



EMPLOYMENT TRIBUNALS

Claimant: Mr E Latham

Respondent: Cambian Childcare Limited

Heard at: Manchester

On: 22, 23, 24, 25 and 26
January 2018
26 March 2018
(in Chambers)
9 May 2018
(in Chambers)

Before: Employment Judge Batten
Ms D Radcliffe
Ms S J Ensell

REPRESENTATION:

Claimant: In person

Respondent: Ms G Williams, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant is and was at all material times a disabled person within the meaning of section 6 and schedule 1 of the Equality Act 2010;
2. The claimant was not subject to unlawful discrimination or victimisation contrary to the Equality Act 2010;
3. The claimant was not subjected to a detriment because of any qualifying disclosure, none having been made; and
4. The claimant was not dismissed because of making a qualifying disclosure.

REASONS

1. This Judgment was reserved because, at the conclusion of a 5 day hearing, the evidence was completed but the parties had not had time to make submissions. It was therefore agreed that the respondent would file written submissions by 9 February 2018, and the claimant by 23 February 2018, and that the Tribunal would then meet to consider their decision in chambers.

Background

2. The claims which the claimant brings were clarified at a preliminary hearing on 16 May 2017. It was confirmed that the claimant claimed disability discrimination, victimisation contrary to section 27 of the Equality Act 2010, detriment because of making a qualified disclosure within the meaning of section 47B Employment Rights Act 1996 and dismissal because of making a qualified disclosure within the meaning of section 103A of the Employment Rights Act 1996.
3. The claimant asserts that he is a disabled person within the meaning of the Equality Act 2010. The physical impairment he relies on is hypochondroplasia, which the claimant contends has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities. The claimant contends that he has been disabled from birth.
4. The claimant also contends that he was perceived to be disabled and discriminated against on the grounds of his perceived disability.
5. At the preliminary hearing on 16 May 2017, the claimant confirmed that he made two protected disclosures as follows:-
 - (1) On 30 June or 1 July 2016, he told the head teacher of an incident which took place on 29 June 2016, between a member of staff and a pupil in a corridor. The claimant contends this was a safeguarding issue, affecting the health and safety of the pupil or the member of staff concerned; and
 - (2) On 5 July 2016, the claimant made a disclosure to senior staff, Caroline Sullivan and William Lewis, informing them that he had been left alone in a small room with 2 or 3 pupils, one of whom, MM, was of a violent nature. The claimant informed the 2 senior members of staff that this was a breach of his health and safety, and a breach of a legal obligation to provide that pupil with the appropriate level of supervision.
6. The claimant contends that he suffered detriment because of the 2 qualifying disclosures he made. In particular he says that members of staff were awkward with him, pupils called him a “snitch”, and the relationship between him and other members of staff and the public thereafter became strained.
7. The claimant considers that his resignation was provoked by the detrimental treatment which he suffered as a result of his qualifying disclosures and the failure of the respondent to provide him with appropriate support.

8. The claimant also considers that he suffered from discriminatory behaviour because of his disability.
9. The claimant makes a number of complaints of discriminatory behaviour and protected acts within the meaning of section 27 of the Equality Act 2010. In particular the claimant considers that:
 - (1) He made verbal complaints to William Lewis, the head teacher in September and on 4 October 2016, informing him that members of staff and pupils were laughing at him, making discriminatory comments relating to his height;
 - (2) He made a complaint of similar discriminatory behaviour to the new head teacher, Vicky Heaton by email dated 14 December 2016;
 - (3) He made further complaints to Vicky Heaton during a meeting on 14 December 2016 and by email dated 9 January 2017; and
 - (4) On 16 January 2017, the claimant told Diane Lever of the respondent's HR Department of the discriminatory treatment he was facing in the workplace.
10. The claimant contends that his complaints were ignored and that no steps were taken by the respondent to stop the discriminatory treatment. The claimant asserts that, instead, he was told that he needed to be more resilient, that staff needed to "vent" and the new head teacher questioned whether the claimant was right for the job.
11. The claimant also contends that he suffered harassment within the meaning of section 26 Equality Act 2010. He was hurt and offended by the comments made about his height. The claimant contends that the respondent was fully aware of the harassment and its effect on the claimant but took no steps to prevent it.
12. As a result of the discriminatory and detrimental treatment, and the failure of the respondent to provide the appropriate support, the claimant resigned on 16 January 2017 and claims that he was constructively dismissed.

Evidence - documents

13. The Tribunal was provided with a bundle of documents which the parties had been unable to agree. At the beginning of the first day of the hearing, 22 January 2018, the claimant made a number of applications with regard to the contents of the bundle.
14. In particular, the claimant considered that there were documents which he had disclosed to the respondent but which had not been included in the bundle which the respondent had prepared. The claimant made a written application to the Tribunal, dated 9 January 2017, for documents and photographs accompanying his disability impact witness statement to be included in the bundle. After discussion between the Tribunal and the parties, it was agreed that these would be included and they were added.

