Reserved **Case No: 2600312/2017**

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Ponty**

Respondents: **The Governing Body of Southglade Primary School (1)**
Nottingham City Council (2)

Heard at: **Nottingham** **On:** **Wednesday 14 September 2017**

Before: **Employment Judge Clark (sitting alone)**

Representatives:-

Claimant: **Mr O'Dair of Counsel**
Respondent: **Mr Jupp of Counsel**

JUDGMENT

1. The claims of disability discrimination were presented out of time and it is not just and equitable to extend time.

2. The claims of suffering detriments for making a protected disclosure proceed out of time, it having not been reasonably practicable to present the claims in time and presentation on 7 April 2017 being a further reasonable period.

3. The claims of unfair dismissal proceed out of time, it having not been reasonably practicable to present the claims in time and presentation on 7 April 2017 being a further reasonable period but only insofar as they proceed on the following limited grounds:-

    a Under s.103A Employment Rights Act 1996, in respect of the reason, or principal reason, for dismissal being the Claimant making qualifying protected disclosures.
    b Under s.98(4) Employment Rights Act 1996 in respect of the reasonableness of relying on the reason, or principal reason, of capability where the decisions reached, and steps taken to reach those decisions, were influenced by the Claimant's concerns about safeguarding such that they fell outside the range of reasonable responses of a reasonable employer.

REASONS

1. Introduction

1.1. This Preliminary Hearing is to determine whether to extend time for the presentation of the Claimant's claims according to the relevant statutory provisions each engages. It is common ground that the claims have been presented significantly out of time.

1.2. The claims were identified at the previous telephone preliminary hearing as claims of unfair dismissal, automatic unfair dismissal and detriments for making protected disclosures and disability discrimination in the form of unfavourable treatment and failure to make reasonable adjustments. The Claimant's employment ended on 31 December 2015 and the alleged acts of discrimination and detriment are said to have started some considerable time before then. Her claim was presented on 7 April 2017, approximately 15 months after her employment had ended.

1.3. The underlying facts of this case engaged one of the most serious of matters conceivable for any primary school to deal with, that is the death of a pupil (SW) at the hand of a family member and the subsequent forensic scrutiny of its safeguarding procedures. The circumstances are in the public domain and have been examined in both the Crown Court and the Coroner's Court. It is the information learned in the disclosure made during the more recent inquest, and the Coroner's findings, that the Claimant relies on as the grounds for extending time.

2. The Claims

2.1. The Claimant has prepared a list of issues for today's hearing which identifies those aspects of the claim that she would rely on as establishing discrete claims of discrimination, her alleged disclosures, the detriments and the basis of the unfairness of the dismissal. After giving time for a conference with the Claimant, Mr O'Dair distilled that list further. I have set out the resulting list in the appendix to these reasons. It is against those claims as they are now advanced that I have considered the statutory tests for extending time.

3. Evidence

3.1. The evidence before me consisted of a bundle running to 347 pages. The Claimant relied on a written witness statement which was adopted on oath and she was questioned. The Respondents did not call any witnesses. Both sides concluded their case with oral submissions supplementing written skeleton arguments.

4. Background

4.1. It is necessary to understand something of the background to the claim but unless it is necessary for me to do so for today's purposes, I do not seek to trespass on the findings necessary to resolve the substantive issues in the case, should this matter proceed to a final hearing. Much of what is set out below is not in dispute. Where it is, I have tried to express the background as I understand will be put in the Claimant's case.

4.2. Since 1998 and until her dismissal, the Claimant had been employed at Southglade Primary School ("the School") as Assistant Head Teacher with SENCO responsibility. She took on responsibility for safeguarding from January 2013 and undertook training in May 2013. In January 2014 a new safeguarding team was formed, initially including the Claimant along with the then recently appointed head teacher Mr Peter Smalley and the new Learning Mentor Laura Shreeves. From April 2014, the Claimant's formal role in safeguarding ended. She retained a role in safeguarding to the extent all teachers and staff do.

4.3. SW started attending the School from January 2013. There was already a history of social services involvement with the family and she was being cared for by her paternal Aunt, Kay-Ann Morris who had been approved as her special guardian. In the months that followed, the Claimant and others expressed safeguarding concerns about SW's well-being.

4.4. From early 2014, there seems to have already been something of a deterioration in both the Claimant's own self confidence in the workplace work and her relations with Mr Smalley and Ms Shreeves. This partly coincided with a period of change in the school's safeguarding systems including who was responsible for what, the detail of the systems and procedures, the application of individual judgments on when to refer matters and what was a proper response to individual cases. From the Claimant's perspective, the tensions between staff and within the operation of the new safeguarding systems grew. The Claimant's view was that her safeguarding role diminished. She ceased being invited to the regular safeguarding meetings. During this time, issues continued to be reported about SW's well-being, albeit there were differences of opinion as to the proper response. A safeguarding concern form relating to SW went missing. The Claimant had seen the original. It was recreated by Laura Shreeves and Mr Smalley in different terms, less damning of Ms Morris. Laura Shreeves took the view that the school was being too hard on Ms Morris and that the bruising being observed by staff was as a result of self-harming and not a safeguarding concern. This view may have been formed, in part, from Ms Morris's dominating personality by which she seems to have been able to heavily influence some school staff.

4.5. On 31 July 2014, SW was found dead whilst in the care of her Aunt.

4.6. In the aftermath, the second Respondent arranged for psychological support for the staff and pupils at the school. Gail Holliman was the Claimant's contact. The Claimant engaged with this service.

