Case Number: 3322728/2016
3323278/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss S Ahmed **v** **Autism Consulting Limited**

Heard at: Watford **On**: 27 February 2017 to 2 March 2017

Before: Employment Judge R Lewis
Mrs S Goldthorpe
Ms S Johnstone

Appearances

For the Claimant: Ms S Robertson, Counsel
For the Respondent: Ms P Leonard, Counsel

JUDGMENT

1. The claimant's claims of discrimination, harassment, and victimisation, brought under the Equality Act 2010, howsoever formulated, fail and are dismissed.

2. The claimant's claim of having suffered detriment because of protected disclosure fails and is dismissed.

3. The respondent's application for an order for costs is allowed

4. The claimant is ordered to pay to the respondent costs of £3,000.00.

REASONS

1. Ms Leonard asked for these reasons in writing after judgment had been given. This was the hearing of claims presented at the start of 2016 by the claimant, and which were the subject of detailed case management on 31 August 2016 (Employment Judge Bedeau) leading to an order sent on 17 September 2016, pages 57-63 of the hearing bundle.

Case management

2. A number of case management matters arose at the start of and in the course of the hearing as follows:

2.1 The tribunal noted with concern information in witness statements which could lead to the identification of vulnerable students at the respondent's school, and directed that the actual names of students be removed from witness statements provided to the public (Rules 44 and 50) and that when members of the public were observing, students should not be referred to by name or actual initial. Both parties endeavoured to adhere to this discipline, which was not challenged.

2.2 We were grateful to both sides for adhering to disciplines imposed by timetabling issues which arose during the hearing, and for adhering rigorously to the discipline imposed by Judge Bedeau's order.

2.3 It was agreed that this stage of the hearing would deal with liability only and that the claimant's case would be heard first.

2.4 An immediate issue arose as to witness statements. The claimant had submitted a witness statement of 3 February. It was not fit for the purpose of the proceedings. It failed to address a large number of the central issues in the case. We were told that on the Sunday night before the start of this hearing Ms Robertson had sent Ms Leonard a document entitled "Supplementary Witness Statement". That appeared to be a professionally drafted analytical witness statement, confined to the issues in chronological order. However, as Ms Leonard rightly pointed out, it had been served some 14 hours before the start of the hearing, the claimant having been professionally represented throughout. Ms Leonard applied for its exclusion.

2.5 Ms Robertson made an application to amend, seeking to rely on additional documents and additional protected disclosures to those identified in Judge Bedeau's order. Ms Leonard resisted the application. After discussion, in which it was agreed by the respondent that it accepted that it had received the claimant's log (110-120, see below), and in which the tribunal observed that that was plainly relevant background, Ms Robertson did not pursue the application to amend.

2.6 Although we were entirely with Ms Leonard in her view that it was "simply not good enough" for a represented party without explanation to seek to serve a witness statement the night before a hearing, it did not, after reading the statement, seem to us in the interests of justice to strike it out or exclude it. It was, on the contrary, in the interests of justice that the claimant should place before the tribunal a coherent

account of events, which in any event might have been introduced by additional evidence in chief.

2.7 Ms Leonard asked us to accept Mr Hilton's statement as read in his absence, as Mr Hilton could not attend due to health matters. She asked also for leave to interpose the evidence of Mr Matthews, not an employee of the respondent, whose evidence would deal briefly with peripheral matters. Both were agreed.

2.8 The claimant was the only witness on her own behalf. The respondent's witnesses in order of giving evidence were: Mr Alex Matthews, branch manager for Teaching Personnel Limited (the agency which supplied the claimant's services to the respondent); Ms Akinyi Dulo, principal; Mr Mateusz Slezak, teacher; Ms Carol Wilkins, office manager; and Ms Angela Law, head of HR. Each witness adopted his/her statement and was cross-examined. There was in addition a bundle in excess of 450 pages, much of which was not necessary for the tribunal to read. The bundle contained at pages 110-145 a number of documents written by the claimant at different times, describing her experiences during her employment and subsequently. These were all referred to as the claimant's logs. The most material, referred to in these reasons as "the log" was at pages 110-120.

3. Although the parties confirmed at the start of the hearing that the issues remained those identified by Judge Bedeau, which we do not here repeat, the tribunal at the start of the respondent's case asked Ms Leonard to clarify a number of points, which she did as follows:-

3.1 The respondent agreed that at all material times the claimant was a worker for the purposes both of protected disclosure and the Equality Act;

3.2 The respondent accepted vicarious liability for any matter alleged against Mr Slezak, who was its employee;

3.3 The respondent's case was that the log does not contain protected disclosures or a protected act.

3.4 It was common ground that the log was given by the claimant to Ms Dulo on a date between 24 June 2015 and the end of term in July 2015;

3.5 The claimant asserted and the respondent denied that the log at 123-132 was provided by the claimant to the respondent in September 2015;

3.6 It was common ground that there was no record, and no documentary record in the bundle, of any of the meetings with which we were concerned in the period between 3 and 11 September 2015.