15. The claimant also asked for 3 further pages of diary extracts to be included in the bundle. The respondent questioned the relevance of the diary extracts which consisted of the claimant's notes of training on safeguarding and which did not appear to be relevant to the issues in the case. However, it was agreed that these additional diary extracts would be added to the bundle: the photographs were included as page 67(a) of the bundle and the diary extracts were included as pages 150(a)-(c).
16. In addition, the claimant objected to a number of items in the bundle. The claimant's DBS check was said by him not to be relevant; however, the respondent contended that the DBS check record was available when the claimant was appointed and would tend to confirm that the respondent did not have a discriminatory attitude towards the claimant. The Tribunal disagreed and decided that the DBS check was not relevant to the issues. It was removed from the bundle (pages 123-128 were removed).
17. The claimant made an application for 2 further items, being two audio recordings of what he said were grievance meetings with the Head Teacher on 14 December 2016 and 16 January 2017 to be included in evidence and for the Tribunal to listen to them. The Tribunal was told that these were covert recordings of 2 meetings which the claimant had not at the time told the respondent that he was recording. The recordings amounted to approximately 1½ hours of audio recording. Agreed transcripts appeared in the bundle at pages 302-319 and 320-367. The Tribunal was told that the transcripts were agreed by the respondent but nevertheless the claimant wanted the Tribunal to listen to the recordings in any event. The claimant reasoned that the way things were said and the tone of voices would assist the Tribunal in determining the issues. The respondent did not object as such but raised a safeguarding issue in that individual children at the respondent's school were named within the recorded discussions. The respondent further contended that it was not necessary to listen to the actual recordings when the transcripts were agreed, nor was it proportionate in that it was estimated that listening would take a whole afternoon of hearing time and, thereafter, further time to refer to aspects of the recordings in cross examination. The Tribunal reserved its decision on that matter for consideration in the recess.
18. The claimant then raised the question of late disclosure by the respondent in that the respondent had apparently not sent him all the documents that they had about him when he issued them with a 'subject access request'. The respondent explained that Ms Sullivan, the deputy head teacher of the respondent school, had been on maternity leave at the time of the claimant's request and the respondent was not aware that she had emails which related to the claimant. When Ms Sullivan returned from maternity leave, these were located and disclosed. The Tribunal decided that no issue should be taken with such late disclosure in the light of the explanation from the respondent.
19. The Tribunal noted that, within the bundle, there appeared a number of names of children at the respondent's school, which was a special school. The Tribunal considered that the children's names should be redacted in full and not mentioned in the hearing. It was therefore agreed by the parties that individual children should be referred to, if at all, by initials.

20. Having resolved the above issues and due to the substantial amount of documentation provided by the parties and the numerous witness statements, the Tribunal thereafter used the rest of the first day as a reading day.
21. At the start of the second hearing day, the claimant asked whether the hearing itself would be recorded. The Employment Judge confirmed that the Judge's notes of the proceedings would stand as a record. The parties were warned that it is an offence to record the proceedings by other or electronic means.
22. The claimant also raised the issue of the true identity of the respondent. It was noted that his contract of employment named the respondent as "Cambian Childcare Limited". This issue had been raised at the preliminary hearing on 16 May 2017 and it had then been decided by the Employment Judge on that occasion that the correct name of the respondent is Cambian Childcare Limited. The claimant then withdrew his point.
23. In relation to the audio tapes of 2 meetings, the Tribunal confirmed that it had considered the matter during reading time on the previous day. The Tribunal did not consider it was proportionate to spend Tribunal hearing time listening to the tapes in full and that the transcripts, prepared by the claimant and agreed by the respondent, would suffice. The Tribunal also considered that the transcripts reflected what was said and the flavour of the conversations that took place at each meeting.
24. The claimant then confirmed that the 12 items listed in his amended ET1 were the incidents of discrimination and/or detriment that he relied upon, save that number 7 on that list was not in fact an incident at all, and likewise number 11 was about an email from the claimant to the respondent and therefore could not amount to an act by the respondent. The claimant also asked for an incident to be added in relation to the Secret Santa Midget Gems that he received in December 2016. The respondent pointed out that the item had been in the claimant's original pleading and has been deleted by him and was now being reintroduced by him but did not object. It was then agreed with the parties that the list, with numbers 7 and 11 deleted and the Midget Gems incident included, would stand as the claimant's list of incidents of discrimination/detriment for the purposes of determining the claims.

Evidence - witnesses

25. The claimant went first in giving his evidence from a written witness statement and he produced a second statement, titled 'addendum' to his witness statement. He was subject to cross examination.
26. The respondent called its new head teacher - Vicky Heaton; HR manager - Diane Lever; deputy head teacher - Caroline Sullivan, and two of its staff: Jade Chaisty and Kaysor Abu to give evidence. The respondent provided written witness statements for each of these witnesses together with a further witness statement of Amy Sefton who was not in attendance and did not attend the hearing to give oral evidence or be subject to cross examination. In those circumstances, the statement of Amy Sefton was not read or taken into account by the Tribunal in reaching its decision.

Issues

27. The issues which the Tribunal identified as being relevant to the claims were set out and agreed with the parties at the preliminary hearing on 16 May 2017. The issues to be determined are as follows:-
- (a) Whether the claimant is disabled as defined within the meaning of section 6 of the Equality Act 2010;
 - (b) Whether the respondent knew or ought to have known that the claimant was disabled as defined;
 - (c) Whether the respondent perceived the claimant to be disabled when he was not;
 - (d) Whether the acts or omissions referred to at paragraphs 1-12 of the particulars of claim were acts of disability discrimination and/or harassment contrary to section 13, and/or 15, and/or 26 of the Equality Act 2010;
 - (e) Whether the claimant was dismissed and if so was he dismissed because of his disability?
 - (f) Whether the claimant's complaints form a part of a continuing act and/or whether they have been brought within a relevant time limit pursuant to section 123 Equality Act 2010 and, if not, whether it is just and equitable to extend time.
 - (g) Whether the claimant was subjected to a detriment because he made a complaint of disability discrimination contrary to section 27 of the Equality Act 2010.

Qualifying/Protected Disclosures

- (h) Whether the claimant made a qualifying disclosure;
- (i) Whether the claimant was subjected to any detriment as alleged at paragraphs 1-12 of the particulars of claim, and if so whether it was because he made a qualifying disclosure and, if so, is the claim in time?
- (j) Whether the claimant was constructively dismissed and if so whether that dismissal was because he made a qualifying disclosure, in particular whether the respondent committed a fundamental breach of contract, whether the claimant resigned in response to that breach and whether the reason or principal reason for the fundamental breach was because the claimant had made a qualifying disclosure.