4.7. The Claimant was involved in the school's contribution to the initial social services strategy meeting in response, largely due to Mr Smalley and Ms Shreeves being on holiday at the time. Deficiencies in the school's safeguarding processes emerged including a concern that a safeguarding concern form about SW had gone missing. The Claimant initially perceived the head was now involving her again in safeguarding issues as an attempt to manage the school's response to what was now also a criminal investigation. However, what was initially expressed as being supportive of each other, she perceives developed into blaming the Claimant for deficiencies in safeguarding. During September 2014, the Claimant states how she discussed her safeguarding concerns with Rebecca Hullett, the

second Respondent's education safeguarding co-ordinator.

4.8. It is in the discussions with Rebecca Hullet and Gail Holliman that the Claimant says qualifying protected disclosures were made which she says in turn materially caused her to suffer the subsequent detriments as alleged and, ultimately, be dismissed.

4.9. The stress of the whole situation took its toll on the Claimant and her health deteriorated. From 29 September 2014 the Claimant was off sick and would never in fact return to school. The school engaged its attendance management procedures, including obtaining occupational health advice. It embarked on arranging meetings to discuss the absence, not all of which. the Claimant attended. By 3 March 2015, the Head had prepared a capability report to the board of governors proposing her dismissal.

4.10. A serious case review process commenced to which the Claimant was obviously required to contribute. She did so, but distanced herself from contact with her colleagues during the process.

4.11. Mr Smalley undertook his own internal investigation which was heavily critical of the claimant, supportive of Ms Shreeves and the schools safeguarding practices generally.

4.12. Lynne Wilson was appointed as an independent reviewing officer to review the school's safeguarding procedures. The Claimant contributed to her review and was in contact with Ms Wilson on various occasions from March 2015. At one stage there was a discussion between them about the Claimant's sense of unfair treatment and Ms Wilson offered some informal advice. The Claimant says she considered putting in a grievance about Mr Smalley's conduct towards her but decided not to. She says the reason was her perception of his closeness to the board of governors.

4.13. Lyne Wilson's independent review report was published to a closed circulation in April 2015. The Claimant was not a recipient. However, and despite its confidential nature, as a contributor the Claimant did receive a verbal briefing from Ms Wilson of those parts of the findings relevant to her contribution. She will say she was told how the report showed she had been side-lined, that it was not appropriate to blame her, that the changes in her responsibilities had been poorly handled. The Claimant was told that she should be given due regard for process and representation upon her return to work from sick leave.

4.14. The criminal trial of Kay Ann Morris took place in April and May 2015. The Claimant participated as a witness. She describes being more anxious about contact with Mr Smalley than the trial process itself which was otherwise cathartic.

4.15. A staff dismissal committee of the Board of Governors was convened on 4 June 2015 to consider Mr Smalley's capability report and recommendations. In advance of the hearing, the Claimant contacted the Assistant Director of Education seeking support for her situation, anticipating that she was about to be dismissed. During the hearing the Claimant's TU argued for further investigation into the underlying reasons for her absence and the stress caused by Mr Smalley and Ms Shreeves.

4.16. The governors decided to dismiss the Claimant with notice. According to the teacher's contract, that dismissal took effect at the end of the following term, that is 31 December 2015. It is the decisions taken within the attendance management procedure and the subsequent capability dismissal procedure which form the detriments and unfavourable treatment relied on. At the hearing the Claimants case is that she made reference to the Independent Reviewing Officers report which the chair of Governors, Mr Grocock denied having knowledge of. She confirmed that she could not return to work alongside Laura Shreeves and Peter Smalley. At the time of the hearing she had learned of a threat allegedly made by Ms Shreeves that if the Claimant returned to work there would be another death. The Claimant was aware of Mr Grocock's handling of this allegation and how it found its way to being dismissed in the letter of dismissal.

4.17. The subsequent appeal against dismissal was also rejected. The Claimant says she raised issues relating to what she had been told was present in the independent Review Report and was told it was confidential.

4.18. The Claimant commenced early conciliation on 25 November 2015 with the support of her union, NASUWT. That support ceased soon after and she received an email from the regional officer confirming that an employment tribunal claim would not be supported as he did not believe it had reasonable prospects of success.

5. Facts

5.1. Over and above that general contextual background, I now make findings of fact on those specific matters necessary to determine this application.

5.2. The events surrounding the death of SW was a traumatic event and adversely affected the Claimant's health, as it undoubtedly did for all staff and connections to the school. The Claimant went off sick from 26 September 2014 and did not return. Her GP diagnosed anxiety and depression but no medication was prescribed. The school's Occupational Health Adviser reported on the Claimant's ill-health and absence on 12 January 2015. During the examination of the Claimant, psychological assessments were undertaken which recorded nothing of clinical significance. The O.H. adviser identified the poor relationship with the Claimant's colleagues as the single most significant obstacle to a return to work.

5.3. I have not been taken to any further or subsequent medical records or reports concerning the Claimant's health since her employment ended. I accept the Claimant's evidence that after her dismissal, she suffered with low moods again, was ashamed of what had happened and was keeping her dismissal secret from friends and family. I am sure that the Claimant's involvement in these events continued to have an adverse effect on her emotional and psychological well-being but beyond that lay assessment, I am unable to measure, quantify or assess that further in the absence of appropriate evidence.

5.4. I find the Trade Union's decision not to support the Claimant [80A] considered, at least on its face and in broad terms, all the claims that the Claimant now seeks to advance. It articulates limited reasons which it expresses in the sentence *"there is no evidence that the decision to dismiss*

was based on your disclosures about safeguarding issues, but on the basis that you had been absent for 9 months". No more detailed reasons are provided in respect of the disability discrimination claim. The opinion was given to the Claimant on 19 January 2016 after ACAS early conciliation had concluded and at a time when any claim would have been in time, at least as far as the effective date of dismissal was concerned.

5.5. I find the Claimant accepted her Trade Union's assessment of the prospects of her claim and she focussed her energy, instead, on finding new employment. In the circumstances it was reasonable for her to do so.

