame even for that. The claimant had not been provided with the guidance he had asked for about physical intervention in difficult situations and we are concerned that what the claimant said about A was partly a reaction to the fact the respondent was not listening to his points resulting in the claimant becoming more strident in the views he expressed. Accordingly taking into account the balance of justice, we find that it is just and equitable to reduce the compensatory award payable to the claimant by 25% in accordance with s123(6).

144. The contributory conduct of the claimant noted above relates to the period before dismissal and we find that it is also just and equitable to reduce the amount of the basic award by 25% in accordance with s122(2) of the ERA

Disability discrimination claims

145. The knowledge of the employer of the claimant's disability is key to whether his claims under s15 (discrimination arising) and s20 and 21 of the EqA for a failure to make reasonable adjustments can succeed. It is accepted by the claimant that he did not tell the respondent or its agent, the occupational health adviser, that he had suffered from PTSD in the past or that he may be suffering a repeat of that condition (which is how the claimant puts his case). Not only

did he not tell his employer about an underlying health condition, for example by not answering questions, he positively asserted that he did not have an underlying condition. This happened at the recruitment stage, but more significantly it happened again when he attended an occupational health appointment. Accordingly the legal claims asserted by the claimant are dependent on a finding that the employer ought reasonably to have known about the claimant's disability <u>despite</u> what the claimant himself had told them.

146. The claimant alleges that his behaviour was so extreme that the employer should have known that he had PTSD. He points to the fact that he showed signs of extreme anxiety and stress, that caused him to stammer and to make "emotional and revengeful outbursts".

147. As our findings of fact make clear, we accept that the respondent's witnesses saw evidence from the claimant's behaviour that he was suffering from stress and anxiety, indeed that was why the claimant was referred to occupational health, but they had no reason to believe this was anything other than a short term reaction to difficult circumstances. It is noted that the claimant had confirmed that he was well enough to return to work before the disciplinary hearing which would have been consistent with a short-term stress reaction. The claimant says that his behaviour was so extreme that the employer should have known there was something more going on. It is relevant at this point to note that the tribunal must look at the evidence of what the claimant's health was at the relevant time and in terms of the respondent ought to have known we have based our conclusions on what the respondent's witnesses say they observed and were aware of at the time, not what the tribunal has seen in terms of the claimant's behaviour at this hearing. The claimant has not offered us any independent evidence which assists us. All the witnesses told us that what they observed then was very different from what we have all observed in the hearing. They saw someone who was upset and anxious and showed signs of that but nothing more. We have accepted that.

148. The claimant asserted to us in his submissions that it would be highly unusual for someone to show extreme emotions in an investigatory or disciplinary setting. The respondent's witnesses say that the claimant's behaviour did not seem unusual. It is the experience of the tribunal that it is very common for employees facing a disciplinary hearing which they have been told may lead to their dismissal, to be signed off with stress. Many of them will access counselling services. Many employees become very upset and distressed during investigation and disciplinary hearings, sometimes extremely so. Some of them have underlying mental issues but many people who react like this do not. The tribunal is satisfied that although the claimant believes his behaviour would have been out of ordinary and that should have alerted the respondent to his underlying health condition, this was not the case.

149. The tribunal finds that there was no reason for this employer not to accept what the claimant had told them about his mental health at face value. The respondent had taken reasonable steps to find out if the claimant had an underlying health condition. The claimant chose not to take any of the opportunities that he had to tell his employer about his PTSD and it was reasonable for the employer to rely on what it was told by the claimant and the occupational health adviser. We conclude the respondent did not have

knowledge of the claimant's disability or could it reasonably have been expected to know of his disability.

150. In light of this conclusion the claimant's claims under s15 and s20/21 of the EqA must fail. These discrimination claims cannot succeed if the respondent did not know or could not reasonably be expected to know about the claimant's disability.

151. Knowledge is not required for a harassment claim to succeed but the tribunal has also concluded that all of the claimant's claims of harassment must fail on the basis of the facts we have found.

152. We have made the following findings about the harassment claims:

a. The allegation that the deputy head teacher informed the claimant at the meeting on 21 July that she was going on holiday and hoped to get back to him in a month or two: this was to manage the claimant's expectations of when the investigation would conclude. It was reasonable for the claimant to be warned that a holiday was going to delay the outcome of the investigation. This was a statement of fact, the tribunal finds it was not conduct which had the purpose of harassing the claimant nor did it have that effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) and the statement was related to the holiday not the claimant's disability.

b. The allegation that the investigation report was biased and conducted in a degrading manner: the investigation report was biased, and the investigation was carried out unfairly, but we are satisfied that this was not related to the claimant's disability. The reasons for the bias were related to the perceptions of the claimant and his previous conduct which had been reached when, on the claimant's evidence, he was well and happy and not showing any signs of mental health problems so those perceptions cannot be related to his disability.

c. Inviting to the claimant to a disciplinary hearing around 23 November 2017. The claimant was invited to a disciplinary hearing after he had told the respondent that he was well enough to return to work. It was the appropriate next step under the disciplinary procedure and was not for a reason related to the claimant's disability.

d. The allegation that the respondent only permitted the claimant one comfort break during the disciplinary hearing on 18 December 2019: the claimant was only permitted one break because only one break was perceived as being required. The claimant did not ask for any other break. The tribunal finds it was not conduct which had the purpose of harassing the claimant nor did it have that effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) and it was not related to the claimant's disability.

e. The allegation that the respondent failed to give the claimant more than one break: The claimant did not ask for a break which he was refused.