Findings of Fact

28. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts

of evidence as arose on a balance of probabilities. The Tribunal took into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

29. Having made primary findings of fact, the Tribunal considered what inferences it should draw from them, for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances of the case, to consider whether, taken together, they may represent an ongoing regime of discrimination.
30. The Tribunal's findings of fact relevant to the issues which had to be determined are as follows:-
 - (1) The claimant commenced work for the respondent on 23 May 2016 as an ICT teacher. The respondent runs schools for children who have been excluded from mainstream education due to their challenging behaviour.
 - (2) On 28 June 2016, the claimant witnessed an incident between a teacher at the respondent's school and a student. In that incident, the child raced down the corridor, through a door, and the teacher tried to shut the door with her foot to slow the child down. The child was not injured but he shouted at the teacher, saying that she might have trapped his hand in the door. The claimant was concerned about the health and safety implications of the incident and what might have happened.
 - (3) On 29 June 2016, the claimant reported the incident he had witnessed the previous day to the head teacher, Mr Lewis. The claimant reported there had been an incident and expressed his concern that somebody could have been hurt. The head teacher said that he would speak to the teacher concerned about the incident, whereupon the claimant expressed concern that if the head teacher did so, the teacher would know that the claimant had reported it.
 - (4) On 5 July 2016, the claimant was teaching 3 children in a small classroom. One child, MM, had a history of violence. The usual staffing ratio at the school was to have one teacher and one teaching assistant to 4 children. In the course of the lesson, one child left the classroom, and the teaching assistant went out to see what the issue was with that child, which left the claimant alone to teach 2 children including MM. The claimant felt unsafe. After the lesson, the claimant reported to the head teacher and to Ms Sullivan the fact that he had been left alone with MM and that the recommendations for supervision of MM had not been followed, namely that two members of staff should be present at all times. The head teacher decided and the claimant agreed that he should bring the matter to the attention of all staff at the next staff debrief which took place at the end of each working day. The claimant therefore raised the matter at the staff debrief.

- (5) On 12 July 2016, the claimant completed an information report sheet to describe an incident in an English class where MM came in, followed by a classroom assistant. The claimant was in attendance for supervisory purposes. MM stood approximately 3-4 feet away from the claimant and the claimant recorded that he said, "I'll cut off your nose." The claimant's report suggests that the claimant viewed this as having been said in a joking manner. The teaching assistant also reported the incident and said that the student had told the claimant, "I'll cut your fucking nose off". As a result, the head teacher was called to investigate and the pupil was subsequently excluded from school for a short period.
- (6) The school then closed for the summer holidays.
- (7) At the beginning of September 2016, the claimant began to experience students making discriminatory remarks to him, including "little man". On one occasion, Ms Chaisty was present and remarked to the claimant, "You will not stop them saying that".
- (8) In September 2016, Kaysor Abu called the claimant "big man". He was referring to the fact that the claimant had taken over responsibility for the ICT curriculum. The claimant pointed out to Mr Abu that he did not like the term "big man" and he thought it was a reference to his lack of height. Mr Abu immediately apologised and did not repeat the phrase either to the claimant or at all.
- (9) Also in September 2016, a residential care worker assigned to one of the students, made a remark within the claimant's hearing, saying "I love dwarves, they're so cute".
- (10) The claimant reported the 3 incidents and comments to the head teacher, Mr Lewis, who agreed to monitor the situation. The claimant confirmed that he was happy that the head teacher should monitor such treatment.
- (11) In the third week of September 2016, the claimant proposed to run a photography project with some of the students. It was suggested that a visit could be made to Tyldesley Mines which are disused coal mines not far from the school. The photography project was discussed in the school reception, when the claimant was present with a number of staff and students. A remark was made about dwarves living in the mines and local legends to that effect. The claimant did not make any complaint about that comment but an entry about the incident appears in his diary.
- (12) In early October 2016, a support worker employed by a third party, make a remark about the claimant not being able to see over a balcony. The claimant spoke directly to the support worker about her comments as she was not a member of the respondent's staff.
- (13) On 4 October 2016, the claimant sent an email to the head teacher about having heard the remark by the support worker. The claimant

confirmed to the head teacher that he would deal with it. The email was not a complaint. However, the head teacher raised the remark in the next staff meeting, as a result of which the claimant confirmed that he was feeling much better.

- (14) In mid October 2016, the claimant was driving the school minibus for a field trip. He overtook another member of staff's car in the course of the trip. Later that day, the driver of the car that had been overtaken spoke to the claimant about his speeding. The claimant was upset by this and went to the head teacher to ask to be taken off driving duties. No complaint was made by the driver of the car that had been overtaken or any other member of staff to the head teacher about the incident. The head teacher told the claimant not to worry and pointed out that the respondent's vehicles have trackers if the matter needed investigating.
- (15) In late October 2016, the respondent's school was subject to an Ofsted inspection which resulted in the school being placed in special measures. The head teacher, Mr Lewis, left the respondent's employment in November 2016 and a new head teacher, Ms Vicky Heaton, the head teacher of another of the respondent schools nearby, was appointed to care take the school. The claimant recorded in his diary that Ms Heaton "seems OK, strict but nice".
- (16) On 1 December 2016, there was an incident in an ICT lesson, where a student wanted to use the computer to play music and not to do work. This was refused by the claimant. Shortly afterwards, Ms Chaisty came into the room and the student asked her if he could use her computer. Ms Chaisty said "yes" because she was trying to be helpful. The claimant then pointed out that he had in fact refused to allow the student to use a computer to play music. The student became cross and punched the claimant. This incident arose due to a misunderstanding between Ms Chaisty and the claimant.
- (17) On 13 December 2016, the claimant emailed the new head teacher to inform her about "a disclosure that I made in early July of this year". The claimant mentioned that there had been numerous incidents/comments which were discriminatory and made regarding his height which were said more than once. The claimant also said that he told the previous head teacher about the issue and also emailed him. The claimant's email to the new head teacher concluded by saying that he was sending her this information as he wished her to be fully aware of the "previous issues that I have faced". The Tribunal did not consider this to be a complaint; it was the claimant simply making the new head teacher aware of the claimant's previous treatment.
- (18) In response, the new head teacher replied saying that she was not aware that the claimant had faced issues in the past and that they should have a meeting. The new head teacher advised the claimant that she would not tolerate any form of derogatory comments made to or from anyone within the school.