5.6. I find the Claimant was aware at the time of Laura Shreeve's stance of supporting Kay-Ann Morris and finding innocent explanations for her bruising.

5.7. I find the Claimant did not know of, and was not involved in, Mr Smalley's own internal investigation into safeguarding undertaken soon after SW's death and which would later be heavily criticised for bias. The Claimant did not know that Ms Wilson's appointment as an independent reviewer was, at least in part, in order to scrutinise Mr Smalley's internal investigation. I find the Claimant did not know that Mr Smalley was levelling accusations against her in meetings in November 2014 in the context of her *"having an axe to grind"* and that he was planning to subject her to a disciplinary investigation related to her stance on safeguarding.

5.8. I find the Claimant was told by the Chair of Governors at the time of her dismissal that he had not received Ms Wilson's report into her independent review of safeguarding. I find the Chair of Governors was in fact the first recipient identified *"for the attention of"* when Ms Wilson's report was published on 2 April 2015 and that it, and its contents, was either known to him, the head and the school or, in any event, it was a document they had immediate access to.

5.9. Over three weeks in February 2017, the inquest touching the death of SW took place in Nottingham. Again, the Claimant was called as a witness. It is what she learned in that process and the Coroner's findings that form the basis of the Claimant's case to extend time for the presentation of her claims. In paragraphs 70 – 93 of her witness statement, the Claimant identifies those facts she says emerged for the first time. In summary form, they are:-

a The extent of Laura Shreeves' support for SW's Aunt in the way the school responded to safeguarding concerns.
b The safeguarding concern form completed by Laura Shreeves to replace one drawn by Carol Ellis that went missing and how that differed to the original report by Carol Ellis.
c The minutes of a special circumstances meeting in September 2014 which suggest that there was a concern that facts were being misrepresented by Peter Smalley and Laura Shreeves.
d The minutes of a special circumstances meeting on 1 October 2014 confirming the school and chair of governors were aware that a review would be conducted.
e The minutes of a special circumstances meeting on 16 October 2014 confirming allegations by members of staff of management's handling of circumstances prior to and since SW death.

f The minutes of the education directorate's safeguarding partnership meeting in November 2014 which recommended a temporary transfer of safeguarding responsibilities from Laura Shreeves arising from the interviews Dr Gail Holliman had with members of staff. Mr Smalley's response to this recommendation was to minimise those concerns as arising from staff with "an axe to grind" in particular the Claimant who didn't want to accept him as the head, couldn't accept that Laura's role had grown considerably and wanted the school to fail.

g The existence of an internal investigation report prepared by Mr Smalley which recommended reinstating Laura Shreeves to her safeguarding role immediately and, more specifically, to investigate various allegations regarding the practice and conduct of the Claimant upon her return to work following long term sickness. That recommendation was adopted by the school governors on 18 November 2014.

h The existence of a strategy meeting in January 2015 in which the extent of Laura Shreeves continued role in safeguarding was considered and limited. There is a sense that the local authority and Mr Smalley hold different views. In the course of the discussion, Mr Smalley suggests the missing concern form had been handed to the Claimant before it went missing. The notes also record how Mr Smalley's own internal investigation finding support for Laura Shreeves was biased.

i The full detail of Lyne Wilson's independent review report. The Claimant learned the remit for the independent review investigation was a critical review of Mr Smalley's own investigation and was in part for the purpose of engaging with staff who had been excluded from his investigation. Her conclusions dismiss Mr Smalley's concerns about the Claimant's capability in her safeguarding role and confirms her sense of the Claimant being bullied in her role, of Laura Shreeves' accusations of the Claimant being accepted by Mr Smalley as fact without question, being itself an example of his approach of fully supporting her without having a balanced approach to the investigation. This led Ms Wilson to recommend Mr Smalley be supported in his people management skills whilst at the same time giving credit to the Claimant and recognising there was no evidence of misconduct or poor practice on her part.

j That notes of meeting to follow up concerns on 3 February 2016 which confirmed the missing concern form had been recreated and demonstrated the support the head had amongst the governors. The Claimant views this as showing Mr Smalley would have succeeded in a whitewash of the facts had it not been for the Coroner's later findings.

k That Gail Holliman realised her role was not just to allow staff to process their feelings, but to share deeply held concerns about safeguarding processes in the school.

l That Mr Smalley accepted the missing concern form had been retrospectively created by him and Laura Shreeves, the contents were different and exonerated the perpetrator, that he had not spoken to the original author of the report and that he had not shared the fact with the murder investigation. He accepted how badly he had managed the safeguarding process.

m In handing down her judgment on 29 March 2017, the Coroner reached a conclusion that praised the Claimant's professionalism in

safeguarding. This was contrasted with a damning criticism of Mr Smalley and Ms Shreeves's management of safeguarding and their response to it including recreating a referral form in different terms to the original author's concerns in terms which was a self-serving fabrication designed to exculpate the perpetrator. She makes a finding that *"the extent of their behaviour was not fully revealed prior to his inquest hearing. I remain unconvinced even now that they appreciate the gravity of their actions… This paints a very troubling picture of management within this school"*

