

Neutral Citation Number: [2025] EAT 60

Case No: EA-2023-001498-LA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 28 April 2025

**Before :**

**JUDGE STOUT**

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**Between :**

**(1) THE LONDON BOROUGH OF SOUTHWARK**  
**(2) THE GOVERNING BODY OF EVELINA HOSPITAL SCHOOL**

**Appellants**

**- and -**

**MR AYODELE MARTIN**

**Respondent**

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**P Linstead** (instructed by Ashford LLP) for the **Appellants**  
**R Kohanzad** for the **Respondent**

Hearing date: 2 – 3 April 2025  
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**JUDGMENT**

## **SUMMARY**

### **WHISTLE-BLOWING, PROTECTED DISCLOSURES**

The claimant was employed by the respondents to work at the Evelina Hospital School. He brought claims against the respondents that (among other things) he had been subjected to various detriments for making protected disclosures about the School's failure to adhere to the requirements relating to "directed time" for teaching staff in The School Teachers Pay and Conditions Document 2017. The detriment claims were originally dismissed following a final hearing at the Employment Tribunal in September 2019, but after a previous successful appeal to the EAT by the claimant, the claims were re-heard by a fresh Tribunal and succeeded in part. The respondents appealed in relation to all the detriment claims that succeeded, and the claimant cross-appealed in relation to one detriment claim that had failed. The cross-appeal succeeded on grounds that it was perverse for the Employment Tribunal not to have accepted that the claimant had been subjected to a 'detriment' in law. The appeal was dismissed on the basis that there was no other error of law in the Tribunal's decision. The case was remitted to the same Employment Tribunal.

## **JUDGE STOUT:**

### **Introduction**

1. The appellants in this matter were the respondents in the proceedings below and I will refer to them as such. The respondent to the appeal was the claimant below and I will refer to him as such. The respondents were, by dint of The Education (Modification of Enactments Relating to Employment) (England) Order 2003, both the employers of the claimant. The claimant was employed by the respondents between June 2015 and December 2019 to work at the Evelina Hospital School, which is a designated special school based in St Thomas' Hospital, London.
2. The claimant brought five separate claims against the respondents. This appeal is concerned only with the claimant's claims of detrimental treatment owing to protected disclosures. The claims were originally dismissed following a final hearing at the Employment Tribunal in September 2019. The claimant appealed to the EAT. HHJ Tayler (EA-2020-000432-JOJ, judgment 10 June 2021) held that the Tribunal had erred in law in concluding that the claimant had not made any qualifying disclosures and the case was remitted to be heard again by a newly constituted Tribunal.
3. The claims were heard for the second time by a Tribunal over 6 days on 20-27 February 2023. According to the Employment Tribunal's decision, the first day of the hearing was a reading day. The remaining five days were taken up with evidence and submissions (submissions being heard on the afternoon of the last day). The Tribunal then deliberated over a further six days (28 February, 2 March, 30 and 31 May and 11 and 12 July 2023) in chambers. The reserved judgment and reasons were sent to the parties on 14 November 2023. The Employment Tribunal upheld some of the claimant's claims, holding that he had been subjected to six detriments for having made protected disclosures.
4. The respondents appealed to the Employment Appeal Tribunal and, after a preliminary hearing, permission was granted by HHJ Barklem on eight grounds, which were directed at

each of the six detriments in respect of which the claims were upheld. The claimant then cross-appealed on one ground, contending that the Employment Tribunal had erred in rejecting one of the claimant's other detriments claims. Judge Keith granted permission on the cross-appeal.

## **Background**

5. The background facts as they appear from the Employment Tribunal judgment are as follows.
6. The claimant was employed by the respondents between June 2015 and December 2019 to work at the Evelina Hospital School, which is a designated special school based in St Thomas' Hospital, London. I will just refer to it as "the School".
7. The claimant was an experienced teacher employed at senior level (UPS 3) with additional allowances, making him the highest paid teacher in the School. From 1 September 2015 onwards he was employed as Teacher of ICT (Information and Communication Technology) and Maths, working full time. During his employment he was also elected as Staff Governor to the Governing Body (attending his first meeting on 28 November 2016) and was voted to be the National Union of Teachers' representative on 30 June 2017. The Headteacher of the school was Ms Hamilton. The school was rated as 'Outstanding' by Ofsted at all material times.
8. In accordance with the requirements for all teachers at maintained schools, the claimant was employed under The School Teachers Pay and Conditions Document 2017 (the STPCD). This includes a requirement that full-time teachers should be available for work for 195 days in any school year, of which 190 days are teaching days. A full-time teacher is required to be available to perform 1265 hours per year of what is referred to as "directed time", this being time in which duties are specified by the headteacher. A teacher is also required to "work such additional hours as may be needed to enable him/her to discharge effectively his/her professional duties including, in particular, the marking of pupil's work, the writing of reports on pupils and the preparation of lessons, teaching material and teaching programmes". The employer is prohibited from determining how many or when any additional hours must be

worked.

9. At [36] the Employment Tribunal noted that the School's teaching day is shorter than mainstream schools because of the students' medical conditions. The morning session was 10am to 12 noon, and the afternoon session from 1.30pm to 3pm.
10. At [37], the Tribunal found that from 1 September 2015, the School limited its opening hours to 8am to 5pm. A document written by the then Deputy Head Teacher stated that, "*It would be expected that teachers would work an average day of 8.15-4.30, though we appreciate that colleagues will sometimes arrive earlier or leave later as their work or personal life demands*". The Tribunal found ([38]) that the Headteacher, Ms Hamilton, gave a slightly different direction, specifying that staff "*had to be in the School ready to work from 8.30am and they could leave at 4.30pm*". The claimant, however, tended to work much longer hours. At [47] the Tribunal found that in May 2016 he was arriving at school around 7.40am and leaving at 6pm. (The Tribunal's findings do not address how the claimant was doing this given the opening hours of the school, but there is no dispute that the claimant was generally working longer hours than most and I note from [82] of the extract of the claimant's witness statement in the supplementary bundle for this hearing that the explanation may lie in the fact that the claimant previously had keys to the school and was allowed to come in early but that Ms Hamilton stopped this when she changed the opening hours after the 2017 summer holiday.)
11. There also does not seem to have been any dispute that the claimant was an excellent teacher in terms of his classroom technique, but the Tribunal at [47]-[51] records evidence it received about performance issues that arose with the claimant regarding time management, deadlines and record-keeping. From May 2016 the claimant was being provided with "*intensive support and coaching*". This was recorded in his 2015/2016 performance review ([51]). It listed the support provided and stated, "*Going forward this level of support is unsustainable, and you will be expected to fully embed the skills you have gained in the coming year*". However, this mild threat was tempered with the positive: "*Well done for making a brave start you showed*

*your resilience and ended the year in a position of strength. Congratulations*". The Tribunal found his 2016/2017 performance review contained some "*very positive*" comments, albeit with 'mild' criticisms as to meeting of targets and paperwork ([53]).

12. On 9 July 2017 the claimant made the first of what the Employment Tribunal accepted to be three protected disclosures about directed time. He emailed Ms Hamilton saying he "*may be missing something*" but it appeared as if the requirement to be in school for the whole of the school working day of 8.30am to 4.30pm (minus 1 hour for lunch) meant that, taking into account INSET days and staff meetings, over the course of the year staff were doing, by his calculation, 97.5 hours more directed time than permitted by the STPCD 2017.

13. Ms Hamilton replied:

I think there might have been a bit of confusion around directed hours. I am encouraging staff to leave by 4.30 to promote good work life balance. You are quite right directed time should average out at 6.5 hours a day over the year. Work under the general direction of the Head can be completed offsite but teachers have generally in this school decided to complete their work onsite and stay to 4.30 and beyond. Thanks for drawing this to my attention. I hope this clarifies matters.

14. Dissatisfied with Ms Hamilton's response, the claimant then raised the same concerns with the Chair of Governors by email of 17 July 2017. This was his second protected disclosure.
15. The Chair of Governors responded to the claimant's email on 19 July 2017 indicating that advice would be taken and she anticipated that as it was the end of term, this would now be after the summer holidays.
16. At a staff meeting at the beginning of the autumn term (4 September 2017) Ms Hamilton announced a change to the school's opening hours, which were to reduce from 8am to 5pm to 8.15pm to 4.15pm with a one-hour lunch break 12 noon to 1pm.
17. On 11 September 2017 there were two communications about directed time, one from Ms Hamilton to all teachers and one from the Chair of Governors to the claimant. The Chair of Governors indicated that the directed time issue he had raised would be brought before the next Finance, Personnel and Premises Committee (FPPC) on 16 October 2017.
18. Ms Hamilton's email to all staff began:-

Dele [i.e. the claimant] sent me an email requesting that I let you know what your working hours are. The opening hours of the school have been shared and in previous years I have intended that that information will ensure a reasonable work-life balance.