- (19) The following day, 14 December 2016, the claimant met with the new head teacher. He asked the new head teacher for a copy of the school's complaints procedure and opened the meeting by suggesting that he did not want to speak to her but that he wanted to raise matters with her superiors. The head teacher made efforts to get the claimant to confirm the contents of his complaint. However, the claimant confirmed during the course of that meeting that the matters he was referring to were "in the past" (bundle page 306) and he said, "It's not happened in the past few weeks" (bundle page 314). The claimant confirmed that he did not want the head teacher to take any action, although he covertly recorded the meeting. The claimant appeared concerned to obtain a copy of the respondent's grievance procedure and he repeated this request to the new head teacher on several occasions. She did not have a copy of that procedure to hand. However, she did tell the claimant that the procedure was stored on the intranet to which the claimant had access as a member of staff.
- (20) Following the meeting, the same day, the new head teacher emailed the claimant (bundle page 186). The email is clear that the new head teacher would arrange a further meeting before the Christmas break and that she would investigate any issues which the claimant brought to her according to the policies and procedures in place. The new head teacher also asked the claimant to keep her informed of any issues he felt she needed to be informed of at all times, in order for her "to have a full understanding of the extent of the problems you are facing".
- (21) On 20 December 2016, the claimant was asked by Ms Sullivan to move his car, in order to take a student home. The claimant responded to Ms Sullivan in a sarcastic manner and the conversation became heated. Ms Sullivan later apologised to the claimant.
- (22) Shortly before the end of term, the claimant was in the school kitchen preparing food for a Christmas meal with other staff. The head teacher came in and asked where the pupils were. The claimant responded that he did not know, at which the head teacher became cross with the claimant and reacted badly to his statement. The head teacher later raised the matter as a general staff issue in a staff meeting.
- (23) On the last day of term, 21 December 2016, the respondent's staff all went out for a Christmas meal. In the course of the meal they exchanged "secret Santa" presents to the value of £5. Ms Chaisty brought the claimant 3 presents but it transpired that the claimant had an additional, fourth present which was in different wrapping paper to the presents which Ms Chaisty had bought for him. Ms Chaisty had not bought the claimant the fourth present, which the claimant left till last and hesitated in opening it. The fourth present was a packet of Midget Gems. The Head Teacher took the present and the wrapping paper and the label back to school immediately to investigate and see what she could find to trace who had brought the midget gems for the claimant, but without success.

- (24) In evidence, the claimant confirmed that he had previously purchased a packet of Midget Gems as a present for a student but then thought better of it. He had left the Midget Gems in his locker but these had subsequently disappeared.
- (25) On 21 December 2016, at 19:13, the head teacher emailed the claimant to confirm the action she had taken in relation to the midget gems including the fact that the claimant had declined to talk or discuss the situation. The head teacher confirmed that she had done a fact-finding exercise to try to establish the person who sent the present, including interviewing by telephone all staff who were at the meal; that she had taken the wrapping paper and sweets; that she had gone back to the school after the meal to search the staffroom and other areas to see if she could find evidence, and that she had spoken to her superiors. The head teacher also confirmed that she was going to create a CPD session on equality and diversity and deliver this in the first week of term back to school on 11 January 2017 as whole staff training so that the staff would be crystal clear on her expectations of their behaviour.
- (26) On 9 January 2017, school resumed. That morning, the claimant experienced a panic attack as a result of which he emailed the Head Teacher (bundle page 220) to say that his position of ICT teacher was no longer tenable and that he could no longer work at Tyldesley School. The claimant stated that, if there are any other suitable positions within the Cambian Group, he would gladly take the opportunity to continue working for the respondent.
- (27) The head teacher made efforts to arrange a meeting with the claimant, for 12 January 2017, at school. The claimant replied saying that he wanted the meeting to be out of school, off school premises, or alternatively after school.
- (28) On 12 January 2017, the claimant had a brief telephone conversation with Ms Lever of the respondent's HR department, as a result of which a meeting was arranged for 16 January 2017 at 3.30pm at the school.
- (29) On 16 January 2017, the claimant met with Ms Lever of HR, by telephone, to air his concerns on an informal basis about the discrimination he considered he had suffered. The claimant told Ms Lever that the incidents which he had reported to the previous head teacher, Mr Lewis, had been resolved but that there had been incidents since then. Ms Lever asked him if he wanted to deal with the matters formally or informally and they discussed what other jobs might be available for him with the respondent. As a result of that meeting the claimant felt ready to return to work and was prepared to speak on an informal basis to the head teacher, Ms Heaton, that afternoon.
- (30) On the afternoon of 16 January 2017, the claimant met with Ms Heaton. He recorded the meeting covertly. The meeting commenced at around 3.30pm and lasted approximately half an hour. The agreed transcript is clear that this was an informal meeting, more in the

manner of a discussion and was not structured; although at the beginning of the transcript the claimant suggests to Ms Heaton that the meeting should be a supervision meeting.