5.10. For the most part, I accept and find that the information being acquired by the Claimant in the above documents was new to her state of knowledge. Some documents contain significant facts, such as when certain people had possession of certain documents or Mr Smalley's view of the Claimant having an axe to grind and proposing a disciplinary investigation against her. Some documents may not add much when considered in isolation or may do little more than confirm the picture that is emerging. The exceptions are that I find the Claimant was always in possession of knowledge sufficient, at least, to assert the fact that Laura Shreeves took a position of supporting Kay-Ann Morris so that sub-paragraph a) is not wholly new information. Similarly, I do not accept that the Coroner's findings can in this context be the source of new information. They are the results of the underlying evidence she weighed in order to reach her findings on the questions relevant to her jurisdiction and it whilst a Tribunal may be bound by the prior judicial findings of fact, it is the underlying evidence that is the source of any new facts. It seems to me, and I find, that the value to the Claimant in the Coroner's conclusions goes only to bolster her own sense of self confidence, rather than being new facts on which she can rely. I have considered whether the Independent Review Report is new information as the Claimant did know of its existence and new the essence of certain matters relevant to her contribution as divulged by Ms Wilson verbally. I find that it does contain new information. It deals with others raising complaints and it identifies the school's responses to those complaints. It also is part of the new information which identifies Mr Smalley's own bias towards safeguarding and Ms Shreeves' role in it. It sets out a view of the claimant's competence in safeguarding which must have been known to the dismissing panel at the time the capability dismissal decision was made. To that extent I am satisfied there is new information obtained in that document albeit she was aware of its existence and some limit aspects of its content.

5.11. Whatever is to be made of the information obtained through the inquest, it was disclosed in piecemeal fashion over three weeks in February 2017 and then in the form of the Coroner's decision, itself promulgated on 29 March 2017. There was therefore a period of at most around 9 weeks before the claim was presented on 7 April 2017 during which I find there would need to be a period of time to appreciate the significance of the picture emerging and then for it to be digested and considered with advisers against the Claimant's potential claims in this jurisdiction.

5.12. I have not heard evidence from the Respondents on the question of evidential prejudice but I am told, against a background which leads me to view it as highly likely, that Mr Smalley is no longer employed by either Respondent and is unlikely to be a cooperative witness. That is clearly a potential prejudice to the Respondents. Whether that position would have been different had the claim been presented in 2016, I cannot say. Beyond

that, it is clear that these events and their effect on the Claimant's employment generated substantial contemporaneous documentation as they unfolded.

6. **The law of Extension of Time**

6.1. In order to bring the claims of unfair dismissal and the detriment claims out of time, the Claimant has to establish the test set out in ss.48(3)(b) and 111(2)(b) of the Employment Rights Act 1996 Act which, in their essence, are in identical terms. In both cases the Claimant has to establish two things: That it was not reasonably practicable to bring the claim before the end of the period of three months and that it was presented within such further period as the tribunal considers reasonable.

6.2. There are many situations that may engage this provision. In this case, the context is the discovery of new evidence or key facts which leads to the presentation of a claim that would otherwise not have been brought. In that regard I was referred to *Cambridge and Peterborough NHS Foundation Trust v Crouchman [2009] ICR 1306* and *Teva (UK) Ltd v Heslip UKEAT 0008/09*. Both refer to the Court of Appeal decisions on this point in *Machine Tool Industry Research Association v Simpson [1988] IRLR 212*, *Churchill v A Yeates & Sons Ltd [1983] ICR 380*, and *Marley (UK) Ltd v Anderson [1996] ICR 728.* I have had regard to the propositions these cases are authority for and, in particular, the summary of the authorities set out at paragraph 11 of *Crouchman.*

6.3. In *Teva*, the issue arose whether the new facts discovered had to establish the belief in a claim that otherwise did not exist at all in the Claimant's subjective belief, or whether it was sufficient that the newly discovered facts changed a pre-existing belief that there had been unfairness, but one which was not viable to run, into one where the claim became viable. The EAT held the latter was sufficient.

6.4. Mrs Ponty asserts both an automatic unfair dismissal for making a protected disclosure and an alternative claim of "ordinary" unfair dismissal which illustrates the point made in paragraph 11(5) of the summary in *Crouchman*. That is, the different "grounds" or "heads" that may be advanced to establish the claim of unfair dismissal. The authorities require me to keep in mind the individual grounds of the claim when considering whether the newly discovered information alters the basis of that claim being brought in time.

6.5. In order to bring the claims of disability discrimination, s.123(1) of the Equality 2010 Act provides that proceedings :-

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

6.6. It is for the Claimant to show it is just and equitable and there is no presumption in favour of an extension. (*Robertson v Bexley community centre 2003 IRLR 434*). I was referred to *Miller v Ministry of Justice UKEAT/003/15* which summarised the relevant principals at paragraph 10 as:-

i. The discretion to extend time is a wide one.

> ii. Time limits are to be observed strictly in employment tribunal. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule.
> iii. ...
> iv. What factors are relevant to the exercise of discretion, and how they should be balanced, are for the employment tribunal. The prejudice which a Respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases.
> v. The Employment Tribunal may find the checklist of factors in section 33 Limitation Act 1980 helpful. This is not a requirement, however, and any employment tribunal will only err in law if it omits something significant

6.7. The s.33 factors import considerations of the prejudice to both parties, the length of the delay, the reason for the delay, the effect on the cogency of evidence, whether the Respondent had cooperated with requests for information, and the promptness of the claim. I take the view that the approach to the "reasonable practicability test" set out above also has relevance to the just and equitable test in this context, albeit it may not be determinative but the reasonableness of the Claimant's subjective belief before and after the discovery of new information and its relevance to how the claims are put has to be relevant to whether it is just and equitable to extend time.

7. *Submissions*

7.1. Both counsel put their case firmly and succinctly. In summary, Mr Jupp for the Respondents says this. The Claimant knew everything, or at least sufficient facts, from the outset and nothing disclosed in the inquest shows the reason why the employer acted as it did was the Claimant's alleged disclosures. They say that the new information does not provide the causal link to any alleged disclosures any more than would have been the case arising from inferences that could have been argued if a timely claim had been presented. In any event it has absolutely no bearing on the alleged discrimination claims. They point out that had her Trade Union given her positive advice in January 2016, she would have brought a claim without knowing the information now discovered. In a similar vein it is argued that had a timely claim been submitted, the process of disclosure would have provided the information now relied on and, in respect of the independent report at least, the Claimant knew of its existence and could have made application for specific disclosure. The Respondent set out the effect of s.33 on this case as leaning against allowing an extension of time.