19. The Employment Tribunal found at [76] that there was nothing untoward in Ms Hamilton's email referring to the claimant as having raised the issue as that would have been common knowledge. Ms Hamilton's email continued by explaining the difference between directed time and additional time and then stating:

Teachers are expected to work hard and to a high standard within a reasonable working day. I think this working day is 8.15 – 4.15, with time for directed activities generally being between 8.30-4pm, allowing for 1 hour for lunch. This allows 6 ½ hours a day for directed tasks, with 3 ½ hours contact time with pupils. On this basis, the directed hours add up to 1140, plus INSET, plus staff meetings, a total of 1209 hours of directed time. That gives us 56 hours flexibility for contingencies.

I will be presenting this to governors in October, and will add more information if any arises from that meeting. As part of the appraisal process, I will be talking to teaching staff individually as regards their working practices.

20. On 4 October 2017, Ms Hamilton corrected her direction as to the time that staff were supposed to be in school to 8.30am to 3.45pm not 4pm.
21. At 3.33pm on 16 October 2017, the claimant sent a further email about the directed time issue to the FPPC. This email emphasised the governors' responsibility for complying with requirements as to directed time. This email was also found by the Tribunal to be a protected disclosure. The FPPC's meeting was already underway when the email was sent. Ms Hamilton as a member of the FPPC was a recipient of that email. This communication was also found to be a protected disclosure.
22. The School has a Management Information System (MIS). At [44]-[45] the Tribunal made findings that teachers were required to complete pupil logs on the MIS on a daily basis so that teachers and other professionals can see the progress a pupil has made. The claimant's logs were scrutinised by colleagues on 16 October 2017, prior to a scheduled performance meeting on 20 October 2017 ([108]). The Employment Tribunal found at [108] and [111] that this was done by "colleagues" on 16 October 2017 prior to a scheduled performance meeting on 20

October 2017. Additional log scrutiny was done after that date ([111]).

23. On 31 October 2017 Ms Hamilton emailed the claimant informing him that the governors had agreed that the school would now be open 8.15am to 4.30pm with directed time remaining as 8.30am to 3.45pm.
24. On 2 November 2017 Ms Hamilton met with the claimant and on 3 November 2017 she sent the claimant an email headed “Notice of concerns”. This stated that she had spoken to him about concerns that he was not completing teacher evaluations on a daily basis. She continued: *“since I undertook a detailed log scrutiny it has been shown that a record about pupil progress was inaccurate”*. She expressed concerns about his working practice being *“unsatisfactory”*, his lack of awareness of professional development needs. She wrote, *“there is now a sense of urgency that your practice should improve significantly”*. She referred him to the Teachers’ Standards *“a copy of which you will find as part of your appraisal documents”* and she also provided a link. She continued: *“there is an increasing likelihood that more formal procedures will be actioned unless there is a marked change in the way you manage your work and I can see that you are indeed meeting the teachers’ standards and the expectations I have for my middle leaders”*.
25. On 1 December 2017, Ms Hamilton emailed the claimant about concerns he was not completing teacher evaluations or completing dialysis ward round minutes. In a meeting on the same day Ms Hamilton also told the claimant that an unnamed colleague had complained about him. She did not tell him that no further steps would be taken in relation to that complaint until June/July 2018.
26. On 16 January 2018, the claimant contacted ACAS in respect of what would become his first claim to the Employment Tribunal, which was a claim for unlawful deduction from wages based on the School’s failure to pay for the excess directed time he considered had been carried out.
27. On 9 March 2018 the claimant forgot to attend a scheduled half hour meeting with Ms Bennett



(the Deputy Headteacher) about the End of Term report for maths. She was in the same room as him but did not remind him. Ms Bennett then circulated an End of Term Report to the Pastoral and Curriculum Committee (PCC) containing negative comments about the claimant that he was not given an opportunity on which to comment because it was circulated when he was off sick with stress.

28. On 16 March 2018 the claimant went on sick leave.
29. On 27 March 2018 the claimant submitted his first ET1 and on 19 June 2018 he submitted his second ET1.
30. On 9 July 2018 he began a phased return to work, but went off sick again on 3 September 2019, putting his further claims in to the Employment Tribunal thereafter.

**The detriments that are in issue in this appeal**

31. The claimant made 14 allegations of detriment, six of which were upheld by the Tribunal. The six detriments to which the Employment Tribunal concluded the claimant was subject as a result of his protected disclosures were as follows:-

(a) Ms Hamilton told other teachers that the change in opening and closing times of the School was a consequence of the claimant's email of July 2017 (Detriment 5(c), ET Reasons [104]-[107], [292]);

(b) Ms Hamilton sent an email entitled "Notice of Concern" to the claimant on 3 November 2017, and then failed to respond to the claimant's four emails asking her to specify what Teachers' Standards she believed the claimant was not meeting (Detriment 5(e), ET Reasons [108]-[114], [294]-[295]);

(d) Following Ms Hamilton telling the claimant she had received a complaint from colleagues about him on 1 December 2017, she subjected him to a detriment by the time she took to address the complaint and tell him in July 2018 that it was not being pursued (Detriment 5(f), ET Reasons [115]-[118], [296]);

(e) Ms Bennett sent a humiliating email to the Claimant on 20 February 2018 that was lacking in any corroborative evidence, accusing the claimant of not following the instructions to all staff regarding testing of students, as well as falsely listing Teaching standards she claimed the claimant had broken in the process (Detriment 5(h), ET Reasons [119]-[122], [297]-[300])

(f) Ms Bennett failed to prompt the claimant to attend a scheduled half hour one to one meeting on 9 March 2018, even though the claimant was eight steps away in the same room at his desk, but instead producing documents to put him in a negative light and circulating them to the governing body and the pastoral and curriculum committee (Detriment 5j, ET Reasons [127]-[132], [303]-[306]); and

(f) At a Governing Body meeting on 12 March 2018, which the Claimant attended, Ms Hamilton stated that she was taking a member of staff through capability procedures without saying who it was (which the Claimant reasonably believed referred to him) (Detriment 5(k), ET Reasons [133]-[139], [307]).

32. The other detriment that is relevant to this appeal is Detriment 5(b), which was rejected by the Tribunal, but which is now the subject of the cross-appeal:

- a. Ms Hamilton changing the opening and closing times of the school from the first day back at the start of the academic year on 4 September 2017 (Detriment 5(b), ET Reasons [101]-[103], [290]-[291]).

## **The law**

### **The EAT's jurisdiction**

33. Under section 21 of the Employment Tribunals Act 1996 an appeal to the EAT lies only on a question of law. This means that the appellant must show that the Tribunal made an error of legal principle, such as misreading or mis-applying a statute or principle established by case law, leaving out a relevant factor or taking into account an irrelevant factor or otherwise

making an irrational decision, making a material error of procedure or fairness or giving inadequate reasons: see, eg, *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13].

34. Errors of fact are not errors of law unless they satisfy the high threshold set out by the Court of Appeal in *Yeboah v Crofton* [2002] IRLR 634 at [93] –[94] per Mummery LJ of amounting to “an overwhelming case ... that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and law, would have reached”, such as where the Tribunal misunderstood the evidence in a way that led it to “make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence”. As Mummery LJ cautioned in that case: “...no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal”.
35. In scrutinising the judgment of the ET, the EAT is required to read the judgment fairly and as a whole, remembering that the ET is not required to express every step of its reasoning but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016 at [57]. It is not an error of law to fail to mention a particular fact in the judgment: *ibid* at [57(3)]. That case also makes the point (at [58]) that where the ET has correctly stated the law, the EAT should be slow to conclude that it has misapplied it “*unless the contrary is clear from the language of its decision*”.

*Detriments for making protected disclosures*

36. Under section 47B(1) ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his employer done on the ground that the worker has made a protected disclosure.
37. A detriment is something that a reasonable worker in the Claimant’s position would or might

consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Warburton v Chief Constable of Northamptonshire Police* [2022] EAT 42 at [48]-[51], applying *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337.

38. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment “on the ground that” he made a protected disclosure (s 47B(1)). It is well established that the same approach is to be applied as for direct discrimination under section 136 of the Equality Act 2010. The protected disclosure must be a material factor in the reason for the treatment, in the sense of being a more than trivial influence on the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at [43] and [45]. As for discrimination, this requires an analysis of the mental processes of the worker who is alleged to have subjected the claimant to a detriment.

39. Unreasonable conduct by the employer is not to be equated with unlawful conduct. As the EAT (Langstaff J) put it in *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust* UKEAT/0269/15/JOJ at [48] (emphasis added):

48. An overriding feature of this case has been that the Respondent has repeatedly been found to be lax, lacking in attention to detail or careless. The logic of the approach taken in *Zafar* is clear: that unreasonable, even unpleasant, behaviour is not of its nature essentially and necessarily behaviour adopted because of a protected characteristic of the Claimant. **Where there is an approach towards all which creates an equality of misery it is particularly clear that it is unlikely to be because of a protected characteristic peculiar to only one or a few of them. However the “unreasonable not discriminatory” defence may be less applicable in a case in which the evidence shows that only one employee has in particular been made miserable.** In that latter case, though it remains logically right that the individual may have been the unwilling victim of a mistake or oversight, there is much greater reason to consider carefully and with particular scrutiny whether this might simply be too easy an explanation. It may call, in an appropriate case, for evidence as to how others have been treated who, if the explanation were true, one might expect to have been treated equally badly.

40. Mr Linstead in this case has referred to the point made by Langstaff J in the foregoing

paragraph as ‘the equality of misery’ principle. Mr Kohanzad for his part gave it the label by which it is more commonly known: ‘the bastard employer defence’.

41. Where there are multiple potential reasons for treatment, the Tribunal may need to consider what is often referred to as ‘the separability principle’. The Court of Appeal’s decision in *Kong v Gulf International Bank* [2022] ICR 1513 is the leading case on this issue. At [57]ff in the judgment of Simler LJ (with which the other members of the Court agreed) the Court held:

57. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. ...

59. The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistleblower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant’s conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

...

61. The legislation confers a high level of protection on whistleblowers for sound reasons, and the distinction should not be allowed to undermine that important protection or deprive individuals of protection merely because their behaviour is challenging, unwelcome or resisted by colleagues. As Mr Laddie emphasised, whistleblowing by its nature, frequently involves an individual raising concerns about wrongdoing committed by individuals, frequently colleagues, commonly working in the same workplace. It is a natural human response to be defensive and resist criticism. Not only is it likely that the subject or content of a protected disclosure will be unwelcome, the manner in which it is made, repeated or explained, may also be unwelcome, leaving individuals feeling it necessary to restate their concerns, and increasing the prospect of being perceived as an irritant or thorn in the employer’s side. Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur. The way in which the protected disclosure is made is also, in general, part of the disclosure itself, unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable.

42. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he was subject to detrimental treatment. However, section 48(2) ERA 1996 provides that it is then “for the employer to show the ground on which any act, or deliberate failure to act, was done”. It has been held (cf *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at [40]) that this creates a shifting burden of proof similar to that which applies in discrimination claims under section 136 of the Equality Act 2010 (EA 2010). In this case, the parties have relied on the authority of *Fecitt v NHS Manchester* (ibid) in relation to burden of proof. At [41] Elias LJ held:

Once an employer satisfies the tribunal that he has acted for a particular reason, here, to remedy a dysfunctional situation, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in *Igen Ltd v Wong*. Here the tribunal was satisfied that in redeploying Mrs Fecitt and Mrs Woodcock the employer had acted in order to resolve the dysfunctional situation. I see no basis for going behind that finding which is essentially one of fact for the employment tribunal.

## **The grounds of appeal**

### **Preliminary observations**

43. The eight grounds of appeal and the cross-appeal all criticise the Employment Tribunal’s conclusions on the issues of: (i) detriment; and (ii) causation or ‘reason why’. I note at the outset that the Employment Tribunal at [231]-[232] gave itself a correct direction of law as to the ‘reasonable worker’ test that it needed to apply to the question of whether there was a detriment. It referred both to *Shamoon* and *Warburton* as I have done when setting out the legal principles above. At [246]-[247] the Tribunal also gave itself a correct direction as to the burden of proof and the test for causation being a material, or no more than minor or trivial influence, by reference to *Fecitt*. This is accordingly a case in which, applying the principles in *DPP v Greenwood*, I should be slow to conclude that the Employment Tribunal has erred in law in its application of those principles to the facts of the case.

44. It is convenient to take the cross-appeal first.

*The cross-appeal: the finding at [103] and [291] refusing to uphold detriment 5(b) consisting of “Anne Hamilton changing the opening and closing times of the school from the first day back at the start of the academic year on 4 September 2017”*

45. Detriment 5(b) was: “Anne Hamilton changing the opening and closing times of the school from the first day back at the start of the academic year on 4 September 2017”. The Tribunal’s findings of fact in relation to this allegation are at [101]-[103] and are as follows:

101. On the first day of the new academic year, Ms Hamilton announced to staff during the afternoon staff meeting that the School premises would be open from 8.15 am to 4.15 pm with lunchtime at 12 to 1 pm.

102. We note that in the Claimant’s evidence he makes the following allegations. That Ms Hamilton was setting him up to fail by denying him access to the school and its resources in which to complete his work because he had raised the issue of Directed Time. He further alleges that she treated him badly in front of other colleagues to instil fear in them and to isolate him. He further asserts that on 22 September 2017, he emailed Ms Hamilton to schedule time in his school day to provide a range of IT support but she declined (at B524). He further states that his Autumn term timetable for 2017-2018 (at B487) that he received on 7 September 2017 included no time for the range of IT support he was giving. As a result he said that this meant he no longer had the time to carry out a whole range of ICT tasks.

103. However, focusing on the detriment pleaded. There appears to be an apparent contradiction given that the Claimant was effectively complaining about excess Directed Time hours. So limiting his working day by reducing the School opening and closing hours does not amount to a detriment. It is actually going some way to addressing the issue that the Claimant had raised, although perhaps the changes were an unexpected consequence of his raising the issue of Directed Time.

46. The Employment Tribunal’s conclusions on this issue are at [290]-[291] as follows:

290. As we have said above, there appears to be an apparent contradiction between this given that the Claimant was effectively complaining about excess directed hours. So limiting his working day by limiting the School opening and closing hours does not amount to detriment. It is actually going some way to addressing the issue that the Claimant has raised although perhaps the changes were an unexpected consequence of his raising the issue of Directed Time.

291. We therefore conclude that this does not amount to a detriment.



47. Mr Kohanzad for the claimant submits that the Tribunal's conclusion on this issue was perverse. He points out that it was well known that the claimant tended to work long hours and that changing the opening and closing times obviously had an impact on him as it made him difficult for him to complete his work in the time available with the reduced opening hours. The Tribunal recorded that that was the claimant's case but failed to address it. If it had addressed it, it could not have concluded otherwise than that he reasonably perceived that change as a detriment. The Tribunal had conflated directed time with school opening hours in its view of the case. Reducing school opening hours did not address the issue of directed time.
48. Mr Linstead in response accepts that directed time was not the same as the opening hours of the school, nor was it the same as teaching time. He accepts that the claimant was concerned about excessive directed time, not excessive working hours. Mr Linstead submits that the claimant's complaint in this respect appears to have been a financially motivated complaint because of his subsequent unlawful deduction from wages claim, although Mr Linstead accepted that the Tribunal made no finding to that effect. Mr Linstead submits that the Tribunal's finding at [103] is factually correct. He submits that reducing school opening hours did go some way towards meeting the claimant's concerns. The respondents' Answer to the Cross-Appeal submitted that Ms Hamilton was in September 2017 indicating that opening hours correlated with directed time. He submitted that shortening the hours provided clarity for staff and Mr Linstead submits it was open to the Tribunal to conclude as it did that this was not a detriment to the claimant.
49. Mr Linstead submits the Tribunal has not erred by not addressing the claimant's argument about the claimant not being able to work as long on the school premises. It has recorded some of the claimant's arguments in this respect at [102] and then rejects them effectively at [103]. The Tribunal sees the restriction in hours as being to the claimant's advantage so it cannot be a detriment. Mr Linstead accepts that the Tribunal had not expressly applied the *Shamoon*



approach to this detriment, but submits that it has in substance taken a permissible approach because in effect they are saying that a reasonable worker could not come to the conclusion it was to his disadvantage. Mr Linstead adds that the claimant had an uphill struggle on this claim because he had to show that a change applied to everybody was a detriment to him because of his making a protected disclosure. Mr Linstead referred to the ‘equality of misery’ principle. He submitted that Ms Hamilton’s purpose was to address the directed time issue, not to set him up to fail by denying him access to the school.