- (31) In the course of the meeting, the claimant raised the safeguarding issue from July 2016 together with his complaint about Kaysor Abu's comment to him and a complaint about the comment about dwarves in the coal mine. However, the claimant confirmed that these matters had been dealt with by the previous head teacher, Mr Lewis, and in staff meetings.
- (32) Ms Heaton asked the claimant what he wanted her to address (bundle page 334) but the claimant does not tell her what or who has offended him or what specific acts he is complaining about. At best, the claimant says that he has noticed a change although nothing has been said and the claimant comments, when pressed, "It's just the treatment", and "it's the way things are said". The claimant then says that he does not like the way he is spoken to by staff, including Ms Heaton. The conversation wanders and eventually, the head teacher asks the claimant if he thinks he is in the right job and if he believes he is resilient enough for the school. The claimant says he is but that he should not have to put up with "crap" that other members of staff come out with, which he also describes as "banter". The claimant alludes to the need for boundaries and the head teacher asks him what it is that he wants to achieve.
- (33) Eventually, the head teacher says that there appear to be three ways forward (bundle page 351): firstly, the claimant can make a formal complaint and the school will do an investigation; secondly, the claimant can come back to work and they will start again afresh, drawing a line under things. In the course of the discussion on these options, the claimant accepts that the previous incidents had been sorted out and he says he believes he is in the right job (bundle page 352). However, the head teacher suggests that the claimant may not be in the right place. As the conversation develops, the head teacher sets out the third option and offers to look at a package for him because the claimant says that he is interested in a job but he does not want to come back to the particular school he has been working at (bundle page 353). Ms Heaton reminds the claimant that he could draw line in the sand and move on but that the claimant needs to be aware that the school is a challenging school, that staff need an opportunity to "vent" and that he should not see comments as necessarily aimed at him. The claimant agrees with this view. Then, later in the conversation (bundle page 363) the claimant repeats that he does not like his treatment but is not willing to give up his job because of somebody else's behaviour. The head teacher is left with the distinct impression that the claimant will go away and think about things. At the end of the meeting, the claimant thanks the head teacher for speaking to him frankly and says that he will go away and make a decision about whether he is coming back to work. The meeting ended some time after 4.00pm and the claimant went home.

- (34) At 17:18 that day, the claimant sent an email to the respondent's HR department saying that, after his meeting with Ms Heaton, he had decided to resign with immediate effect. That email was in complete contrast to the discussions he had had with the head teacher in their meeting less than an hour beforehand.
- (35) On 19 January 2017, the claimant emailed the respondent's HR asking, "Are there no other places at which I could remain in employment with the respondent?" (bundle page 277)
- (36) On 24 January 2017, the respondent's HR Manager, Ms Lever, emailed the claimant to confirm that the respondent had offered, and he had accepted, informal discussions and that they understood that he had been looking at a return to work and that the respondent regretted that the claimant had chosen to resign. (bundle page 278)
- (37) Subsequently, in March 2017, the claimant made a Data Protection Act request for disclosure of documents in connection with actual or prospective legal proceedings and also served an Equality Act 2010 discrimination questionnaire. The respondent then pointed out to the claimant that the questionnaire procedure under the Equality Act 2010 was repealed in 2014.

Conclusions (including where appropriate any additional findings of fact)

31. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.
32. On the issue of whether the claimant has a disability, the Tribunal considered that hypochondroplasia is a physical impairment by reason of the restricted growth experienced. The claimant has had the condition since birth and therefore it is a long-term impairment. On the question of adverse effects, the claimant had produced very few examples to support his contention of disability. The claimant relied on the fact that, when he went shopping, he could not always reach the highest shelves in the supermarket; that he had to buy children's clothes due to his size and stature; that he could not reach the top shelves of the cupboards in his kitchen, that he struggled with obtaining items from a chest freezer and that he had to deal with the reaction of strangers in the street to his physical size. The Tribunal noted that the word "substantial" within the statutory definition has been held to mean more than trivial. The Tribunal considered that there were adverse effects of the claimant's disability and that they were more than trivial. The Tribunal considered that the claimant's claim of disability was a borderline case but that, on balance, the claimant satisfied the definition of disability.
33. On the question of whether the respondent knew or ought to have known that the claimant was disabled, the Tribunal have no hesitation in finding that the respondent knew the claimant to be a disabled person and its personnel viewed him as such. A telling example was the discovery of the Midget Gems within the secret Santa present. The reaction of the respondent and its employees was such that they were immediately aware that there was an

issue and offered apologies, having been sensitive to the offence that may be caused.

34. The Tribunal considered the acts which the claimant had identified at paragraphs 1-12 of the particulars of claim and whether they were in fact acts of disability discrimination, harassment or otherwise. The Tribunal dealt with them as follows:-

(1) and (2) The claimant had not identified either of these acts as acts of discrimination but rather the first two items in his amended ET1 were the protected disclosures he relied upon which are referred to in these reasons above at paragraph 5.

(3) In relation to number (3), this in fact comprises several matters which are dealt with as follows. The comment by Jade Chaisty to the effect that the claimant would not get the students to stop making comments about him was found to be an observation about the behaviour of the students at the school and their mentality. The Tribunal did not find this to be an act of less favourable treatment or of harassment but more an observation about the behaviour of difficult students who are inclined to pick on individuals. The issue about Kaysor Abu's comment of "big man" arose from a misunderstanding. The claimant's view was pointed out to Mr Abu and he apologised. His apology was accepted by the claimant. The support worker, Amy, was not an employee of the respondent and out of the control of the respondent and the claimant dealt with that aspect himself. The knife incident with the pupil was not related to the claimant's disability. There was no suggestion in any of the reports that the reason for the student wielding a knife near the claimant had anything to do with the claimant's disability and the claimant never asserted such in his ET1 or in submissions. The fact that the head teacher agreed to monitor the situation was not an act of discrimination - the claimant agreed to that course of action and confirmed on several occasions that he had been happy with Mr Lewis's monitoring and handling of the situation.

(4) The comment about dwarves in the coalmine is an act of less favourable or harassment but the Tribunal noted that the claimant did not complain about this matter at the time to anybody. The claimant contended that this incident took place in the third week of September 2016. The Tribunal noted that, at the beginning of October 2016, the claimant referred those matters that he wished to complain about to the Head Teacher and those matters referred did not include a complaint about this comment. The Tribunal found it surprising that such an obviously discriminatory statement should not have been referred to the head teacher to monitor nor those who had made the comment, given that it was, on the claimant's evidence, the most recent incident immediately prior to the claimant's referral to the head teacher.