7.2. In equally brief, summarised terms, Mr O'Dair for the Claimant says this. The information gleaned from the internal documents now obtained supports her case that she was viewed by the School as a whistle-blower. She submits there is a crucial distinction between a Claimant believing she has been unfairly dismissed and having a viable claim for unfair dismissal which, she says, this new information establishes. She submits it was reasonable to accept the Trade Union's advice on the merits of her claim as it was understood in January 2016 where there was, on the face of it, a valid capability "front" to the reason for dismissal. The new information fundamentally changes the way the claim looks and demonstrates a desire

on the part of the head to subject the Claimant to a disciplinary investigation. A significant insight into his approach appears in how he describes her as having an axe to grind. Because of the new information, the Claimant's subjective view of the case has fundamentally changed to the positive and it is now reasonable to hold the belief in a viable claim. Permeating all the period of delay is the fact that the Claimant's health operated negatively on her ability to bring the claims in time but the relevance of the inquest process and outcome is the restoration of her own self-belief. He submits that the statutory restriction on time limits is only compatible with Article 6 of Schedule 1 to the Human Rights Act 1998 where they are a proportionate restriction to the right to bring a claim. In this case the Claimant's health, active concealment by the school of material evidence, the facts having already been largely investigated and documents including in other judicial proceedings all mean it would be disproportionate to restrict the Claimant's access to justice.

8. *Discussion and Conclusions*

8.1. There are aspects of each submission that I can deal with separately. Firstly, I take the view that the process of applying relevant tests, whether that is compliance with the time limit not being reasonably practicable or weighing the competing prejudice of allowing or declining an extension under the just and equitable test, they are both part and parcel of the framework by which the domestic law finds compliance with Article 6. The factors Mr O'Dair points to in respect of the Article 6 proportionality of time limits are also relevant factors for the domestic tests to be applied and I therefore do not see that the considerations that Article 6 imposes sit separately to the considerations that I have to consider and weigh in this application in any event.

8.2. I agree with Mr Jupp that so far as the Claimant's ill health is relevant to either test for extension, the Claimant has not provided evidence sufficient for me to be satisfied this, in itself, rendered it not reasonably practicable for her to present a claim in time or just and equitable to extend time although the Claimant's case on ill health isn't put on quite such a black and white basis. That ill health was not instrumental in the delay in presenting a claim is reinforced by the fact that towards the end of her employment the obstacle to a return to work was principally having to work alongside Mr Smalley and Ms Shreeves, and not her health. I accept, however, that the Claimant remained subject to some adverse emotional or psychological effects as a result of the whole experience and that may have some relevance to weighing other factors on the tests. I also accept Mr Jupp's submission that if the Trade Union had provided a positive opinion the claim would in all likelihood have been presented in time without there being any issue of the Claimant's health preventing it. I do not, however, regard the alternative hypothetical of what would have happened had there been a positive opinion by the Trade Union as being of wider assistance to determine whether time should be extended.

8.3. I reject the Respondent's submission that the newly acquired information is information that the Claimant knew all along and that it does not go to relevant issues in the claims as they are now put. In my judgment the information obtained was new information and, considered as a whole, shows a developing theme of a head teacher who viewed the Claimant as someone as having an axe to grind. That arises in the very context of the

disclosures she alleges making relevant to safeguarding, may be relevant to the determination of whether those disclosures are qualifying protected disclosures and are set in a context where he is defensive of the safeguarding systems he was responsible for and Ms Shreeves role in it. It shows a desire to penalise the Claimant for the failings that were ultimately levelled at him. I am satisfied that the information obtained is capable of being found by a Tribunal to go directly to the state of mind of Mr Smalley as the orchestrator of the Claimant's dismissal and is relevant to any finding for the reason why events happen as they do.

8.4. I am not at all satisfied that had a timely claim been presented, all that the Claimant has recently learned would have been forthcoming in the disclosure process. In the first instance there is some evidence of the school not being prepared to disclose matters, a position I have to conclude was likely to continue into any litigation unless forced. Secondly, much of the information originates in a social services serious case review in respect of which there is likely to be significant obstacles to its disclosure into employment proceedings. The Claimant did not know of the existence of these notes to seek specific disclosure. In this particular case, the possibility of some disclosure does not, in my judgment, provide the answer to the reasonableness of whether the claim was viable at its different stages.

8.5. I agree with Mr O'Dair that the authorities recognise the new information that a Claimant belatedly obtains may go to the view of the viability of a claim already believed to exist and is not limited to situations where the Claimant had no prior belief at all in the possibility of a claim. (see ***Teva***). Exactly how one measures how far that newly discovered information causes the viability of a claim to move along the continuum from a poor to a strong case is a difficult question. There is an element of fact and degree at play in the evidence available to any claimant and it would be wrong to allow a case to proceed out of time simply because its merits have now improved slightly. The necessary degree in the change of a claim's viability is answered by considering the reasonableness of the Claimant's belief it was not viable during the time limit and the reasonableness of her now holding a belief that the new information provides a viable claim.

8.6. In order to undertake that assessment of reasonableness, each claim must be considered individually and, potentially, against the alternative grounds on which it is advanced. Consideration can then be made of how the newly acquired information has altered the reasonableness of the Claimant's positions. I start with the unfair dismissal claim. The Claimant advances two grounds in the alternative. "Ordinary" unfair dismissal as an alternative to automatic unfair dismissal for having made qualifying protected disclosures. The basis of the ordinary unfair dismissal claim puts the Respondent to proof of the reason for dismissal and that it was a potentially fair reason and, if it was, advances an evidential case as to the reasonableness of that dismissal. Extension of time is subject to the not reasonably practicable test.