*My conclusions on the cross-appeal*

50. I accept the claimant’s submissions on the cross-appeal and reject the respondents’. The headteacher’s previous stipulation as to directed time was that teachers should be in school 8.30am-4.30pm, while the school was open from 8am until 5pm. Changing the school opening times to 8.15am-4.15pm (as happened on 4 September 2017) did nothing at all by itself to address the issue of excess directed time, it just reduced school opening hours to the duration that had previously been directed time. Only changing directed time could change the directed time. Changing the school opening hours just reduced the amount of time that staff had available in school to complete their additional duties. While reducing school opening hours could also have had the effect of reducing directed time if the opening hours had been reduced to less than the previous directed time hours, that was not what happened in this case.
51. Although perversity is a high threshold, it is crossed in this case. No reasonable Tribunal could have concluded that reducing the school opening hours was addressing the issue as to directed time. More importantly, the Tribunal has failed to address the claimant’s case as to why the reduction in opening hours was a detriment, i.e. because of the effect on him of reducing the amount of time available in school to do his work. It is not sufficient just to have recorded his evidence on this point, the Tribunal needed to deal with his case. As such, despite having directed itself earlier in the decision to the *Shamoon* approach, the language of the decision at

this point makes it clear that the Tribunal did not apply the *Shamoon* approach. *Shamoon* requires the Tribunal to consider whether the employee's subjective reason for believing he has been disadvantaged is one that a reasonable worker in the employee's position could hold. However, the Tribunal has simply set out its view of the matter. It has not attempted to address the claimant's reasons for regarding the change in hours as a detriment, let alone considered whether it was reasonable for him to regard the change as a disadvantage.

52. I also agree with Mr Kohanzad that the only reasonable conclusion a Tribunal could have reached in this case was that the change in opening hours of the school was a detriment to the claimant. It is plain that a number of his colleagues were also unhappy about it. The claimant's position was obviously reasonable because the change made it harder for him to complete his day's work in school and made it more likely he would have to take work home. Mr Linstead's 'equality of misery' argument has no relevance to the detriment stage of the analysis. The fact that it affected other employees does not stop it being a detriment to the claimant.
53. It follows that if the Tribunal had made a finding that Ms Hamilton's decision to change the opening and closing times of the school was materially influenced by the claimant's protected disclosures, this detriment claim would now succeed. The Tribunal at [103] came very close to saying this in holding the change to the school opening hours was "*going some way to addressing the issue the Claimant had raised*", but it cannot really be said that that is a proper answer by the Tribunal to the causation question. The Tribunal's analysis in relation to this detriment stops at the point it decides (perversely) that this change was not a detriment.
54. Mr Kohanzad had understood, and said as much when responding to the appeal on the claimant's behalf, that "*It was not in dispute that Ms Hamilton told teachers that the opening and closing times were a consequence of the Claimant's July 2017 [email]*". However, Mr Linstead maintained that it had been in dispute that Ms Hamilton told teachers that (as the Tribunal notes at [106]). Further, Mr Linstead argued that, although the respondent's case had been that the decision to change the school opening hours was in part addressing the concerns

about directed time raised by the claimant, it was not accepted by the respondent that the claimant's protected disclosure played a material part in that decision. As such, it appears that this is an issue that remains to be determined in relation to this detriment and the parties will need to make submissions on disposal accordingly. In doing so, they will need to take into account as appropriate my conclusions in relation to Ground 1 of the appeal, which concerns a closely-related detriment.

Ground 1: [Detriment 5(c)] the ET erred in finding that facts which did not form part of the pleaded case were a detriment

55. Detriment 5(c) was identified in the List of Issues as being *"Anne Hamilton told teachers that the opening and closing times of the school was the consequence of C's email of July 2017"*. The claimant's evidence was that several teachers told him that Ms Hamilton had told them in meetings that the change in school opening hours was as a result of his complaint about directed time. The Tribunal summarised his evidence in this respect at [104]. At [105] the Tribunal recorded the evidence of one of the claimant's witnesses, Ms Ryden:

*105. One of his witnesses, Ms Lene Ryden, who was a Teacher at the School at that time, said in evidence that she went to see Ms Hamilton because the change of hours also presented her with difficulties doing her work. She said that Ms Hamilton asked her if she was "in on" the Claimant's "case", as she put it. Ms Ryden answered yes and Ms Hamilton replied "well that's what happens". Ms Ryden said in her written evidence that she aware of three other Teachers who had been called in by Ms Hamilton and subjected to the same questioning.*

56. The Tribunal appears to have considered that there was a slight conflict between the claimant's evidence and Ms Ryden's noting at [106] that Ms Ryden's evidence did 'not go so far as' the claimant's, which I take to be a reference to the fact that the claimant's evidence, based on hearsay from other staff, was that Ms Hamilton had said in terms that the change in hours was because of the claimant's complaint, whereas on Ms Ryden's evidence, this is merely insinuated. The Tribunal recorded that Ms Hamilton disputed these allegations, but accepted the evidence of Ms Ryden for the reasons it gives at [107]. The Tribunal went on at [292]-

[293] to find that the claimant had been subjected to a detriment because Ms Hamilton was “clearly” telling Ms Ryden that the claimant was to blame for the change in opening hours (which Ms Ryden had been complaining also made her life difficult), and they had in fact been changed as a result of the claimant complaining about excess directed hours.

57. The respondents submit that what the Tribunal did here was to find alternative facts to those relied on by the claimant and then find that it constituted a detriment. The respondents rely on *Chandhok v Turkey* [2015] ICR 527 to say that the respondent only needs to respond to the allegation made and not to a different one. The respondents further submit that the Tribunal has not correctly directed itself as to the difference between the claimant’s evidence and that of Ms Ryden. The respondents submit that Ms Ryden’s evidence makes no link between the change in hours and the claimant’s case.
58. The respondents submit that there is a contradiction between it not being a secret that the claimant had raised the matter of directed hours and asserting that making reference to this was placing the blame on the claimant of it. The respondents submit that Ms Ryden’s evidence was not consistent with a finding that Ms Hamilton was putting blame on the claimant. The respondents submit that the Tribunal was finding that it was inevitable that there needed to be a change in the opening and closing hours of the school.

*My conclusions on Ground 1*

59. I reject the respondents’ arguments essentially for the reasons advanced by Mr Kohanzad (whose submissions I have not therefore separately set out). The detriment alleged by the claimant was that “*Anne Hamilton told teachers that the opening and closing times of the school was the consequence of C’s email of July 2017*”. This was what the claimant had heard. Understandably, the Tribunal preferred Ms Ryden’s direct evidence of what she had been told to the claimant’s hearsay evidence based on reports from other staff, but the evidence of Ms Ryden was to the same effect. Ms Ryden’s evidence was that she went to complain about the change in opening hours of the school and that Ms Hamilton in the meeting linked the change

in opening to the claimant's case, by asking Ms Ryden about whether she supported that case and indicating that this was 'what happens' in response.

60. The claimant's alleged detriment was thus established on the evidence because the Tribunal concluded on the basis of Ms Ryden's evidence that Ms Hamilton had told teachers that the opening and closing times of the school were a consequence of the claimant's raising the directed time issue. This was not therefore a case of the Tribunal departing from the pleaded case, but upholding the pleaded case on the basis of the evidence of one of the claimant's witnesses.
61. The respondents submit that Ms Ryden's evidence was not consistent with a finding that Ms Hamilton was putting blame on the claimant. However, I disagree. This is an argument that could only succeed if it amounted to perversity, but it comes nowhere near showing that the Tribunal's decision was perverse. Ms Ryden was complaining about a detrimental change and Ms Hamilton indicated that the claimant's complaint was the reason for that detrimental change. That is blaming the claimant.
62. The respondents further submit that there is a contradiction between it not being a secret that the claimant had raised the matter of directed hours and finding that making reference to this was placing the blame on the claimant. However, there is no contradiction in that once it is understood (for the reasons I set out in relation to the cross-appeal) that the change in opening hours of the school was not addressing in any way the claimant's complaint about directed time. The change in opening hours was an additional, unnecessary detrimental change in staff working conditions. Indicating to staff that it was a consequence of the claimant's complaint (that everyone knew about) was therefore putting blame on the claimant for something that was not his fault.
63. There is no error of law in the Tribunal's conclusion in relation to Detriment 5(c) and I dismiss Ground 1 of the appeal.