- (5) In relation to the comment about the claimant not being able to see over the balcony, the evidence was that the support worker was not employed by the respondent and the claimant told the head teacher that he would speak to her, which he did and she apologised. Indeed, the claimant's diary entry on this event confirms that he claimant was "feeling much better now" after having dealt with it. In relation to Jade Chaisty's alleged comment about 'little man syndrome' the Tribunal did not find that such a comment had been made. Jade Chaisty's evidence, largely unchallenged, was that she denied ever having made such a comment. The comment made by Kaysor Abu was not repeated after he had apologised for it. The Tribunal accepted that, as the claimant says under number 5 in his amended ET1, he made a complaint to the previous head teacher, Mr Lewis, the issues were brought to the attention of all staff by the head teacher and the claimant, in the staff meeting, and dealt with.
- (6) The complaint made by the staff driver regarding the claimant speeding was not in fact a complaint. Those individuals present at the time did not raise the matter with anybody save for the claimant. The Tribunal found that the matter as raised with the claimant was not because of his disability and there was no evidence to link the incident in any way to his disability. Rather the Tribunal considered that those members of staff would have spoken similarly to any other member of staff who had been driving fast and overtaking them whilst having schoolchildren in their vehicle.
- (7) It was agreed at the beginning of the hearing that the points made under item (7) could not amount to an act of discrimination.
- (8) The fact that the claimant was assaulted by a student was not because of his disability but rather because of a misunderstanding about the claimant's instructions as to the student's use of IT equipment.
- (9) The Tribunal found that the pigeon hole incident did not happen. The claimant had a pigeon hole and it was at a height he could reach. There is no evidence to suggest that that pigeon hole was moved and it was denied by the respondent's witnesses. Those denials were unchallenged by the claimant. In particular, the Tribunal noted that, in the course of the meeting of 14 December 2016 which the claimant had covertly recorded, the claimant said that there had not been an incident in the past 2 weeks and that there had not been anything which had happened in the last few weeks (bundle pages 306 and 314). This is in contrast to and contradiction of the claimant's diary entries on this matter which suggested that this incident had happened in the week ending 9 December 2016, almost immediately prior to his first recorded conversation with the Head Teacher. The Tribunal concluded that those incidents could not have happened at the time

because, if they had, the claimant would have raised them with the head teacher as part of any complaint, they being fresh in his mind. Further, in his email to the head teacher on 20 December 2016, the claimant clearly refers to his complaint being about "historical discriminatory comments". The Tribunal therefore accepted the evidence, supported by contemporaneous documents that there had not been any new incidents of alleged discriminatory behaviour, hence the claimant did not pursue a complaint about them. The claimant's evidence was that he had been reluctant to name names, that he wanted to take the matter higher but the Tribunal noted that he never in fact did so. After the meeting of 14 December 2016, the head teacher, Ms Heaton, was clearly asking the claimant to give her an opportunity to look at his complaints before he escalated them. The claimant neither gave Ms Heaton the information necessary to investigate, including the details of who had said what and when and what had happened, nor did he escalate the matter and to her managers. Nevertheless, in the amended ET1, under item 9 the Tribunal considered that the claimant's statement that he was persuaded by the head teacher to relay his complaint to her is simply not correct because he did not at any stage relay his complaint to her, or in any form that she could possibly pursue. Indeed, the claimant confirmed that he was reluctant to give Ms Heaton information because part of his complaint was about a senior member of staff. The fact is that the claimant did not relay his complaint to the head teacher. Further, the Tribunal did not find that Ms Sullivan was verbally aggressive to the claimant as alleged after he had made a complaint or at all. The claimant had not made a complaint nor conveyed sufficient information for any complaint to be discerned. Therefore the Tribunal considered that Ms Sullivan was not aggressive and that there was no act of discrimination involved. The claimant's email to the head teacher was about historical discriminatory comments, as he says himself, and therefore not relevant.

- (10) The claimant's pleading on this point relates to the staff meeting which took place after the incident in the school kitchen when the head teacher asked where the pupils were and the claimant said that he did not know. The Tribunal considered that it was appropriate for the head teacher to raise this matter in a staff meeting and, further, that the head teacher's comments were not aimed at the claimant alone nor intended to single him out. Rather they were aimed at all staff. The Tribunal considered that it was reasonable for the head teacher to be concerned that staff did not know where pupils were, particularly given the nature of the pupils attending the respondent's school which, at the time, was a school in special measures. In relation to the Secret Santa present, the Tribunal noted that the respondent never got to the bottom of who may have been responsible for the Midget Gems within the claimant's Secret Santa but that, nevertheless, the head teacher's actions were appropriate and proportionate in an

effort to address that incident, as far as was possible. She took pictures of the evidence; she retained the evidence; she returned to work and searched the staffroom and other areas of the school; she questioned every member of staff. At 7.00 pm that evening, the Head Teacher emailed the claimant to confirm the action she had taken, that she proposed training for all staff in the New Year and that she proposed taking a hard line on such behaviour. The Tribunal further noted that, in the course of the meeting on 16 January 2017, the claimant accepted that the Head Teacher had done everything that she could and he took the view that it would be guessing to work out who may have been responsible.

(11) It was agreed at the beginning of the hearing that item (11) was not an act of the respondent.

(12) The Tribunal noted that under this point the claimant had listed five points (a)-(e) which he contends are victimisation. The Tribunal however considered that the claimant had taken these matters out of context. The claimant contended that the head teacher made comments which he believes to be demeaning and negative, whereas when the transcript is read carefully, it is clear that the head teacher is giving the claimant options, asking rhetorical questions and providing examples for consideration. Those comments are not discriminatory of the claimant. The fact that the head teacher suggested that staff get stressed and need to "vent" was not a matter of less favourable treatment or harassment of the claimant but a statement of the head teacher's opinion about the cause of staff behaviour in a challenging working environment. Item (e) was one of 3 options given to the claimant in the course of the meeting. There was still a chance of the claimant returning to work and/or putting in a formal complaint as alternative ways of resolving the situation which he perceived and of the parties moving forward.

35. In light of the above findings, the Tribunal concluded that the claimant had not in his amended ET1 identified any act which was found to be an act of unlawful discrimination against the claimant or that such acts and allegations made by the claimant were supported by the evidence.