8.7. I have come to the conclusion that it was reasonable for the Claimant to believe her claims of unfair dismissal were not viable notwithstanding that she did hold a subjective belief that there had been unfairness related to her stance on safeguarding. She was supported by professional advisers and both she and they were faced with the fact that she had been absent from work, ostensibly through ill health, for around 9 months. The authorities

identify the prevalence of redundancy cases in the development of this area of law and the reason for that prevalence seems to me to be that, in such cases, a potential Claimant is faced with bringing a claim against an *apparent* fair reason for dismissal. It is only the later discovery of facts that alter that reason that brings the prospects of a claim alive. That analysis has analogy to this case as the Claimant's dismissal *appears* to be because of her long term absence and, thus, capability. The Trade Union's written opinion is limited on its reasoning but the basis of their negative assessment seems to reflect this and, in my judgment, was a reasonable one; as was the Claimant's acceptance of their opinion. In assessing the first stage of the reasonableness of the Claimant's belief, I therefore conclude it was reasonable to believe she did not have a viable claim.

8.8. When one comes to considering the second stage, that is whether it is reasonable to hold the view that the later discovered information makes the claim viable, it is necessary to consider the ground on which the claim is advanced against the information learned.

8.9. As to the claim of automatic unfair dismissal, this is a claim which hinges only on the reason, or principal reason, for dismissal. Was it capability as the Respondents say, or was the reason or principal reason the Claimant's alleged disclosures. In my judgment the force of the picture painted by the new information discovered is capable of being found to be one that goes to the motive of Mr Smalley to subject the Claimant to disciplinary investigation in circumstances which could relate to the facts of her expressing safeguarding concerns. It is therefore capable of supporting the Claimant's contention in this head of claim. I am therefore satisfied that it is reasonable for her now to hold the view that the new information turned an unviable claim into a viable one. Consequently, I am satisfied that it was not reasonably practicable to present the claim for automatic unfair dismissal under s.103A Employment Rights Act 1996 within the time limit.

8.10. There is then the period of up to 9 weeks after the new information started to be disclosed to the claimant before the claim was itself presented. There may be criticism that this was not a prompt further period but I am satisfied it was itself a reasonable one. It arose in the heat of the inquest which would understandably and reasonably remain the focus of the Claimant's attention. The disclosure was piecemeal such that there would be a period of time before the full extent of the picture emerged. Even then it was reasonable that there would be a period of time for the Claimant and her advisers to digest the new picture and prepare the claims. I am therefore satisfied that the further period for this head of claim to be presented on 7 April 2017 was itself a reasonable one.

8.11. I then turn to whether there is a distinction to be drawn between automatic unfair dismissal and the claim in its "ordinary" form. The basis of that ordinary claim is not fully particularised but is clearly an alternative to the automatic unfairness, particularly if a legal element of a whistleblowing claim is not made out such that the s.103A claim falls away. To the extent that the ordinary claim challenges the true reason, it would seem to duplicate the automatic unfair dismissal claim which is now proceeding such that there is neither anything gained nor lost to either side by allowing or refusing the claim out of time on that ground alone. If the Respondent fails to show a potentially fair reason, it does not follow that the automatically unfair reason will be found (*Kuzel v Roche Products Limited [2008] EWCA*

Civ 380) although it will be a conclusion open to the Tribunal. However, to the extent that the ground for this claim challenges the fairness of relying on *capability* as a sufficient reason to dismiss, I have to consider whether the newly acquired information has any relevance to the viability of that ground of the claim. At first blush, it would seem doubtful when considered against the typical grounds on which the fairness of an absence based capability dismissal could be argued (e.g. procedure, discussion and consultation, medical enquiry and prognosis, appropriate warning, consideration of alternative work etc.) and it must be the case that if there were any failings in respect of those typical considerations of reasonableness, they were there to be considered by the Claimant and her advisers at the time. I do not see how a claim put on that basis only should be allowed to proceed out of time in the circumstances of this application. However, it seems to me that there is a very specific and narrow point advanced in the Claimant's case under s.98(4) where the principal reason for dismissal was the Claimant's absence from work but where the Claimant's safeguarding complaints were material to the employer's decisions to invoke the attendance management procedure when it was, in the manner that it was invoked and leading to the process and decision of dismissal. The newly discovered information is capable of being found to show a desire on Mr Smalley's part to invoke some form of disciplinary investigation with some connection to the Claimant's stance on safeguarding concerns which is then overtaken by the recommendation for a capability dismissal. I am satisfied there is enough in the discovered information to advance a viable argument that the Claimant's safeguarding concerns could have been materially causative of the manner in which the attendance management procedure was applied such that the ultimate decision leading to dismissal, and the procedural steps taken to get it, fell outside the range of reasonable responses of a reasonable employer. Of course, if the Claimant's concerns are found to amount to qualifying protected disclosures it may add nothing to the existing automatic unfair dismissal claim. Equally, however, it may be held that they fail to satisfy the legal requirements of a qualifying protected disclosure but remain present in the factual background to the dismissal. In that case, the recently discovered information remains arguably relevant to the questions posed by s.98(4) and the employer's reliance on the capability reason as a sufficient reason for dismissal. For that reason, it seems to me that the "ordinary" claim of unfair dismissal should be permitted to proceed out of time on that very limited basis. I consequently conclude it was not reasonably practicable to present the non-viable claim in time, and that it is reasonable that the viable claim was presented on 7 April 2017.

8.12. The detriments claim is also subject to the same reasonable practicability test. It is so closely linked to the Respondent's decision to invoke the attendance management procedure that the overlap with either claim of unfair dismissal is substantial. I take the view with the reasons expressed above apply equally to the detriment claims. It was not reasonably practicable to present the non-viable claim in time. It is reasonable that the viable claim was presented on 7 April 2017.