Ground 2: [Detriment 5(e) – Part 1] In relation to the notice of concern dated 3 November 2017, the ET erred in its finding that there was a deliberate attempt by the Head Teacher to find fault with C’s log and that the concerns were exaggerated.

64. The respondents submit that the Tribunal’s finding that the sending of the Notice of Concerns was materially influenced by the claimant’s protected disclosure was based on two key findings: (i) apparent deliberate fault finding; and (ii) exaggeration of concerns. The Tribunal found the timing of the log scrutiny and the claimant’s email to the Governors about directed time looked “highly suspicious”. The respondents submit that what the Tribunal apparently means is that the log scrutiny was carried out on the same date as the third protected disclosure.
65. The respondents submit that this was an error because it was inconsistent with the innocent reason for the log scrutiny identified in [108] which was that it was being carried out in the run up to a scheduled performance meeting. The respondents submit that at [109] the Tribunal accepted Ms Hamilton’s evidence that other colleagues carried out the log scrutiny. At [109] the Tribunal had found as a fact that the School “routinely monitored pupil logs”.
66. The respondents submit that the content of the Notice of Concerns is wider than merely that he was not completing log entries on time. It also relates to concerns that had been raised previously. The respondents submit that the Tribunal has lost sight of the prior concerns.
67. The respondents submit that the Tribunal needed to engage with whether the Notice of Concerns was justified, because if it was justified then the claimant could not reasonably have regarded it as a detriment. The respondents complain that the Tribunal has not decided whose evidence it preferred at [109]-[110] about whether there were any errors in the logs or not.
68. The respondents acknowledge that the Tribunal has found that the claimant may have been at fault, but submits that the findings are not sufficiently clear, eg where the Tribunal says that issue “has perhaps been exaggerated”.
69. In summary, Mr Linstead submits that the Tribunal has not given adequate reasons for its conclusions given the evidence that was before it. Alternatively, it was perverse.

*My conclusions on Ground 2*

70. Again, I do not summarise Mr Kohanzad’s submissions as I largely agree with them. The respondents are simply seeking to re-argue the facts. I reject the submission that it was perverse for the Tribunal to have concluded that the sending of a Notice of Concerns to the claimant in the terms of the email sent on 3 November 2017 was a detriment to which he was subjected for making protected disclosures. It was open to the Tribunal on the facts of this case to reach that conclusion. Ms Hamilton by sending the Notice of Concerns was ‘stepping up’ the threat of capability procedures in relation to the claimant. The email is a semi-formal Notice, a clear precursor to further action if matters do not improve. Any employee might reasonably regard that as a disadvantage.
71. It cannot be said that the Tribunal left out of account any of the relevant factors that the respondents seek to emphasise. The longstanding nature of concerns about the Claimant’s performance, to which the Notice of Concerns alludes, are documented in the decision at [47]-[55], as is the fact that logs are routinely checked, and why they are important (a point of which the Tribunal expressly reminds itself at [109]). Ms Hamilton’s evidence as to the delays in completing the logs and their inaccuracy is also referenced, as is (at [108]) the scheduled performance review.
72. There was nothing perverse about the Tribunal’s observation at [111] that the timing of the log scrutiny was ‘highly suspicious’. It is hopeless to suggest that the Tribunal had lost sight of the scheduled performance review that it mentioned just three paragraphs earlier. The fact that a scheduled performance review was coming up was one reason why a log review might be carried out, but there was nothing to stop the Tribunal concluding that there were other reasons, or that the way that the review was carried out in the claimant’s case, or the conclusions that were drawn, were influenced by the protected disclosure.
73. It was reasonable for the Tribunal to regard the timing of the log scrutiny as highly suspicious. The third protected disclosure was made at 15:33. The initial handwritten note of log review

is dated the same day. The Tribunal evidently considers it possible that this handwritten note was prepared after receipt of the claimant's email. It does not need to decide for sure whether or not it was though, because, of course, the third protected disclosure is just a repeat of the previous disclosures, so timing is not critical and, further, as it finds, after that date (i.e. clearly post the third disclosure) the records were looked at again.

74. As to the conclusions that there was a deliberate attempt to find fault and that the respondents' approach was 'exaggerated', the decision needs to be read as a whole. That in particular means keeping in mind [54]-[55] (where the Tribunal observes there is a 'disconnect' between the respondents' evidence that formalised capability proceedings were being contemplated for the claimant and the documented history of performance concerns). It also means that parts 1 and 2 of detriment 5(e) need to be considered together. The Tribunal's finding that Ms Hamilton failed to particularise the Teachers' Standards she considered had been breached is, when one reads the decision as a whole, part of the picture that contributes to the Tribunal finding that there was an element of deliberate exaggeration and fault-finding in relation to the Notice of Concerns (as to which, see my consideration of Ground 3). In short, when the decision is read as a whole, it is clear to the reader why the Tribunal considered that Ms Hamilton was overstating, or making too much of, shortcomings in the claimant's performance, and why it concluded that there was a shift in approach following his making protected disclosures and an element of deliberate fault-finding. The Tribunal's inference that the 'stepping up' of the handling of the concerns about claimant's performance by the sending of a Notice of Concerns was materially influenced by the protected disclosure was an inference that it was open to the Tribunal to draw in the circumstances.
75. I also do not consider that the respondents' submission that the Tribunal failed to deal with its point that its concerns about the claimant justified the sending of a Notice of Concerns has any merit. The Tribunal has in fact proceeded on the basis that there was some justification for the Notice, as it acknowledges at [111] that the claimant was 'not without fault'. However,



the Tribunal's conclusion is that the sending of the Notice was heavy-handed for the reasons identified. Delay in completing logs and one (possible) inaccuracy is clearly capable of being regarded as not the most serious performance issue, even taking into account the reasons for keeping the logs. The Tribunal did not have to make detailed findings about the nature and extent of the claimant's fault in order reasonably to take that view. The matters mentioned in the Notice of Concerns were not complicated issues, and they did not in the end proceed to capability (or disciplinary) proceedings. As it was open to the Tribunal on the evidence to conclude that the Ms Hamilton's Notice was heavy-handed, it follows that it was also open to it to conclude that it was a detriment, even if in principle the claimant was 'at fault' as regards the performance issues raised. He could have a justified sense of grievance that his performance issues were handled in the way that they were.

76. The respondents' concerns about the alleged inconsistency between the finding that log scrutiny was carried out by colleagues in the run-up to a scheduled performance review and the finding that the sending of the notice was influenced by the protected disclosures are also misplaced. First, I accept Mr Kohanzad's submission that at [108] all the Tribunal is doing is setting the scene and the chronology that the scrutiny of the logs occurred prior to a scheduled performance meeting at [108]. There is also nothing in the respondents' suggestion that it was other people doing this scrutiny not Ms Hamilton. The Tribunal at [110] identifies Ms Hamilton as being the person who found the alleged inconsistency in the logs, and she herself says it was her in her 3 November 2017 email. Colleagues may have been involved in the first log check, as the Tribunal notes at [109], but that does not mean that Ms Hamilton was not personally involved or that her handling of it was not influenced by protected disclosures.
77. All that said, I do have sympathy for the respondents' concerns about the adequacy of the Tribunal's reasons in relation to this detriment. They are not model reasons. They do not deal with and resolve every point raised by and relied on by the parties. They do not tie up all the loose ends on the evidence. The use of tentative language ("*perhaps exaggerated*") rather

than making clear findings of fact on the balance of probabilities is to be deprecated. However, the Tribunal does not have to deal with every point raised and minor infelicities of expression do not invalidate a decision. Reasons need only be adequate so that the parties can understand why they won or lost and that no error of law has been made. In this case, the reasons are adequate and I am satisfied there is no error of law in the decision. Ground 2 is dismissed.

Ground 3: [Detriment 5(e) – Part 2] In relation to the finding that Ms Hamilton’s failure to specify the relevant teaching standards was because of the protected disclosure, the ET erred by making inconsistent findings.

78. Much of what I have already said about Ground 2 applies here as well, but there are some additional points I need to deal with. The Tribunal’s findings regarding part 2 of detriment 5(e) are at [295] and [112]-[114]. The respondents submit that there was a clear mistake about what Ms Hamilton’s evidence was. Her oral evidence was that she had told him in the meeting what Teaching Standards were being breached. The Tribunal apparently rejected that oral evidence at [112] on the basis that it contradicted her witness statement. However, [25] of Ms Hamilton’s witness statement does say that she mentioned this in the meeting as it says “*I verbalised them*”. The respondents submit that the Tribunal has failed to take into account that she said this in her witness statement and has identified this as a contradiction between her oral evidence and the witness statement when there was no contradiction. Her evidence was also that the claimant was being unnecessarily pedantic in asking her to repeat what she had already said. The respondents submit that the Employment Tribunal has missed this point and failed to weigh it up in its conclusion at [295].