36. In relation to the claimant's dismissal and the question of whether he was dismissed because of his disability, the Tribunal considered this matter carefully. The claimant was not expressly dismissed but contended that he was constructively dismissed. For a constructive dismissal, the respondent must be in fundamental breach of the claimant's contract. Given that the claimant does not have the necessary length of service to claim ordinary unfair dismissal, his complaint is that he was constructively dismissed because of acts of discrimination and/or constructively dismissed in response to the protected disclosures he made. However, the Tribunal did not find that the respondent was in fundamental breach of the claimant's contract. In January 2017, the respondent's head teacher was trying to address 'complaints' that the claimant was at best alluding to, without any information

or detail about what he complained. She was attempting to meet him halfway and to explore options for his future employment. There was no fundamental breach of the claimant's contract of employment in that situation, and nothing that amounts to an act of discrimination because of disability, nor that was caused by or in response to the protected disclosures which the claimant made in the previous school year.

37. In relation to the issue of whether the claimant's complaints form part of a continuing act, the Tribunal found that the claimant's complaints do not amount to unlawful discrimination and therefore cannot form part of a continuing act. The respondent through its head teacher was doing all it could to address those matters it knew of, once it knew of them. However, throughout the recorded meetings, what is apparent is that the claimant is not providing any information that might allow the head teacher to undertake any or any reasonable investigation of matters. This is supported by the claimant's evidence to the effect that he did not provide such information to the new head teacher because he was reluctant to do so.
38. Further, the Tribunal noted that the claimant had previously made an informal complaint to the previous Head Teacher, Mr Lewis, who had acted upon it by raising it in a staff meeting and providing the claimant with an opportunity to talk to staff about the matters. The claimant's evidence was that matters up to then were dealt with. Nevertheless, in emails to the new Head Teacher, Ms Heaton, the claimant suggested that those matters had not in fact been dealt with properly. This is a contradiction of the claimant's previously stated position, namely that he was happy with the way that Mr Lewis had dealt with matters.
39. The claimant's first email to Ms Heaton, shortly after her appointment, reads to the effect that the claimant only wanted to make her aware of "a disclosure that I made in early July" and that there had been incidents/comments made by staff which were discriminatory regarding the claimant's height. However, in that email, the claimant confirms that he had told the previous head teacher about the issues. The claimant says to Ms Heaton "I am sending you this information as I wish you to be fully aware of the previous issues that I have faced". The Tribunal did not take that statement as the presentation of a complaint and nowhere in its contents is a complaint about such matters suggested.
40. In the claimant's second email to Ms Heaton he asked for "an update" on his complaint. In response, Ms Heaton understandably asks the claimant what complaint he has made, and says that he should tell her and that she will investigate. Ultimately, on 21 December 2016, Ms Heaton confirmed what she has done to investigate the Midget Gems incident in detail. In all the circumstances, therefore, the Tribunal was unable to conclude that there had been any discriminatory treatment whether forming part of a continuing act or at all, or any detriment as a result of such treatment.
41. The Tribunal considered the claims of detriment for making protected disclosures. The Tribunal did not consider that either of the disclosures relied on by the claimant as set out in paragraph 5 above were in fact qualifying disclosures. The Tribunal considered that the first disclosure relied on by the

claimant in fact amounts to him raising a possible safeguarding issue and the risks of a possible incident. There was no conveyance of facts. Rather, the claimant expresses his concern about the behaviour of a colleague and his belief that there was a “near miss” with the potential to have caused harm. Even if this matter amounted to a qualifying disclosure, the Tribunal noted that the only detriment identified by the claimant that could be linked to this disclosure was the fact that a child or children had called him “snitch”. Such comments took place at the latest in July 2016 and are now significantly out of time, given the claimant presented his ET1 on 9 March 2017.

42. The second disclosure relied on by the claimant for protection arose from a misunderstanding by the claimant as to a recommendation and guidance. The claimant had read notes about a child which included a recommendation for supervision of that particular child at his residential home. The practice in the respondent’s classrooms was for 2 staff to be present and that, if a pupil left the room of their own accord, one member of staff would follow that pupil in order to supervise and return them. The Tribunal considers it was reasonable for the claimant to be concerned about the situation which arose as a result of one staff member leaving the room. However, the situation was addressed in the staff meeting because it was reported by him and by others. The Tribunal considered that the claimant’s concerns about a potential situation do not amount to a conveyance of facts which would be a disclosure qualifying for protection. In any event, the claimant brought no evidence of any detriment arising from this alleged protected disclosure, nor was it suggested that he had suffered any detriment as a result of raising the matter.
43. In light of the above and in light of the fact that the claimant was not found by the Tribunal to have been constructively dismissed, the claimant’s claims of whistle-blowing detriment/disclosure fail and are dismissed.
44. In the course of its deliberations, the Tribunal spent some time reviewing the evidence presented by the claimant in support of his case. The claimant’s diary gave the Tribunal particular concern. Certain matters appeared as diary entries but other matters which the claimant sought to rely upon did not. The omission of certain matters caused the Tribunal concern and led it to question whether the diary had been written up contemporaneously or not. On the balance of probabilities and in light of the contemporaneous documentation surrounding a number of matters, the Tribunal concluded that the diary was not necessarily compiled immediately after a number of events. In those circumstances the Tribunal did not accept that the claimant’s diary was contemporaneous or accurate.
45. The Tribunal noted that the claimant relied on his diary as evidence of the acts which he contended were discriminatory and/or detrimental. This is a diary made and recorded by the claimant. The Tribunal had expected to see some form of corroborating evidence but were concerned that there was little or no corroborating evidence of much of what was in the diary, and indeed there were a number of anomalies - matters appeared in the diary but did not appear in the transcripts of contemporaneous discussions. Further, there were significant incidents in July 2016 which the claimant considered sufficiently serious to have filled out incident reports and reported them to the respondent. Nevertheless, these incidents do not appear in the diary which

the claimant confirmed he had used to record serious incidents. If the claimant's diary had been a complete record of events as they happened, the Tribunal would have expected all incidents to appear in it. Further, the diary makes no reference to the Ofsted inspection or its outcome and effect on the school. The Tribunal considered it was not credible that a diary of a teacher at the school would not at the very least mention such an important Ofsted inspection. The Tribunal took note of the fact that Ofsted inspections are understood to be particularly stressful and pressurised times at school with much activity going on and people under a high state of alert. In addition, as a result of that Ofsted inspection, the school was put into special measures. That is a significant outcome and one which the Tribunal would have expected to have been recorded and/or referred to in the claimant's diary, but it is not mentioned.