General matters

4. We preface our judgment with a number of general observations. As is usual in the work of the tribunal, we heard evidence about a wide range of matters, some of them in depth. Where we make no finding about a matter of which we heard, or make a finding which is not made to the depth to which the evidence went, our approach is not oversight or omission but truly reflects the extent to which the point was or was not of assistance to us.

5. In closing submissions, both counsel, starting with Ms Robertson, made comments which we understood to be oblique references to a possible issue of the claimant's mental health. There was no medical evidence before us. In the absence of medical evidence, the tribunal makes no finding about the claimant's health.

6. Ms Leonard cross-examined to the claimant's credibility, and placed credibility centre stage in her submissions. We are often asked to make findings about credibility, because many cases turn on one person's evidence against another.

7. We approach credibility with caution. We must recognise that the procedure of giving evidence is a strange experience for most people and that there may be many reasons why a witness might appear uncomfortable in doing so. That general proposition had no application in this case, as the claimant gave her evidence with composure and the appearance of thoughtfulness.

8. We must likewise exclude purely subjective factors in evidence giving, such as the allowance to be made for a witness giving evidence in a second language. We should bear in mind that not everybody expresses herself best orally or on paper, and that the technique of counsel's questioning is itself artificial.

9. In assessing credibility, we must base our findings on evidence, and not guess or speculate. In doing so, we may bring to consideration of the evidence the human experience of the tribunal, and the specialist workplace experience of the non-legal members.

10. In this case, we find that where the claimant's evidence is without independent corroboration, we reject it. Where there is a conflict between the claimant's uncorroborated evidence and that of another witness, we prefer the evidence of the other witness. Our general reasons for doing so were the following:-

10.1 The claimant described unusual events which, if they happened, were in principle capable of independent proof, but of which there was no independent proof, such as electronic tampering with her car, her keys, her mobile phone, and her bank account. We would expect the clamant to be able to obtain the written report of an independent expert to verify that any such event had happened.

10.2 Where the claimant asserted that she had had independent proof of an allegation (notably, her allegations about obscene or otherwise objectionable notes being left in her classroom) she had destroyed all of them save one, which was plainly the handiwork of a student.

10.3 The one document which the claimant asserted was independent proof was at pages 369-370, which consisted of two sides of A4, on which was typed headline information about the claimant's medical history, and that of her parents and two siblings. We have no independent evidence to verify the factual accuracy of what was written on the document. There was no evidence of how the document came to be created. The claimant denied having done so. There was no independent evidence to verify the claimant's assertion that her medical records (and by inference presumably those of four members of her family) had been improperly accessed by anyone, let alone this respondent or a person acting on its behalf.

10.4 The claimant purported to describe events in which on a number of occasions random strangers had been so well informed about her, her employment, this claim, and her other personal affairs that they were speaking about her when she had a random encounter with them. Examples included a hospital receptionist, other passengers in a queue for a flight, and other persons in a supermarket. We do not find that those accounts accord with our human experience. We do not accept that her attribution of those events, if they happened, to the respondent accords with our experience of the workplace, workplace disputes or their consequences.

10.5 The claimant gave evidence that many colleagues on many occasions over a period of time showed hostility towards her by gestures including touching their faces or making "goldfish mouths". She also asserted that while in her classroom she had heard voices in the corridor which were sufficiently clear for her to know that she was being spoken about in a hostile manner, but not sufficiently clear for her to identify a speaker or any words used. No other colleague has commented on having noticed any of these events. The claimant's evidence on the points was uncorroborated. We do not find that her account accords with our human experience and we do not find that her attribution of such events to an ex-employer accords with our experience of workplace disputes. We add that where her account was enlarged by an interpretation (eg that a colleague touching his or her face is a form of harassment of the claimant on

grounds of perceived gender re-assignment) we find that such interpretation is not reasonably sustainable.

10.6 The claimant gave evidence that after she finished working at the respondent, former colleagues or persons on their behalf followed her and members of the family if they were with the claimant, in order to engage in some of the conduct described above. When questioned, she agreed that they could have no interest in doing so.

10.7 The claimant alleged that on a number of occasions colleagues forced or manipulated students to say or do things to harm or hurt the claimant, in the knowledge that the students did not understand the impact of such actions. That was evidence which suggested that colleagues abused the vulnerability of the young people in their care. The claimant agreed that she could think of no reason why they should do so.

10.8 The claimant adopted the above assertions in thoughtful and careful cross-examination.

10.9 Taking the above matters cumulatively, we find them to be incredible. We use that word in its true meaning, to refer to something which it is impossible to believe. In so saying, we add the following general comments about the points as a whole.

10.9.1 The claimant's allegations imply that colleagues behaved towards her in ways which contravened any professional standard, and the criminal law. By doing so, such colleagues put their careers and even their liberty at stake. We find that incredible.

10.9.2 We repeat our general and overarching observation that such events are contrary to our human and workplace experience.

10.9.3 Some of the events described are so inherently unlikely that we do not accept that they could have occurred. We have in mind in this category, as examples only, the allegations of being followed, and the allegations involving random strangers.