#### *My conclusions on Ground 3*

79. Again, I disagree with the respondents. The inconsistency that the Tribunal identifies between Ms Hamilton’s oral evidence and her witness statement is that in oral evidence she said that during the meeting she told the claimant she was referring to “part 1 section 2” of the Teaching

Standards, whereas in her witness statement she is not specific. The fact that the Tribunal in summarising her witness statement on this point at [112] misses out that she said she ‘verbalised them’ in the meeting is not material in my judgment. It is obvious from [113] that what the Tribunal was concerned about was the lack of “*specifics*”.

80. The clear sub-text to this whole detriment is that a manager telling a teacher they are not meeting the Teaching Standards without specifying in what respect is readily capable of constituting bullying behaviour. It has the air of empty and generic threat. It was for the Tribunal to weigh up the evidence on this point. It concluded, in part because it was only in oral evidence that Ms Hamilton for the first time specified in any way what standards she was referring to, that Ms Hamilton had not given specifics in the meeting, and did not give specifics by email when asked. That was not a perverse or inadequately reasoned conclusion. Especially so, I observe, given that Ms Hamilton in the Notice of Concerns email referred to the Teachers’ Standards as if she was referring to them for the first time and without any suggestion that they had been discussed in the meeting, and the claimant in his response to that on 13 November 2017 was clear that the Teachers’ Standards had not been discussed at the meeting.
81. The respondents submit that a further separate error arises from the last line of [113] where the Tribunal concluded that Ms Hamilton “*did not know or simply did not want to commit*” to which Teaching Standards had been breached. The respondents submit that if the reason why Ms Hamilton failed to specify was because she did not know, that explains why she did not specify, and there was no room for the influence of the protected disclosures. There are two problems with this submission. First, the Tribunal in [114] actually makes clear that it concludes that Ms Hamilton in fact did not want to commit. However, secondly, even if it had left it open as “*did not know or .... Did not want to commit*”, the Tribunal’s point is that if she did not know she should not have been alleging the claimant was in breach. Her failure to specify is clearly capable of being a detriment even if the reason she did not specify is because

she did not know. She should have known what standards she had in mind if she was going to threaten capability proceedings for failure to comply. There is also no inconsistency between the findings that she did not know or did not want to commit and the finding that her treatment of the claimant was materially influenced by the protected disclosure, because the points are not mutually exclusive. It is the absence of specific justification for the action which provides grounds for drawing the inference that the treatment is influenced by the protected disclosure.

82. Yet further, the alleged detriment was actually the failure to respond to four emails from the claimant asking which Teachers' Standards he had breached. I agree with Mr Kohanzad that it was open to the Tribunal to conclude that the non-response was a detriment whatever had previously been said at the meeting.

83. Ground 3 is therefore dismissed.

Ground 4: [Detriment 5(f)] The ET erred by mis-identifying the detriment and in relation to causation, arising from Ms Hamilton telling C that she had received a complaint from colleagues about him.

84. Detriment 5(f) was that: *"Following Anne Hamilton telling C she had received a complaint from colleagues about him on 1 December 2017 she subjected him to a detriment by the time she took to address the complaint and tell him in July 2018 that it was not being pursued"*.

The respondents submit that the claimant was not complaining about Ms Hamilton telling him about the complaint, but the delay to June/July 2018 in telling him that the complaint was not being pursued. The respondents submit that the Tribunal has wrongly focused on why and how Ms Hamilton raised the complaints with the claimant in the first place. The respondents do not suggest that the Tribunal was not entitled to make these findings, but just that it distracted them from considering the reasons for the delay.

85. The respondents submit that the Tribunal should have been considering the employer's mental processes and whether the protected disclosures had a material influence on the delay. Ms

Hamilton's evidence about the delay was that she and the claimant were off sick for periods in 2018 and she referred to being preoccupied with other important matters during that time. The respondents submit that the Tribunal has not referred to this evidence, but bases its conclusion on causation at [296] on its view that Ms Hamilton's actions were "completely inappropriate".

86. Mr Linstead also referred to the 'equality of misery' point. In this case, the Tribunal found that Ms Hamilton had a practice of raising unspecified complaints by unnamed staff and that this was bullying behaviour. He submitted this could not therefore be evidence of the claimant being subjected to a detriment for making protected disclosures. He acknowledged that at [117] the Tribunal has stated that it went further in the claimant's case because he was 'left hanging' by Ms Hamilton. However, the respondents submit that there was not any evidence about other members of staff or the time periods over which they were dealt with so there was no basis for suggesting that the claimant was dealt with differently in this respect.

*My conclusions on Ground 4*

87. I do not consider that there is any error in the Tribunal's decision in relation to this detriment. The respondents are again simply seeking to re-argue the facts in a way that falls far short of identifying any perversity in the Tribunal's decision.
88. The Tribunal has properly focused on the reasons for the delay to which the reasons for the raising of the complaint in the first place were, as the respondents accept, not irrelevant. The Tribunal has also dealt with the most important planks of the respondents' evidence about the reasons for the delay. Thus at [115] the Tribunal deals with what Ms Hamilton said about her period of ill-health, but concludes that Ms Hamilton knew "at a very early stage, or at the outset" that the other member of staff did not want the complaints raised so that (by implication) she could have told the claimant that very quickly or at the outset. At [118] the Tribunal says explicitly, "*she knew that the unnamed complainant did not want the matter*

*taken further before she went off sick*”, which is clearly a reference to Ms Hamilton going off sick. The Tribunal is thus concluding that, right from the point that Ms Hamilton raised the complaints with the claimant, she was delaying telling him that the complaints would not be pursued. It follows that her reasons for doing so cannot have been any of the reasons advanced by Ms Hamilton about matters she subsequently had to deal with, and there is no need for the Tribunal to go through each point that Ms Hamilton made in order to explain its decision.

89. The ‘equality of misery’ point is a stronger ground of complaint about the Tribunal’s decision. The evidence that the Tribunal refers to at [116] that Ms Hamilton ‘had form’ in adopting these bullying tactics with other staff would, in the absence of other evidence, be insufficient to form the basis for a conclusion that the claimant had been subjected to a detriment for having made a protected disclosure. But the ‘equality of misery’ principle is one of evidence not law. As Langstaff put it in *Kowalewska*, where there is ‘equality of misery’ there is ‘unlikely’ to be detrimental treatment ‘because of’ a protected disclosure or protected characteristic. However, ‘unlikely’ does not mean ‘impossible’. And in this case, there was other evidence. First, the Tribunal had already found that some of Ms Hamilton’s treatment of the claimant had been retaliatory for his making protected disclosures and that in itself provides a basis for drawing an inference in relation to the reasons for further unreasonable conduct by her. Although the Tribunal does not expressly refer to that at this point, it does not need to: the decision must be read as a whole. Secondly, the Tribunal found Ms Hamilton’s conduct was not just unreasonable but “completely inappropriate” in the claimant’s case. Although unreasonableness is not to be equated with subjection to a detriment, it is nonetheless open to a Tribunal to conclude that unreasonable conduct is indicative of retaliatory conduct, and the more unreasonable the conduct, the more reasonable it will be to draw that inference, even if there is limited corroborative evidence.
90. Further, the “impression” that the Tribunal had gained from Ms Ryden’s evidence about what happened with other staff was that in the claimant’s case Ms Hamilton ‘went further’.

Paragraphs [116] and [117] have to be read together in this respect: what the Tribunal says in [117] is a product of the impression it gained from Ms Ryden's evidence. (I note that Mr Anderson had in fact said something similar in his statement at [11] so it may be that this has contributed to the Tribunal's impression.) I agree it would be preferable if the Tribunal had been able to make fuller findings of fact about treatment of other staff, but that is not always necessary for every element in a decision: it was entitled to take the view it did of Ms Ryden's evidence and to weigh it in the balance with other evidence. I agree with Mr Kohanzad that if the respondents had wanted properly to rely on 'the bastard employer defence', they would need to have produced detailed evidence as to Ms Hamilton's treatment of other staff.