46. Certain matters, like the pigeonhole incident and a discussion about the undateables programme, appear in the claimant's diary clearly marked with a date being the week ending 9 December 2016. The claimant spoke to the Head Teacher on Wednesday 14 December 2016, only 3 working days later, but they do not appear to have been mentioned in the transcript of that meeting. The Tribunal were surprised that the claimant, when asked by the head teacher during the meeting for examples of events that he was complaining about, did not then raise what were, according to his diary, the most recent incidents, presumably fresh in his memory and possibly still causing him alarm. When pressed in that meeting by the head teacher, the claimant confirms that nothing had happened recently and he says that it is not a case of there being recent events, such as in the past two weeks. Instead, he says that things have been in the past and that they were not dealt with properly in the past. The Tribunal considered it inconceivable that the claimant would not have immediately referred to incidents if they had happened so recently.
47. The Tribunal was also concerned that the claimant never raised a formal grievance. He put nothing in writing, except those matters which appear in his diary and the incident reports which appear in the bundle. It was apparent from the evidence that the claimant knew he needed to record things if he felt they were adverse or detrimental, hence his evidence that he kept a diary. However, he did not formalise matters when invited to do so and even when pressed to do so by the new head teacher. The claimant contended that he did not have the respondent's grievance policy despite asking for it. However, the claimant was the head of ICT and will have known where the grievance procedure could be found, either on the intranet or by reference to HR with whom he communicated on other matters. The Tribunal considered that the claimant could have found the grievance procedure easily if he had wanted to but that, in any event, the claimant was aware that he could complain about matters but he chose not to. The Tribunal also considered that a lack of the grievance procedure being handed to him, about which the claimant complained in his case, was not a barrier to the claimant pursuing matters formally had he chosen to do so.
48. In relation to the time point raised by the respondent, the Tribunal noted that allegations prior to 13 November 2016 would be out of time unless part of a

continuing course of conduct. The Tribunal further noted the claimant's comments in evidence and in the recorded meeting, to the head teacher, that matters were "historical". Mr Lewis, the head teacher who dealt with those historical matters, was the previous head teacher and had left the school in late October/early November 2016. The Tribunal considered that the matters dealt with by Mr Lewis were out of time and the Tribunal accepted the evidence of the claimant that those matters were historical and had been dealt with. Any claim the claimant now makes in relation to those matters is therefore out of time.

49. That leaves the only incident about which the claimant might complain as in time, the Midget Gems incident, which took place on 21 December 2016. The incident with the Midget Gems troubled the Tribunal. In the absence of a continuing course of conduct, this event was the only act of potential discriminatory or detrimental conduct which was in time for the purpose of the claimant's claims. The Tribunal noted that this had been a matter on which the claimant had changed his position a number of times. The Midget Gems incident had been set out briefly in the first ET1 of 9 March 2017. The claimant later submitted amended grounds of claim in which the reference to the Midget Gems had appeared under item number 10. Those amended grounds of claim were subsequently re-amended and the reference to the Midget Gems incident was entirely deleted. Nevertheless, at the beginning of the hearing, when the Tribunal reviewed the incidents of discrimination and detrimental conduct which the claimant relied upon, the claimant sought to reintroduce the fact of the discovery of the Midget Gems at the Christmas party as an act of the respondent.
50. The Tribunal found that the respondent and its new head teacher, Ms Heaton, dealt with the matter appropriate, immediately and as effectively as it could given the difficulties in investigating who had been the perpetrator of that incident. A number of questions about that incident and the origin of the midget gems packet remained and were unresolved by the evidence heard by the Tribunal. Accordingly the Tribunal makes no finding of any discriminatory conduct arising from that incident. Further, the Tribunal notes that in the course of his meeting with the head teacher on 16 January 2016, which he recorded, at no time did the claimant make reference to the Midget Gems or raise any complaint about the matter or the head teacher's handling of it. The Tribunal therefore concluded that the respondent was not responsible for that incident or the origins of it in all the circumstances.
51. It was the respondent's case that they were suspicious of the origin of the Midget Gems as part of the Secret Santa present. The Midget Gems were wrapped in separate and different wrapping paper. Ms Chaisty's evidence, which the Tribunal accepted, was that she had not bought them nor wrapped them nor included them as part of her Secret Santa present to the claimant. The respondent's case was that they believed that the claimant was not providing the whole story on this aspect. The Tribunal accepted that it remains unclear as to the origin of the Midget Gems and does not consider that the respondent can be held responsible for them.
52. The Tribunal was concerned that the claimant himself had bought a packet of Midget Gems and brought the packet onto the school premises. The claimant

did not explain satisfactorily what he did with the packet once he had brought it to school and/or decided not to give it to the children. He did not say in evidence that he had taken it home; he did not say in evidence that he had eaten the sweets. Further, the Tribunal noted that the claimant makes no mention of the Midget Gems incident in the transcript of the second meeting which he covertly recorded; nor did he ask the head teacher to investigate any other matters in light of her handling of the Midget Gems incident, despite the fact that she clearly took that matter very seriously.

53. In light of all the above the Tribunal concluded that, whilst the claimant was a disabled person for the purposes of bringing claims of disability discrimination, his claims of unlawful discrimination and detriment/dismissal for making a protected disclosure must fail. The claims are therefore dismissed in their entirety.

Employment Judge Batten

Date: 25 May 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 June 2018

FOR THE TRIBUNAL OFFICE

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