10.9.4 Without departing in the slightest from our overarching comment, and our inability to make any medical finding, the observation of the non-legal members on the above is that to the extent that the claimant's beliefs and allegations were within the knowledge of the respondent, they were one of a number of warning signs to indicate to the respondent that whether or not the claimant was an employee or agency staff, all was not well with her.

10.10 In that overall setting, we turn to the limited findings of fact which we are required to make.

Findings of fact

11. The respondent is proprietor of Hillingdon Manor School, Hillingdon. Ms Dulo set the scene (WS1). It is:

> "a special school for students aged 4-19 with a diagnosis of autism spectrum condition and a statement of special educational needs, or an education health and care plan. The students have varying ability and the school offers a curriculum that addresses their specific needs and way of learning…"

12. The school is on two sites which are approximately two miles apart. The claimant worked at the secondary site, with students aged 11-19, and about 130 students. The form ET3 stated that there were 88 staff employed at the school, and that the school was part of a larger group of substantial size and resource. The secondary school had 27 teaching staff and 50 teaching assistants. The maximum number of students per class was 8.

13. It was common ground that the students at the respondent's school displayed challenging behaviour, which at times verged on the extreme. Ms Dulo explained that they lacked what she called the "social filters" of understanding of words, actions and consequence, and that was a helpful phrase. We make no findings in relation to the action of any student, it being common ground that no vicarious liability attached to the respondent for actions by a student which, if taken by an employee of the respondent, might well give rise to such liability. The tribunal was at pains to avoid dealing in the slightest with any aspect of the education or care of any of the students, matters which were not before us for consideration, and which we were conscious were far beyond our capacity to comment on.

14. Ms Dulo had held the post of principal for four years, having joined the school as deputy principal two years before that. When asked about the service provided at the school, or about any student, her knowledge and authority in replying were impressive.

15. The claimant, who was born in 1979, had been a civil servant, and became a late entrant into the teaching profession. She was employed by Teaching Personnel Ltd, an agency, which for the school year starting September 2014, and until 11 September 2015, supplied her services to the respondent. The claimant was a science teacher. We accept that science teachers are difficult to recruit and retain, particularly in special education.

16. We make no finding about the quality of the provision at the school. We referred to reports of Ofsted inspections. We were referred to some evidence about the claimant's capability, and in particular reports of observations of her teaching on 7 November 2014 and in March 2015 (107,

146). We note in those reports some positive matters, and some matters identified as showing room to improve. Ms Dulo's evidence was that the claimant's performance was found to be "par for the course" for a teacher in the first year of her first teaching job, working in challenging circumstances.

Allegations of direct discrimination and harassment

17. At paragraphs 8.3.1.1 to 8.3.1.5 inclusive of his order (60) Employment Judge Bedeau identified the sole acts of direct discrimination or harassment relied upon by the claimant in these proceedings. Each allegation was against Mr Szlezak and was said to have taken place in the claimant's first term, autumn 2014. Each allegation related only to an uncorroborated conversation, in which it was alleged that Mr Szlezak had made the pleaded remarks.

18. When Mr Szlezak gave evidence, he denied that any such conversation took place. His denials were in terms which did not permit an explanation such that there had been a misunderstanding, or a misreported conversation. He said that no such conversation took place.

19. We were concerned with the question of when these allegations first were made. The allegations themselves were dated between September and November 2014.

20. In that period and at all times we accept the evidence of Ms Dulo and Ms Wilkins that they operated with open door, and that it was open to staff to come to speak to them about events which troubled them. It was common ground that none of the five specific allegations was brought to either by the claimant.

21. It was common ground that the log (110-120) was given to Ms Dulo by the claimant in a window of time between 24 June and the end of term in July 2015. Nobody challenged Ms Leonard's question to the effect that it contained up to 80 complaints against over 50 named individuals (staff and students). None of the five allegations before us was mentioned in it.

22. The bundle contained a second log (123-132) which, on the claimant's account (denied by Ms Dulo, whose denial we accept) was provided by the claimant to Ms Dulo on or about 7 September 2015. We find four of the allegations in that document (129-132). We find that that document was made available by the claimant to the respondent in about November 2015 for the purposes of the present litigation.

23. Although the precise first date of the five allegations cannot be stated, we find that they were first made available in writing (or any other medium) by the claimant to the respondent in about November 2015, some 11-14 months after the events in question.

24. When asked to explain why they had appeared in the late 2015 log, but not in the earlier log of summer 2015 the claimant answered that when she wrote the first log, she had not remembered them. She said that when she came to type a better version of the log (the version at 123-132) a friend had reminded her of Mr Szlezak's remarks, which in turn had prompted the claimant's recollection. The claimant declined to name the friend, and there was no other evidence of a witness to any of the five allegations. The five specific allegations also appeared in the claimant's second claim form, which though originally dated February 2016 was accepted on 30 March 2016.

25. We heard some evidence about the general relationship between the claimant and Mr Szlezak and about the Christmas party 2014. So far as material, we confine our findings as follows.