91. Ground 4 is therefore dismissed.

*Ground 5 [Detriment 5(h)] The ET erred in finding that an email written from Kate Bennett to C on 20 February 2018 was a detriment and erred in relation to causation*

92. Paragraph 5(h) stated: "Kate Bennett sending a humiliating email to C on 20 February 2018, that was lacking in any corroborative evidence, accusing C of not following the instructions to all staff regarding testing of students, as well as falsely listing Teaching Standards she claimed C had broken in the process". The findings of fact are at [119]-[122] and the Tribunal's conclusions at [299].

93. Mr Linstead began by emphasising that the Tribunal had expressly stated that it was 'borderline' whether this detriment claim succeeded or not. At [299], the Tribunal concluded that Ms Bennett would have sent this email in any event. As such, it was (Mr Linstead submits) perverse for the Tribunal to conclude that the protected disclosure was a material influence. Mr Linstead relies on the definition of "material" in the Oxford English Dictionary as "having a logical connection with the facts at issue" or "significant, influential, esp to the extent of determining a cause". Mr Linstead accepted that the legal test is not a 'but for' test and that something can have a material influence on a person's reasons for acting without changing

the substantive outcome. However, the respondents submit in this case that if the email would have been sent in any event, that was inconsistent with the protected disclosure having a material influence on the sending of the email.

94. Mr Linstead refers to [299] where the Tribunal finds that Ms Bennett has “taken her lead from the approach that Ms Hamilton has taken in dealing with the Claimant’s actions over the Directed Time issue”. He submits that is inadequate as reasoning because they have already found that Ms Bennett’s actions were no more harsh than they would have been in any event. The disclosure was merely the background so the reason put forward by the Tribunal does not support their finding.
95. Mr Linstead also submits that the Tribunal was wrong to find this was a detriment without upholding any aspect of the claimant’s evidence about the content of this email. In particular, the Tribunal expressly rejected the claimant’s view that the email was “humiliating”. The respondents submit that if the reference to not following instructions was justified it could not be a detriment because an “unjustified sense of grievance” cannot constitute a detriment in law. The mere fact that an email accused him of not following instructions would not make it a detriment.
96. Mr Kohanzad in response submitted that there was no error of law in the Tribunal’s decision. He submitted that what the authorities require is that the protected disclosure has a material influence on the reason for the treatment. It submits it does not matter that the outcome would have been the same regardless of the protected disclosure. He submits that in a discrimination case it would be no answer to a discrimination claim that the employer’s reason for dismissal was materially influenced by the fact that the employee was a woman (say) but that the woman would have been dismissed in any event. That is a point that may go to *Polkey* and remedy but it is not a defence on liability.
97. Mr Kohanzad submits that, in any event, the respondents have mischaracterised the ET’s finding at [299]. The ET’s finding was, he submits, one based on the separability principle.



The Tribunal found that Ms Bennett sent the email because of the claimant's behaviour, but that, as it is impossible to divorce his behaviour from the protected disclosures, the protected disclosures were a material part of the reason for the treatment.

98. Mr Kohanzad further submits that the Tribunal did not need to uphold all elements of the claimant's case in order to find that what remained was a detriment. Whilst the ET concluded that the email was not humiliating, it considered that it was "certainly sarcastic and... strongly worded". This was sufficient to constitute a detriment.

*My conclusions on Ground 5*

99. I do not consider there is any error of law in the Tribunal's conclusion in relation to this detriment either, although the Tribunal's reasons leave much to be desired.
100. First, best practice is certainly that if the Tribunal finds some elements of the claimant's complaint not to be made out (as it did with the "humiliating" element), it ought expressly to identify what is left of the claimant's pleaded case and whether: (a) the claimant did in fact subjectively believe whatever was left of that case constituted a detriment; and (b) if so, whether the claimant's subjective belief was that of a reasonable worker in that position. In many cases, a failure to go through those steps would result in a conclusion that there had been an error of law. In this case, however, I do not consider there is any material error, essentially for the reasons identified by Mr Kohanzad. In short, this was not a harassment claim. The claimant did not have to establish that the email was "humiliating", just that it was reasonable for him to regard it as a detriment. It did not really much matter how either the claimant or the Tribunal characterised the letter as long as it was sufficiently heavy-handed that a Tribunal could reasonably conclude that a reasonable worker in the claimant's position could reasonably conclude that it was a detriment. That is a low threshold and it is in my judgment well surpassed in this case.
101. Secondly, as to the causation issue, a claimant in a discrimination or whistleblowing claim

does not have to establish that they would not have been subject to the detriment ‘but for’ their protected characteristic or protected disclosure. Nor is it a defence for an employer who has in fact acted because of the protected characteristic or protected disclosure to show that they would have subjected the employee to a detriment even if they had left the protected characteristic or disclosure out of account. As the Tribunal properly directed itself at [298], the test is whether the protected disclosure materially influenced the treatment of the claimant.

102. The Tribunal in this case found at [299] that Ms Bennett would have sent this email come what may given the claimant’s general behaviour. However, it did not stop there. What it goes on in that paragraph to address is the separability principle. It does not refer to *Kong v Gulf International Bank* or any other authority, but it takes the right legal approach of considering whether the claimant’s general behaviour can properly be separated from his protected disclosures such that it can be said that the protected disclosures were not a material influence on the treatment of the claimant by Ms Bennett. The Tribunal decided it could not be, especially given that Ms Bennett seemed to be taking her lead from Ms Hamilton’s approach to dealing with the claimant’s actions over the directed time issue. There is no error of law in that conclusion. It was open to the Tribunal on the facts.

103. I therefore dismiss Ground 5.

Ground 6 [Detriment 5(j)] The ET erred by making inconsistent findings in relation to two parts of the same detriment and impermissibly elided the protected disclosures and other disruptive behaviour when considering causation.

104. The pleaded detriment was: “Kate Bennett not prompting C to attend a scheduled half hour one to one meeting on 9 March 2018, even though C was eight steps away in the same room at his desk, but instead producing documents to put him in a negative light, and circulating them to the Governing Body and the Pastoral and Curriculum Committee”. The findings of fact are at [127]-[132] and the conclusions at [303]-[306].

105. The respondents submit that the Tribunal erred in finding that one part of this detriment was materially influenced by the claimant's protected disclosures when the other half was not. The respondents submit this was inconsistent given that the detriment relates to two parts of the same course of conduct and that the Tribunal's reasons are inadequate because they fail to explain the difference. The respondents emphasise that there was a gap of five months between this detriment and the last of the three protected disclosures, that Ms Bennett was not the recipient of any of the protected disclosures, but that she had become frustrated with other behaviours of the claimant at this time. The respondents submit that the Tribunal should have concluded that the claimant's unreasonable behaviour was separable from the protected disclosures as far as Ms Bennett was concerned. Mr Linstead submits that at [304] the Tribunal has impermissibly elided the claimant's other disruptive behaviours with his protected disclosures, and also with contact the claimant made with the DfE and ACAS that they found did not amount to protected disclosures.
106. Mr Kohanzad submits that this is a perversity challenge. He submits that the Tribunal is being criticised for nuance. He submits the Tribunal has properly considered whether the claimant's conduct to which Ms Bennett was reacting was properly separable from the protected disclosures and has concluded that it is not. He submits the Tribunal's reasons are adequate.

*My conclusions on Ground 6*

107. In my judgment there is no error of law in the Tribunal's decision in relation to this detriment. The language of the judgment indicates that it has well in mind the correct legal tests, including the principles from *Kong v Gulf International Bank* (although, as previously noted, there is no reference to that authority in the decision).
108. The Tribunal adequately explains the reason it takes a different approach in relation to the two parts of the same detriment at [305]-[306]. Its decision recognises that, by this point in time, the protected disclosures are in the background and thus that it is borderline as to whether they

are still materially influencing Ms Bennett’s behaviour. They conclude that in relation to the ‘childish’ action of not reminding the claimant about the meeting when in the same room as him, the protected disclosures were an influence, but no more than trivial as the “*action was more of a human although flawed reaction*”. In contrast, the circulating of the report was more of a calculated act. The Tribunal explains at [129]-[132] why it formed the view that she did not need to send the report when she did, and at [306] it explains why the nature of the act (sending a report to governors) was itself a “*full knowledge*” response to what the claimant had done previously “*in his Governor role by putting matters before the board*” – in other words that Ms Bennett’s actions involved a direct reference back to his protected disclosures.