8.13. The claims for disability discrimination are put on two bases but each covers the same ground. The s.15 Equality Act 2010 claim simply requires the Claimant to show unfavourable treatment and a causal link to whatever it is that arises in consequence of her disability. The s.21 claim is framed in terms that mirror the s.15 claim, effectively inverting the unfavourable

treatment into the necessary adjustment that would have avoided that treatment. During the original time limits, the Claimant was aware of the facts that would establish her disability status. She knew she had been subject to the treatment she says is unfavourable and that her case is that it was because of her absence from work. She knew what PCP the employer was subjecting her to and what might be done to avoid the disadvantage that it was said to cause. All that is enough to engage the duty to make an adjustment. The Trade Union's opinion was that there was no evidence to link the treatment to her alleged disability. There may or may not have been consideration of the fact that the Claimant's inability to return to work was expressed as working with Mr Smalley and Ms Shreeves, and not her ill health. Whatever the rights and wrongs of that opinion, and I remind myself the extension of time is not put on the basis of erroneous professional advice, there is nothing I can see in the newly acquired information that adds to the understanding of the disability claim or changes its viability.

8.14. There is nothing more to advance the discrimination claims today than there was in early 2016. Of course, these are claims that may be extended under the just and equitable test and I must consider the wider factors relevant to that test.

a The delay is substantial. There is a period of approximately 15 months between dismissal and presentation of the claim. That is, if the EDT marks the end of a continuing period of discrimination. If it does not, the delay is longer still. The first allegation in time arose over 2 years before the claim was presented. The reason for the Claimant's delay seems to be the acceptance of her Trade Union's opinion on merits, an opinion which I cannot say was necessarily wrong. I can say with greater certainty that nothing has changed since it was given that might affect the merits of the discrimination claims. I do not accept the Claimant's continuing ill health provides the reason for delay and, to be fair to her, she does not put it in those terms. I am sure it did have some level of adverse impact on her psychological well-being but to the extent that Mr O'Dair's submission that the Coroner's decision restored her sense of self confidence is likely to be correct, I do not accept that explains the delay. Overall, I conclude that this factor points against extending time.

b The cogency of evidence that the Respondent can adduce is likely to be diminished to some degree by the fact that Mr Smalley is very unlikely to play any part in the proceedings. The events have, however, been thoroughly documented and others involved in the dismissal can still give evidence so the extent of that prejudice is likely to be less than it might have been. Nevertheless, I regard this factor as pointing against extension of time.

c As to the degree of cooperation, the Respondent was not entirely cooperative during the capability hearings in terms of making the Independent Investigation Report available to the Claimant when it could have been. However, I cannot see that the information that contained has any direct relevance to the disability claim. I am not satisfied this factor assists the Claimant in extending time for presenting the disability claims.

d As to promptness, for the reasons already given, I have to conclude that the Claimant was in possession of sufficient facts to bring these

particular claims within time and therefore has not acted promptly. This factor clearly points against extending time.

e Similarly, I have found the Claimant was represented by her trade Union and relied on their professional advice and opinion at the time. She took reasonable steps in that regard. What has not been established before me, perhaps for obvious reasons, was that the Union were wrong in their opinion. They may not have been and in any event, there is nothing in the information now discovered that materially adds to or alters the assessment of viability of the discrimination claim.

8.15. Considering the discrimination claims in isolation, I reach the conclusion that it is not just and equitable to extend time for them to be presented on 7 April 2017. However, as the unfair dismissal and detriment claims are to proceed on two specific bases, it may then be said that the Respondents are going to have to cover much of the same evidential ground as is relevant to these claims. I have come to the conclusion that this is not enough in this case to render it just and equitable to allow the disability claim to proceed. There remains the issue of disability status itself. There is nothing in the newly acquired information which seems to me to go to the disability discrimination claim. It is put on a basis that it could have been in 2016 and there is nothing beyond the Claimant's restored sense of self confidence that has changed in the meantime relevant to the disability claims. Against that, there is some evidential prejudice to the Respondents in meeting that claim. Although I have concluded it is not as much as it may have been, it remains a prejudice nonetheless. There is currently a "limitation" defence to these claims unless it is just and equitable to extend time. The concept of justice and equity is one that applies to both parties. The burden rests with the Claimant and I am not satisfied that the mere fact that my decision that the Respondents will have to meet specific claims of unfair dismissal and detriment is, in the circumstances of this unusual case, enough to allow what is otherwise a stale claim to proceed.

8.16. I appreciate that this creates the rather unusual outcome that a Claimant has succeeded in satisfying the not reasonably practicable test but failed in what is generally accepted as being the less strict, just and equitable test.

9. *Conclusions*

9.1. The claims of disability discrimination were presented out of time and it is not just and equitable to extend time.

9.2. The claims of suffering detriments for making a protected disclosure are permitted to proceed out of time. The claims of unfair dismissal are also permitted to proceed out of time but only insofar as they proceed on the following limited bases:-

a Under s.103A Employment Rights Act 1996, in respect of the reason, or principal reason, for dismissal being the Claimant making qualifying protected disclosures.

b Under s.98(4) Employment Rights Act 1996 in respect of the reasonableness of relying on the reason, or principal reason, of capability where the decisions reached, and steps taken to reach those decisions, were influenced by the Claimant's stance about safeguarding such that they fell outside the range of reasonable

responses of a reasonable employer.

9.3. Time is not extended to proceed with a claim of unfair dismissal under s.98(4) so far as it is put purely on the basis of the process that was known to the Claimant and her advisers at the time as set out above.

9.4. The case will be listed for a telephone preliminary hearing to deal with directions through to a final hearing.

_____

Employment Judge Clark

Date 6 December 2017

JUDGMENT SENT TO THE PARTIES ON
20/12/17
.....