    25.1 In the claimant's first term, she came into frequent professional contact with Mr Szlezak, and they became amicable colleagues, and then professional friends.

    25.2 They did not socialise outside work, although the claimant gave Mr Szlezak a lift to work on occasions.

    25.3 When arrangements were made for the respondent's Christmas 2014 party, the claimant was initially reluctant to attend, and Mr Szelzak encouraged her to do so. She agreed to attend.

    25.4 She drove to Mr Szelzak's home and stayed there socialising before going to the party. We accept Mr Szelzak's evidence that the claimant in that time had at least one alcoholic drink. We accept that they attended the party together.

    25.5 It was common ground that the friendship petered out after Christmas 2014.

26. In relation to all five allegations, we face a conflict between the uncorroborated evidence of the claimant and the evidence of Mr Szelzak. In light of our general findings about the claimant's credibility, we prefer the evidence of Mr Szelzak. We add the following specific findings and conclusions, which relate to these five allegations.

27. We cannot understand the mismatch between the claimant's pleaded case on these allegations, and the first log. If the five events took place, it is surprising that they are not mentioned in the first written log. It is troubling that they first appear in a second document, a year after the events, and according to the claimant's evidence, at the prompting of an unnamed person, who gives no evidence about any of the other events of which the claimant complains at the school.

28. It was not disputed that there had been a personal friendship between the claimant and Mr Szelzak in autumn 2014, and it was common ground that she gave him lifts, and that they attended the Christmas party together. We find that description of a work based friendship impossible to reconcile with the allegations made by the claimant against Mr Szelzak said to have occurred at the same time, which involved the use of personalised, offensive language.

Allegations of victimisation

29. We now turn to the victimisation case which we must preface with findings about protected acts and protected disclosure.

30. Judge Bedeau's order narrowly defined the protected acts and protected disclosures relied upon at paragraphs 6.2.1 to 6.2.3 inclusive. It follows that we do not need to consider the first log, which was not listed there.

31. We limit our findings about events in the second and third terms of the school year 2014-2015. We note the following only:-

    31.1 The claimant continued at work throughout the year.

    31.2 The respondent's record keeping relating to the claimant's work was poor, possibly because of a misapprehension as to her rights as an agency worker.

    31.3 In about April and May 2015 the claimant had a number of conversations with Ms Wilkins, in which the claimant reported alleged rumours about her, which led Ms Wilkins to ask Ms Dulo about the claimant's welfare, and to ask Teaching Personnel whether it had any knowledge of health concerns on the claimant's behalf (it did not).

    31.4 On an unspecified date after 24 June the claimant had a meeting with Ms Dulo, and gave her the document at 110-120. We accept Ms Dulo's evidence (disputed by the claimant) that she read the document with the claimant, asked the claimant what she wanted done about it, and when the claimant said she just wished to report it, and did not wish any further action to be taken, Ms Dulo accepted that.

    31.5 This was the document which Ms Leonard said contained up to 80 allegations against over 50 individuals. Ms Dulo understood part of the behaviour described to be that of students with challenging behaviour. Her evidence was that she did not recognise in the claimant's account the working culture of the school which she led. She considered it appropriate to take no further action in accordance with the claimant's wishes.

31.6 The document contained the following, which we considered highly significant, and to which we attach very considerable weight:

> "On returning in January [2015 after Christmas], I met with [Ms Dolu] to explain that I was back until she could find a new teacher as I felt it was unprofessional to leave without a second teacher in place. I had also agreed this with her in the meeting in 2014." (116)

31.7 Ms Dulo's evidence, which we accept, was that at some point in her first term, Ms Dulo had perceived the claimant to be struggling, and had had a conversation with her, the gist of which was that the claimant stated that teaching in special needs was not for her in the long term, and that she would look to leave the school and move on. However, entirely professionally, she wished to remain at the school until it was appropriate to leave, which she identified as on the appointment of a replacement. The claimant understood that appointing a specialist science teacher would not be easy. The claimant denied in evidence having said this, and denied that what she had written at page 116 was her own accurate report of her own words.

31.8 We find that the claimant indeed had that conversation with Ms Dulo, and said words to the effect that left Ms Dulo with the legitimate understanding that the claimant was looking for alternative work, outside the specialist sector, and would remain in post until her replacement had been appointed.

31.9 The non-legal members of the tribunal, with whom the Judge respectfully agrees, record their view that the document at 110-120was one of a number of warning signals in relation to the claimant's welfare to which the respondent might well have given further consideration at the time, irrespective of the claimant's agency worker status.

31.10 We accept the evidence of Ms Dulo and Ms Wilkins that undocumented attempts were made during the later part of the school year 2014-2015 to contact agencies with a view to appointing a science teacher. It would have assisted us if there were records of this.

31.11 The school year concluded in July (we were not told the exact date) and the claimant had not been told whether she would return to service the following September. We were assisted by an exchange of emails on 6 and 7 August 2015 between the claimant and Mr Matthews. The claimant wrote:

> "I've had two messages left on my phone in the past week from other TP staff asking to confirm if I will be returning in September… It was just to say that I

> would be returning to Hillingdon Manor school in September, having heard that the feedback was good…"

31.12 Mr Matthews replied the same day:

> "I think you have made the right decision."