109. Nor was there anything irrational or perverse in the Tribunal’s conclusion that the claimant’s protected disclosures were not properly separable from his other conduct that was an influence on Ms Bennett’s behaviour. The Tribunal explains this at [303] by saying that the general frustration with the claimant was “*impossible to divorce*” from the protected disclosures because Ms Hamilton and Ms Bennett “*viewed him as a person who would not take instruction and pedantically raised matters and would not let go of them*”. This is not, as I read it, a reference to things other than the protected disclosures as Mr Linstead submits, but a description of the claimant’s approach to raising and repeating his protected disclosures. The Tribunal is saying that the claimant’s making of the protected disclosures has led to Ms Bennett and Ms Hamilton having a fixed view about his character based on his making of those disclosures.
110. Where the Tribunal at [304] refers to the claimant’s contact with DfE and ACAS, it does so to make clear that it has not left out of account that, by this time, the claimant’s actions in contacting DfE and ACAS are likely also to be influencing Ms Hamilton’s and Ms Bennett’s treatment of him. However, it nonetheless considers the protected disclosures remain a material influence. That was a conclusion that was open to the Tribunal on the evidence.
111. There is also no perversity in the Tribunal finding that Ms Bennett was influenced by the

protected disclosures even though she was not the direct recipient of them. The respondents are not arguing that Ms Bennett did not have the requisite knowledge of the protected disclosures to enable her in principle to act in response to them. Indeed, the Tribunal had found at [292] that it was “*not a secret*” that the claimant had raised the matter, and at [299] that Ms Bennett had “*taken her lead from the approach that Ms Hamilton [took] in dealing with the Claimant’s actions over the Directed Time issue*”. This is in substance a finding of common knowledge and intent as between Ms Bennett and Ms Hamilton in relation to both the claimant’s actions and their reasons for acting.

112. Finally, although the Tribunal should have taken care with its choice of words and spelled out its reasoning more clearly, the Tribunal’s suggestion that Ms Bennett was trying to “sabotage” the claimant in front of the PCC/Governing Body as he had “sabotaged” her and Ms Hamilton is also perfectly comprehensible when the decision is read as a whole. Ms Bennett was the deputy head and thus bore a shared responsibility for setting directed time (as is apparent from the working hours document referred to at [37] having been written by the previous deputy head).

113. I therefore dismiss Ground 6.

Ground 7 [detriment 5k] The ET erred in finding allegation 5(k), about an un-named person being referred to at a Governor’s meeting, to be a detriment.

114. Detriment 5k was that “Anne Hamilton at a Governing Body Meeting on 12 March 2018 in which C was in attendance, stated that she was taking a member of staff through capability procedures without saying who it was”. The Tribunal’s findings of fact are at [133]-[137] and the Tribunal’s conclusion is at [307].

115. The respondents submit that it was perverse for the Tribunal to conclude that it was reasonable for the claimant to think that Ms Hamilton’s reference at the meeting was about him because the Tribunal also found that he accepted no capability procedures had been taken against him,

or were ever taken against him and so the reference could not have been to him. The respondents submit that the Tribunal has wrongly applied a subjective approach at [135] in concluding that this was a detriment. The respondents further submit that the letter three months later referred to by the Tribunal at [139] was not relevant to whether he had been subjected to a detriment in the meeting at the time. Mr Linstead accepted, however, that although the allegation that Ms Hamilton's reference was to the claimant was not confirmed either way, the respondents had not been putting forward a positive case that someone else was being referred to.

116. Mr Kohanzad in response submits that this is another perversity challenge. He explained that the context of this reference in the Governing Body Meeting on 12 March 2018 was that, as the Tribunal found at [133], at this time both Ms Hamilton and Ms Bennett were repeatedly telling him he was not meeting the Teaching Standards, and, in advance of the meeting, Ms Bennett had on 23 February postponed a "management meeting" that the claimant had been due to attend and then on 9 March 2018 rescheduled that meeting for 28 March 2018.

*My conclusions on Ground 7*

117. This ground of appeal is hopeless. The Tribunal has evidently not applied a subjective approach to the question of whether this constituted a detriment. The subjective element is that the claimant believed the reference to someone going through capability procedures was to him. The Tribunal's reasons explain why, objectively, it considered the claimant's belief to be reasonable.
118. Nor is there anything perverse in the Tribunal's conclusion. Again, the decision must be read as a whole. The context is that the claimant was sent a Notice of Concerns on 3 November 2017 referencing the Teaching Standards and threatening "more formal procedures" if there was not improvement, together with the matters the Tribunal refers to at [133] that Ms Hamilton and Ms Bennett had been repeatedly saying he was not meeting Teaching Standards. The evidence to which Mr Kohanzad has referred me of the rescheduling of the "management

meeting” certainly adds to the reasonableness of the claimant’s belief and, as the Tribunal’s decision is consistent with that evidence, I am prepared to assume that it had it in mind even though it did not refer to it in its decision.

119. Further, the fact that Ms Hamilton accepted she had said that she was in the process of taking a member of staff through capability, but did not make out a positive case that it was a different member of staff being referred to strengthens the picture. As does the fact that, when challenged by the claimant about it three months later, she did not deny it as the Tribunal found at [139]. This was not irrelevant evidence as the respondents submit but evidence the Tribunal could legitimately take into account when assessing, objectively, the reasonableness of the belief that the claimant had formed at the time on the basis of his own intuition and the surrounding circumstances as they were known to him at that point.
120. Yet further, what the Tribunal says at [138] about it being unnecessary for Ms Hamilton to tell the Governors that she was in the process of taking a member of staff through capability procedures explains why it concluded that the reference was a deliberate, bullying act by Ms Hamilton, thus linking it to the other similar conduct by her that it had already concluded was materially influenced by the protected disclosures.
121. Finally, the fact that the claimant was never put through capability procedures is completely irrelevant. The bullying conduct by Ms Hamilton, which the Tribunal found to be motivated by the protected disclosures, were the threats and references to formal procedures that in the end were not pursued.
122. I dismiss Ground 7.

**Ground 8: Appeal of paragraph 56 that C’s ICT role was given to another teacher for innocuous reasons**

123. At [56] the Tribunal found as follows:-

We also note a disparity in the chronology and interpretation of events presented by Ms Bennett in evidence. At paragraphs 21 and 29 of her main witness statement, she states that Ms Hamilton re-allocated the Claimant’s

responsibility for ICT teaching to another Teacher, in early 2017, as a result of the concerns about the Claimant's performance. However, the Claimant's email to Mrs Bennett dated 4 October 2017, at B541, and Ms Hamilton's email to the Claimant dated 10 October 2017, at B555, indicate this work had already been given to the other Teacher at that time and for what appear to be innocuous reasons.

124. The respondents submit that this finding was perverse because the emails do not contradict the respondent's case that the claimant's tasks were reallocated because of the claimant's performance. The respondents submit that although the Tribunal did not refer to this conclusion anywhere else in its decision that it has affected its assessment of the evidence because it was part of the reason why the Tribunal did not consider that the respondents' concerns about the claimant's performance were wholly genuine and uninfluenced by the claimant's protected disclosures.
125. Mr Kohanzad submits, in short, that this paragraph of the judgment is immaterial and the point is academic.

*My conclusions on Ground 8*

126. I am satisfied that this paragraph was not material to the judgment. I acknowledge that the paragraph does appear in the section of the judgment where the Tribunal was providing some of its reasons for concluding that the respondent's performance concerns, or the purported extent of those concerns, were exaggerated – findings that paved the way for its conclusion that the 3 November 2017 Notice of Concerns was materially influenced by the claimant's protected disclosures. However, it is a 'makeweight' point in this section and it is not actually referred to by the Tribunal again.
127. In any event, although I do not understand how the Tribunal has concluded from these emails that there were "*innocuous*" reasons for transferring this work to another teacher (since the emails do not say anything about the reasons), I do not actually see how the emails can possibly assist the respondent's case. The claimant's email of 4 October 2017 refers to "*Ben*" having been made the ICT lead "*since*" the staff meeting on 18 September 2017. This post-



dates the protected disclosures so is not going to assist in terms of establishing that there were really significant performance concerns about the claimant prior to him making those disclosures, which I take to be the thrust of the respondents' case on this point.

128. I dismiss Ground 8.

### **Conclusion**

129. For these reasons, I allow the cross-appeal, but dismiss the appeal.

### **Disposal**

130. The parties were provided with a draft of this judgment and invited to make submissions on disposal, taking into account the authorities of *Jafri v Lincoln College* [2015] QB 781 (especially at [21] *per* Laws LJ and [47] *per* Underhill LJ) and *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 (especially at [46] *per* Burton P). The parties are agreed that the case should be remitted to the same Tribunal to consider afresh the issue of causation in relation to detriment 5(b). I am satisfied that is the appropriate course and so order.