His complaint is that the respondent did not proactively offer breaks. The claimant was told he could ask for breaks if he needed them. The tribunal finds that the respondent's actions in not offering breaks when they had not been asked for was not conduct which had the purpose of harassing the claimant nor did it have that effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) and it was not related to the claimant's disability. The breaks were not offered because there was no indication from the claimant they were required.

f. The allegation that Mr Carter told the claimant to merge some of his grounds of appeal: The tribunal finds this was not conduct which had the purpose of harassing the claimant nor did it have that effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) and it was not related to the claimant's disability. The claimant had sought, in effect, to appeal against a disciplinary outcome significantly out of time (the warning following the football incident). It was reasonable not to allow him to do that, but to point out to him he could raise this matter as something relevant to his other grounds of appeal. The respondent's managers sought to be helpful and their reasons were not related to the claimant's disability.

g. The allegation that at the appeal hearing Mr Carter refused to allow the claimant to rearrange his notes: the tribunal finds that this did not happen. The claimant may have felt flustered, but the tribunal does not find that Mr Carter had done anything to make that worse and there was no evidence that Mr Carter had refused time to arrange notes.

h. The allegation that Mr Thorpe refused to allow the claimant to read his closing statement: it was not Mr Thorpe whose comment discouraged the claimant from reading his final statement, but in any event the reason for this was not related to the claimant's disability. This happened because Mr Thorpe and the rest of the disciplinary panel had prejudged the disciplinary process. The reasons for the bias were related to the perceptions of the claimant and his previous conduct which had been reached when, on the claimant's evidence, he was well and happy and not showing any signs of mental health problems so it was not related to his disability.

i. The allegation that Mr Thorpe said to the claimant "how can you be expected to remember anything correctly" when the claimant disagreed that he had employed for less than two years: the tribunal found this did not happen but even if it had it would not have been conduct which had the purpose of harassing the claimant nor did it have that effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect).

j. The allegation that Mr Thorpe, after the child's mother posted her account of the alleged incident on Facebook on 6 March 2018, asked the child's mother to remove the comment about himself, but not what she had said about the claimant: this did not happen in the course of employment or as part of any employment process, but in any event it

was not related to the claimant's disability. The respondent did not intervene to defend the claimant because he had made insulting and potentially defamatory comments about the School and Mr Thorpe.

k. The allegation that the panel made comments (in the written outcome to the claimant's appeal in March 2018) to the effect that the claimant was not suitable to work with young people: this was related to the comments the claimant had made about A. The claimant has not presented any evidence that PTSD will cause someone to make unwarranted or overstated comments about another. In any event the tribunal finds that the comments of the appeal panel was not conduct which had the purpose of harassing the claimant nor did it have the effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect).

l. The allegation that Mrs Brown misquoted Sam Trevor's evidence deliberately on or about 28 February 2018: the tribunal finds that Mrs Brown did not deliberately misquote Ms Trevor and any error in her recollection was a mistake on her part and there was no basis for concluding that it was related to the claimant's disability.

m. The allegation that Mr Thorpe lied on 28 February 2018 when he said no one went back to the primary school after the school play, whereas the claimant says eight staff and 57 children did: the tribunal finds that Mr Thorpe did not lie on 28 February 2018. He may not have recollected correctly what happened, but the tribunal found no basis for finding or inferring that this was related to the claimant's disability.

n. The allegation Mr Thorpe falsified information that was sent to the Disclosure and Barring Service on 11 January 2018: the tribunal finds that it was not Mr Thorpe who collated the information and if incorrect information was included this was an error and there was no basis or finding or inferring that this was related to the claimant's disability.

153. For all the reasons set out above, the tribunal finds that there was no evidence in this case that the respondent's actions towards the claimant were motivated by or related to his disability. He was treated unfairly by the respondent, but unfair treatment is not of itself evidence of discrimination. The tribunal approached this cautiously. We reminded ourselves that an employer is unlikely to admit or record an improper or unlawful reason for action but in this case we found no basis for drawing any inference of discrimination. It seemed clear to the tribunal that the respondent's senior managers had perceptions about the claimant which were not related to his disability but about his attitude to students and those perceptions influenced how they responded to the parent's complaint and the incident at the school play. Our findings are consistent with the evidence and what we know the managers knew about the claimant. Accordingly the claimant's discrimination claims must fail.

Remedy and orders

154. The parties are encouraged to seek to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by the same tribunal panel on **1 October 2020** after hearing any relevant evidence and submissions from the parties.

155. As there has been a delay in issuing this judgment we consider that the following orders will ensure the efficient conduct of the remedy hearing if it is required.

156. **Accordingly the parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):**

Statement of remedy / schedule of loss

157. The claimant must provide to the respondent, copied to the tribunal, **by 4pm on 11 September 2021** an updated Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated, together with copies of any documents and/or statement of evidence that he wishes to rely upon at the remedy hearing.

Counterstatement of remedy / counter- schedule of loss

158. The respondent must provide to the claimant, copied to the tribunal, a counter schedule of loss if it disagrees with the claimant's schedule by **4pm on 18 September 2020** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

Remedy bundle

159. The claimant must prepare a paginated file of documents ("remedy bundle") relevant to the issue of remedy and in particular how much in compensation and/or damages they should be awarded and provide the respondent with a 'hard' and electronic copy of it by **25 September 2020**. The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up to date schedule of loss and any counter schedule of loss at the front of it.

160. **By 10 am on 29 September 2020**

a. the claimant must lodge with the Tribunal four copies of the remedy bundle(s),
b. if either party is relying on witness statements, four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), must be lodged by whichever party is relying on the witness statement in question;

c. three hard copies of any written opening submissions / skeleton argument must be lodged by whichever party is relying on them / it.

161. **Public access to employment tribunal decisions**: The parties are reminded that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

162. Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

163. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Cookson
02 September 2020