31.13 We understand from that exchange that the agency understood that it was still tasked with filling the post of science teacher, and that it had placed the claimant to do so.

31.14 The crucial stage of this case occurred in the period 2-11 September 2015. In that period the already poor record keeping of the respondent plummeted. This case turned on about eight crucial meetings in that period, none of which was documented or minuted, and none of which (not even appointment to a promoted post) led to written confirmation. We fully understand that the first week of the school year is exceptionally demanding for a head teacher, and we do not expect an unrealistic level of note taking by a busy professional. In a number of respects, a two line email or a two line electronic diary entry would have saved all involved in this case considerable work and difficulty.

31.15 In the period 2-11 September 2015 two strands ran simultaneously and we deal first with the shorter and simpler strand. That concerns a teaching assistant, whose name we have noted as Ms Buzak, with apologies if we have mis-recorded the name.

31.16 Ms Buzak was a directly employed teaching assistant (ie not agency staff) in the school year 2014-15. We understood her to be a newly qualified teacher. We accept Ms Dulo's evidence about her in broad outline.

31.17 Shortly after the start of term, Ms Buzak had a conversation with Ms Dulo, in which she told Ms Dulo that after reflecting over the summer on the matter, she would like to be considered for any teaching vacancy which arose in the school.

31.18 Among the many things in Ms Dulo's mind was the awareness that the claimant had said many months previously that she was unhappy in the work of special needs education; that she was unfortunately in a role which was difficult to recruit to; and that she had given a commitment to remain until replaced.

31.19 Either in the same conversation, or in one shortly afterwards (date and details unknown) Ms Dulo asked Ms Buzak if she would be interested in principle in being considered for a vacancy as science teacher. Ms Buzak was not a science specialist.

31.20 There was then an interval, certainly of a day or two (and possibly the weekend of 5 and 6 September) for Ms Buzak to think over matters. Ms Buzak then had a further conversation with Ms Dulo, in which she told Ms Dulo that having reflected on the offer, and looked at the school's science curriculum (a clear indication that she had not previously been involved in science education at the school) she would like to be considered for such a post.

31.21 Either in that conversation, therefore, or subsequently, Ms Dulo confirmed Ms Buzak's appointment to the science teacher vacancy held by the claimant.

31.22 It was not clear to us whether Ms Dulo thought that as Ms Buzak was an existing member of staff, it was not necessary to issue her with a letter of appointment or fresh contract of employment; or if that was done elsewhere, but not disclosed by the respondent's solicitors. It would have assisted the tribunal to see any documentary record of the date of appointment and date of taking up appointment.

31.23 We accept as reliable Ms Dulo's broad outline of the above strand of evidence. Although the date of Ms Buzak's appointment was not verified to us, we accept that it must have been by 11 September at the latest, as we find that it was on that day that Ms Dulo ended the claimant's assignment.

31.24 The second strand intertwines the claimant's interaction with Ms Dulo during that period, with the three protected disclosures alleged in paragraph 6.2 of Judge Bedeau's order.

31.25 It is common ground that there was a training day for teachers on Wednesday 2 September, which the claimant did not attend due to sickness.

31.26 It was common ground that after return from sickness, the claimant was obliged to complete a return to work form, to be handed in to a member of the school management.

31.27 The claimant returned on either September 3 or 4: there was no record of it and we cannot make any more definite finding. Ms Dulo was sure that it was the former, the claimant the latter.

31.28 She obtained a return to work form, filled it in, and handed it to Ms Dulo.

31.29 We do not accept that the claimant, as she suggested to us, wrote the lengthy handwritten narrative which was at the bottom of page 120 (final page of the log) in the bundle. The claimant's startling evidence to us was that this handwritten section, filling about two thirds of the page, was indeed in her handwriting but she had written

it elsewhere and that the respondent must have transposed it on to page 120. We disagree. It was inherently unlikely that the respondent would do so. It had no reason to. There was no evidence that it had done so, other than the claimant's bare assertion.

31.30 We find that the claimant wrote briefly on the return to work form that she had stress headaches in reaction to a colleague having alleged that she (the claimant) had fake breasts. (In her supplementary witness statement, the claimant had named a colleague who she said had made such a remark on 4 September: if the remark was indeed made, and made on 4 September, it cannot have been the reason for the claimant's absence on 2 September, but it may be that the claimant wrote it on the form simply to say something about her current health). In any event, we accept Ms Dulo's evidence that she saw and noted one or two handwritten lines to that effect. We find that that was the totality of the medical information given by the claimant to Ms Dulo.

31.31 We were told that the respondent's procedure was that the original return to work form was logged into the school's systems by office staff (we were not shown any such log) and the original shredded once Ms Wilkins had checked the information against agency staff's attendance records and therefore against payment liability towards the agency.