.S.Cresswell.....
FOR THE TRIBUNAL OFFICE

Appendix
Amended List of Issues

1) The alleged protected disclosures are now limited to the following:-

   a) (Original paragraph 2(g)) Raising concerns about safeguarding at the school with Gail Holliman, an Educational Psychologist employed by Nottingham City Council in September 2014.

   b) (Original paragraph 2(h)) Meeting with Rebecca Hullett, Nottingham City Council's Schools and Education Safeguarding Co-ordinator, in September 2014, and informing her that:-
      i) The Claimant had concerns about the handling of SW's case both before and after her death
      ii) Peter Smalley and Laura Shreeves had accused the Claimant of losing a Safeguarding Concern form submitted by a member of staff just before SW's death.
      iii) The Claimant had serious concerns that what had been written in the preliminary serious case review notes was unrepresentative of what happened.
      iv) The Claimant had concerns over children being handled inappropriately, without the use of restricted physical intervention techniques.

2) The alleged detriments occurring on the ground of making the protected disclosure have also been reduced. The Claimant now asserts only the following:-
   a) (Original paragraph 3(g)) The statement made by Peter Smalley, at the second Respondent education directorate & safeguarding partnership meeting on 7 November 2014, to the effect that the Claimant had an axe to grind, did not want to accept that Peter Smalley was the head teacher, could not accept that Laura Shreeve's role had grown considerably since February 2014 and wanted the school and Laura to fail.
   b) (Original paragraph 3(h)) Peter Smalley's letter to the Claimant, on 5 March 2015, informing her that he would be compiling a report for the school's governing body to consider her long-term absence from school.
   c) (Original paragraph 3(i)) The recommendation, contained in the internal investigation report prepared by Peter Smalley, to the effect that various allegations regarding the practice and conduct of the Claimant should be investigated upon her return to work following long-term illness.
   d) (Original paragraph 3(j)) The statement of capability report, produced by Peter Smalley, recommending the Claimants dismissal.
   e) (Original paragraph 3(k)) The decision not to provide the Claimant with a copy of the report of the Independent reviewing officer
   f) (Original paragraph 3(l)) The failure to make alternative arrangements for the management of the Claimant's absence, in light of the fact that findings of the Independent reviewing Officer's report (dated 2 April 2015) clearly demonstrated that Peter Smalley had a conflict of interest and/or that there were serious concerns about his performance
   g) (Original paragraph 3(m)) The failure of the chair of governors to give proper weight to the concerns raised by the Claimant, at the staff dismissal committee meeting on 4 June 2015, in relation to:-
      i) The Independent reviewing Officer's report
      ii) Laura Shreeves having commented that, if she saw the Claimant again, there would be another death
   h) (Original paragraph 3(n)) The failure of the chair of the dismissal committee

to give proper weight to the concerns raised by the Claimant's union representative, at the appeal hearing on 24 July 2015, in relation to the Independent Reviewing Officer's report.

3) The claims of unfair dismissal and automatic unfair dismissal set out at 4(a) and the second paragraph 4(a) and (b) are maintained in their original form.

4) Subject to the question of disability status which is not agreed, The claims of discrimination arising from disability are now limited to the following:-
   a) (Original paragraph 5(b)(ii)) Failure to allow the Claimant, who had been diagnosed with anxiety and depression, a reasonable period of time for her health to improve before notifying her, on 3 March 2015, that the governors would be inviting her to a formal meeting to discuss whether the school could continue to sustain her absence.
   b) (Original paragraph 5(b)(iii)) Failure to allow a reasonable period of time to the Claimant's anxiety and depression to improve before sending her, on 9 March 2015, a report recommending that dismissal should be considered.
   c) (Original paragraph 5(b)(iv)) Failure to give proper weight to the concerns raised by the Claimant, at the start dismissal committee meeting on 4 June 2015, in relation to: being bullied at work, being sidelined by Peter Smalley, the fact that she was sidelined by Peter Smalley being confirmed in the Independent reviewing Officer's report, not feeling safe and secure at work having heard from another member of staff that Laura Shreeves having commented that, if she saw the Claimant again there would be another death.
   d) (Original paragraph 5(b)(v)) Failing to give proper weight to the concerns raised by the Claimant's union representative, at the appeal hearing on 24 July 2015, in relation to the Independent reviewing Officer's report.
   e) (Original paragraph 5(b)(vii)) Failure to facilitate the process of securing a position for the Claimant with another Nottingham City Council school, contrary to the first Respondent attendance management procedure.

5) The reasonable adjustment claim relies on a PCP of the application of the schools Attendance Management Procedure. The Claimant relies on the same 5 failures as set out above as examples of the disadvantage to which she was put by the PCP. The Claimant contends the following adjustments were reasonable to make:-
   a) (Original paragraph 6(d)(ii)) Allowing the Claimant a reasonable period time for her anxiety depression to improve before deciding to invite her to a formal meeting to discuss whether the school could continue to sustain her absence.
   b) (Original paragraph 6(d)(iv)) Giving proper weight to the concerns raised by the Claimant, at the start dismissal committee meeting on 4 June 2015, in relation to: being bullied at work, being side-lined by Peter Smalley, the fact that she was side-lined by Peter Smalley being confirmed in the Independent reviewing Officer's report, not feeling safe and secure at work having heard from another member of staff that Laura Shreeves having commented that, if she saw the Claimant again there would be another death
   c) (Original paragraph 6(d)(v)) Giving proper weight to the concerns raised by the Claimants union representative, at the appeal hearing on 24 July 2015, in relation to the Independent reviewing Officer's report.
   d) (Original paragraph 6(d)(vi) Facilitating the process of securing a position for the Claimant with another Nottingham City Council school, contrary to the first Respondent attendance management procedure.