31.32 There was a meeting of the claimant and Ms Dulo on either September 4 or 7 to deal with the claimant's return to work. We accept that in accordance with the school's procedures, it should have been on the day of her return, but given the pressures at the start of the new school year, we do not see any valid point of criticism of Ms Dulo if she missed that date. We are unable to make a finding as to the date on which the meeting took place.

31.33 The claimant continued her duties in the week starting Monday 7 September. There was dispute between her and Ms Dulo as to when she was told that her assignment was terminated, and whether she was told it was terminated on the day of being told, or on two days' notice.

31.34 The claimant's version, that she was told on 9 September that her assignment would finish on 11 September, is supported by an inexplicable and curious piece of evidence. On Thursday 10 September the claimant reported absent at short notice, stating that she had at short notice been called to an interview in another school (204). That might on the face of it be consistent with the claimant having been told the day before that her engagement was about to end.

31.35 Supporting Ms Dulo's evidence, that the claimant was dismissed and told that her assignment would end on the day of the conversation, and that that day was 11 September, was a note from Mr Matthews (215), prepared as part of a fact finding investigation following receipt of the ET1, and clearly based on agency records, to the effect that the claimant's assignment ended on Friday 11 September. Although that may have been an accounting or administrative date, it was an indication of the final date.

31.36 In light of our general preference of the evidence of other witnesses over that of the claimant, we find that on Friday 11 September Ms Dulo told the claimant that her assignment to the school would end that day, and it did.

31.37 The claimant asserted that her assignment was ended because of a protected act which was also a protected disclosure; it was notable that in submissions Ms Robertson laid considerably more emphasis on the former than the latter. The Bedeau order identified three potential disclosures. We now deal with them in reverse order.

31.38 The third (6.2.3) was that "on or around 7 September 2015 she gave Ms Dulo a log of incidents of bullying and harassment as set out in paragraph 13 of the particulars of claim". The log here referred to was at 123-132 of the bundle. The particulars referred to (29-30) consisted of the five allegations against Mr Szlezak which we have rejected above, and in addition three allegations against students. We reject the factual basis of the claim. We have above accepted that those incidents were first reported by the claimant to the respondent in or about November 2015 in the context of this litigation. The factual basis of the allegation fails and therefore we do not need to consider whether the words used in the log met either statutory definition.

31.39 Likewise at paragraph 6.2.2 it was stated "on or around 7 September 2015 she had a return to work interview with Ms Dulo, during which she gave further information about the complaints made in her return to work form". We have accepted Ms Dulo's evidence that there was no discussion additional or ancillary to what was written on the return to work form. The factual basis of the allegation fails and therefore we do not need to consider whether any words used met either statutory definition.

31.40 At 6.2.1 the following was written: "In early September 2015, she completed a return to work form in which she wrote that she was being bullied and harassed by members of staff and pupils and provided it to the respondent." If this allegation referred to anything other than the return to work form, the factual basis is not made out and we reject it. We accept that the claimant wrote on the return to work form words to the effect of three discrete pieces of information:

that she was experiencing what she called stress headaches; that they were attributable to rumours; that the subject of the rumours was that she had "fake breasts".

31.41 We accept, not without misgivings, the broad thrust of Ms Robertson's submission. We accept that unwanted comment about a woman's breasts constitutes harassment related to the protected characteristic of sex. We accept that the definition of protected act in s.27(2) is deliberately wide, so as to encompass language used loosely and informally. We accept that by making such an allegation on her return to work form, the claimant made an allegation of sexual harassment, and thereby acquired the protection against victimisation of s.27 Equality Act. It was not made out to us that that protection was lost by application of s.27(3), which would apply only if the allegation were both false and made in bad faith.

31.42 Although it is not strictly necessary for us to decide whether the claimant also made a protected disclosure, we again bear in mind that the legislation is protective legislation, not to be read over-legalistically, and we find that the words in question constituted a protected disclosure, whether read under the Employment Rights Act s.43B(1)(b) or (d), and gave the claimant the protection under that provision.

31.43 We must therefore decide what was the reason why the claimant's engagement was terminated. We accept Ms Robertson's submission that we need not find that the protected matter was the main or only reason, merely that it was a material reason.

31.44 In submission, it was not surprising that Ms Robertson referred to eight matters. She reminded the tribunal of the log submitted the previous summer (110), and she stressed the vagueness of Ms Dulo's evidence on timing. She suggested that the decision to replace a science specialist with a teacher without a science background was inherently suspicious. She referred at four points in her written submissions to paragraph 20 of Ms Dulo's witness statement and at one point to paragraph 19. We quote them:

> "19. Sharmin did though return in September. At the start of that academic year, I had a conversation with an existing member of staff who was employed with us as a teaching assistant but had NQT status. She had initiated the conversation and said that after some thought she felt that she would be willing to be considered for any teaching opportunity that may arise in the school because she now felt that she was confident in her ability.
>
> 20. Sharmin was absent for one of the training days in September 2015 at the start of term and when I spoke to her the following day to ask how she was, she said that she had been suffering from stress headaches because of the rumours about her having a "boob job". At this point I felt that it

> would not be in the interest of any member of staff to start a new academic year with the bad feeling. I spoke to Sharmin later on in the day and warned her that after some thought I'd made the decision to terminate the agreement with her and that we would be informing her agency that we would not be asking her back the following day."

31.45 The matter was put in cross-examination to Ms Dulo. The Judge's note reads as follows:

> "At paragraph 20 of the witness statement I meant that the claimant was clearly finding being at the school a stressful experience. That was not the reason for terminating her placement. The reason was that we had found someone to replace her… The boob [illegible] did not lead to termination. The other person came to see me at start of term to say she wanted to develop professionally."

31.46 The note does not capture the authority with which Ms Dulo gave the evidence, and as stated, we found her to be a compelling witness when speaking about her professional work.

31.47 In rejecting the claimant's interpretation and preferring Ms Dulo's evidence, we attach considerable weight to our reading of Ms Dulo's witness statement as a whole. It does not present as of professional quality in preparation, is not in logical, chronological or thematic arrangement, deals with much material that is not relevant and not with material that would have been relevant; and has been presented to the tribunal with many uncorrected (and obvious) typing and grammatical mistakes. We approach any attempt to interpret the detail of statement with caution. We can understand Ms Robertson's wish to emphasise her reading of the words "at this point" but we do not think it is the fair reading in totality, and we do not accept it.

31.48 We agree with Ms Robertson that the respondent's evidence on timing was inadequate. It is an unhappy position to take poor preparation as a factor in favour of the respondent. That said, we accept the core of Ms Dulo's evidence, which was that she terminated the claimant's engagement, because her replacement had been found; and she wished to replacing a teacher who was a specialist but struggling with a non-specialist who wanted to commit herself to the post.

Costs

32. After we had given judgment and an outline of reasons on 1 March, Ms Leonard indicated that she wished to apply for costs. Ms Robertson was not ready to answer an application and after short consideration we adjourned to deal with costs on the morning of 2 March.

33. Ms Leonard submitted that the claimant had conducted the proceedings unreasonably in two respects. The first was in her general conduct of the claim and the second in her refusal of settlement offers.

34. In support of her assertion that there had been unreasonable general conduct of the claim, Ms Leonard referred broadly to the following points:

    34.1 That the claimant had put forward irrelevant evidence which because of its professional impact the respondent had had to meet;

    34.2 That on the first morning of hearing the claimant had put forward a late application to amend;

    34.3 That until the night before the hearing the claimant had relied on an inadequate witness statement and had introduced her operative witness statement on the morning of the hearing;

    34.4 That as indicated at page 116, she had herself always known the actual reasons for dismissal;

    34.5 That she had made allegations of extraordinary gravity against a provider of education to the vulnerable; and

    34.6 That she had given no evidence on extension of time.

35. With reference to Daleside Nursing Home Ltd v Matthew/UK EAT/0519/08 Ms Leonard submitted that the only inference to draw from the terms in which the tribunal had rejected the claimant's evidence and preferred that of Mr Szlezak was that the tribunal had found the claimant to have lied. She submitted that the claimant's evidence was incredible, therefore a lie, and as the tribunal had found it to be untrue, it would be perverse not to award costs.

36. We were shown without prejudice correspondence which showed an offer of £3,000 with a reference on 15 August 2016, increased to £5,000 on 18 August and apparently repeated at the preliminary hearing on 31 August. She submitted that although counter-offers had been requested, none had been made and the claimant refused unreasonably to budge from her schedule of loss. Ms Leonard explained why she considered that to be unreasonable. She submitted that the claimant had brought te most significant and serious allegations, knowing them to be untrue. She submitted a computer printout showing costs totalling £18,783.60 exclusive of VAT.

37. Ms Robertson in reply raised issues of whether the respondent was truly at risk of costs, submitting that it was funded by insurance. She invited us, with reference to Barnsley MBC v Yerrakalva [2012] IRLR 78 to look at the impact of unreasonable behaviour on costs. She reminded us that costs in the tribunal should be exceptionally awarded, not routinely, not be punitive, and should be considered in the light of the whole picture of the case. She submitted that the respondent had not pursued a deposit application and not pursued costs warnings.

38. Ms Robertson pointed out that the tribunal had rejected any suggestion of bad faith for the purposes of s.27 of the Equality Act. This was not a case based on lies. She reminded us of our findings in which we criticised the respondent's poor record keeping and accepted that late service of the witness statement had assisted the tribunal, not led to costs being incurred or time being wasted.

39. Ms Robertson also drew to our attention a judgment of the Court of Appeal of Northern Ireland in Galo v Bombardier Aerospace UK [2016] IRLR 703, where, in the context of reasonable adjustments for a claimant with disability who was representing himself, the court stated: "The duty is cast on the tribunal to make its own decision in these matters [of adjustment]. There were clear indications of observed agitation and frustration on the part of the appellant. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition." Expressing herself with care, Ms Robertson put forward no positive case as to the claimant's health, capacity or disability but invited the tribunal to proceed on the basis of its obligations under the Human Rights Act and the Equality Act.

40. We heard that the claimant is currently in employment, due to end in two weeks' time, but which may be continued; and that her monthly net pay is £1656. We were told of some £1900 in savings accounts and that she pays £300 per month to her parents' household bills. Ms Robertson's submissions were accepted unchallenged, although unsupported by any document, and the claimant was not called.

41. We approach the costs application in accordance with Rules 74-80 of the 2013 Tribunal Rules and through the well known authorities. We consider that we should approach the matter at three stages. At the first stage we must find as fact whether the claimant has conducted the proceedings unreasonably. If so, we must consider at the second stage whether it is in the interests of justice that a costs award should be made. At the third stage we must consider the amount or formulation of the award, and we may have regard to the claimant's ability to pay.

42. At the first stage, we take care to avoid the wisdom of hindsight once the dust of battle has settled. We take care to apply what we think of as a single objective standard of reasonableness. We find that the claim was conducted unreasonably in two respects. The first was that until 8pm on the night of Sunday 26 February (with the claim due to start at 10am the following morning) the claim was simply not viable, because the witness statement submitted by the claimant was incapable of making good her case. The case was rescued by the redrafting of a witness statement, application for permission to rely on it, and the tribunal exercising its discretion in favour of the claimant. The claimant had been professionally represented throughout, and had had the advantage of a full case management hearing and order several months before the start of this hearing. It was unreasonable to reach a stage less than 24 hours before the

start of a hearing with a witness statement of which Ms Robertson herself conceded that reliance on it would leave prospects of success "extremely slender".

43. We find secondly that it was unreasonable to advance the argument that the claimant's dismissal was an act of victimisation in light of the following. The response form had stated from the start of proceedings that the respondent relied on the argument that the claimant had expressed her wish and willingness to stand down once her replacement was found. By the end of the school year 2014/2015 the claimant had herself accepted and acknowledged that that was the case in writing direct to Ms Dulo (116). The claimant had long accepted the fundamentals of the respondent's rationale for her dismissal.

44. Ms Robertson submitted that while that well may be, the timing of the dismissal, coming immediately after a protected disclosure, was the basis of the claim. That was disingenuous. The timing of the claimant's dismissal came immediately after a replacement was available, a matter which had been awaited for the best part of a year.

45. We do not find that the claimant's rejection of settlement offers constitutes unreasonable conduct, even if it was ill advised. The offers were not so hugely attractive in themselves, and were made very early in proceedings, before case management and before disclosure. We do not find that other detailed matters of case preparation of which Ms Leonard complained constituted unreasonable conduct of litigation. Serious allegations are made frequently, and irrelevant material is placed before the tribunal in most cases. In this instance, we do not find unreasonableness.

46. When we come to the submission in relation to alleged lying, we state as follows. We have made our findings above about credibility (and gave them to the parties on 1 March) and we decline to amplify them. Neither side addressed us on the rationality of the claimant's allegations. If they had done so, we would have said that not all of what was said by the claimant sounded rational. However, we do not accept Ms Leonard's binary view that if we accept the oral evidence of one side, we must by inference accept that the other side is lying. That is just one explanation of a difference of oral evidence and of the findings of a tribunal. It has not been shown to us that the claimant lied such as to constitute unreasonable conduct and we do not so find.

47. We then ask whether it is in the interests of justice that a costs order should be made and we find that it is. We bear well in mind the balancing exercise between the right of access to justice, the need to safeguard respondents from unmeritorious cases, and our obligation to ensure best use of judicial time and resource. In that balancing exercise, we take into account the claimant's right to a fair hearing of her claim. We do not however accept that in the absence of any issue, evidence or positive submission as to disability, the tribunal's duty of reasonable adjustment is engaged.

48. We agree that a costs award is exceptional. In this case we attached weight to two exceptional factors. One was that one of the pillars of the claimant's case involved rejection of her own written submission (116). The other was that the claimant, professionally represented, six months after case management, at a time when the case was fully prepared with significant bundles, had not submitted a witness statement which was capable of being a viable basis for the claim until 14 hours before the start of the hearing.

49. The amount of costs is a matter for our discretion. The figure which we set seems to us within our discretion and the claimant's ability to pay. We had confidence in her further earning power: we had been told a number of times that there is demand for science teachers, and the claimant lives close to London. We noted in the respondent's schedule of costs that counsel's fees for this week of attendance were £5,900. We attached some weight to the fact that a "drop hands" settlement offer was made on the first morning of the hearing. That was made at a time when the respondent was still willing to settle the matter even though significant costs had been incurred. The figure which we have set bears some relation to the costs incurred by the respondent thereafter. In so saying, we do not resile from our finding that it was not unreasonable to reject settlement offers in this case. We seek rather to express the helpful yardstick suggested to us by Ms Leonard in assessing the level of costs.

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Employment Judge R Lewis

Date: 16/03/2017

Sent to the parties on: 16/03/2017

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For the Tribunal Office