EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs Z Dickenson	**AND**	**(1) The Governing Body of Easington Lane Primary School**
		(2) Sunderland City Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **North Shields** **On: 3, 4, 5 and 6 April 2017**
Deliberations: **10 April 2017**

Before: **Employment Judge Shepherd** **Members: Mr Ratcliffe**
Mr Brain

Appearances

For the Claimant: **Mr E Ledgard**
For the Respondents: **Ms K Jeram**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of Unfair Dismissal is well-founded and succeeds

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2. The claim of Direct Age Discrimination is not well-founded and is dismissed.

3. The claim of Harassment on the grounds of age is not well-founded and is dismissed.

ORDER

It will be necessary for a further Remedy Hearing to be listed and directions will be required in order to facilitate this. The parties' representatives must provide suggested orders and details of unavailability for the period May to July 2017 on or before **9 May 2017.** The case will then be referred to Employment Judge Shepherd to consider the appropriate orders or whether a telephone preliminary hearing should be arranged.

REASONS

1. The claimant was represented by Mr Legard and the respondent was represented by Ms Jeram

2. The Tribunal heard evidence from:

Zena Dickenson, the claimant;
Ian Dickenson, the claimant's husband;
Paula Barclay, HR Consultant;
Sarah Nordstrom, Head Teacher.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, consisted of three lever arch files numbered up to page 925. The Tribunal considered those documents to which it was referred by the parties.

The issues

4. The issues to be determined by the Tribunal had been identified at a Preliminary Hearing before Employment Judge Johnson on 14 December 2016. The parties' representatives discussed the issues further at the commencement of this hearing and provided an agreed list of issues as follows:

1. Unfair Dismissal

(a) Was there a breach of the implied term of trust and confidence?

(i). Was the conduct* complained of likely or calculated to destroy trust and confidence.

(ii) Was it done without reasonable and proper cause.

(b) If so, did the claimant resign in response to the breach?

(c) Did the claimant affirm her contract and/or waive the breach by delaying her resignation?

2. Age Discrimination (Direct)

(a). Who is the S.23 comparator?

(b) Was a less favourable treatment*?

(c) Was the less favourable treatment because of age?

(d) Can the respondent objectively justify the treatment?

3 Age Discrimination (Harassment)

(a) Was the conduct*complained of unwanted?

(b) Did the unwanted conduct have the purpose of creating an intimidating, hostile etc environment for the claimant?

(c) Did the unwanted conduct have the effect described at (b) above? Where effect is being considered, the following matters ought to be taken into account:

(i) Claimant's perception

(ii) The other circumstances of the case

(iii) Whether it was reasonable for it to have that effect

(d) Was the conduct related to age?

*The conduct/treatment complained of is:

(a) Suspension} (b) Disciplinary action} (c) " Demotion"} (d) Formal absence } management (e) Disingenuous reply }	As further detailed in the Claimant's resignation letter (P456) and the ET1

A further issue had been identified at the Preliminary Hearing. It was not included within the agreed list of issues but it was mentioned during the submissions and the Tribunal has considered the issue as follows.

Have the claimant's age-related claims been commenced within the appropriate time limitation periods? If not, does the Tribunal have jurisdiction to hear the claimant's claims.

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

5.1 The claimant was employed as School Business Manager at Easington Lane Primary School (the school). The claimant had held that position from April 2009 and had 21 years' continuous service, at the same school, with the Local Education Authority.

5.2 The claimant was a member of the first respondent's senior management team within the school. Her role carried with it responsibility for a £1.2 million budget, procurement and HR functions. 15 other employees reported directly to her.

5.3 In July 2015 Sarah Nordstrom, the Head Teacher of the school, took on an additional role at New Silksworth Primary School in order to improve the performance of that school following an unfavourable OFSTED inspection. This meant that Ms Nordstrom would not be at the school every day and Stephen Trotter, the Deputy Head Teacher became Acting Head Teacher of the school although Ms Nordstrom retained primary responsibility for the school.

5.4 On 11 November 2015 the claimant met with Neil Lawther, Finance Officer for the second respondent. During that meeting it was indicated that the school's projected income would not be achieved due to a shortfall in the 'pupil premium' income and the income from 'early years'. There was also an additional expense in respect of a reassessment of the rates. This meant that the school would not have the surplus that had been projected in March 2015.

5.5 The claimant rang Steve Trotter who was away at a conference at the time and she then met with Steve Trotter upon his return on 16 November 2015 and gave him a copy of Neil Lawther's 'School Outturn Report'.

5.6 On 18 November 2015 the claimant met with Stephen Scott, the link Governor for finance. She informed him that there would be an overspend and lower income.

5.7 On 18 November 2015 the claimant was approached by Kellie Todd, Clerk/Receptionist. Ms Todd inform the claimant that she was considering applying for a position at another school but, in order to help her decide, she wanted to know what her prospects were with the first respondent. The claimant said that she informed Ms Todd that the additional hours she was working above her contracted 25 hours could not be guaranteed in the future. She said that she mentioned redundancies and indicated that it could happen to any of them. The claimant's case was that she was trying to reassure Kellie Todd that she was valued as much as anyone else.

5.8 On 21 November 2015 Hannah Wardle, Senior Teacher, met Kellie Todd at a private party. Hannah Wardle said that Kellie Todd was upset as a result of a conversation she had with the claimant in which the claimant had indicated that she could not guarantee that Kellie Todd would continue to receive the extra hours and that the possibility of redundancies had been raised. She had been told by the claimant not to mention the conversation to the senior management team. Hannah Wardle contacted Sarah Nordstrom to inform her of this.

5.9 Sarah Nordstrom spoke to Kellie Todd on 22 November 2015 and then sought advice from Paula Barclay of PPM, the school's HR advisor. On 25 November 2015 Paula Barclay sent an email to Sarah Nordstrom in which she stated:

> "Background
>
> The Business Manager has made comments in the past regarding her retirement and suggested the ideal would be to be made redundant around that time. This may have been said as 'tongue in cheek' however recently several issues have come to light which could be linked to this statement.
>
> Suggested next steps
>
> I believe there are sufficient incidents to warrant an investigation. Part of this investigation will highlight occasions where the Business Manager has made decisions or had discussions with members of staff which are outside of the remit of her role. The investigation will provide a recommendation as to whether there is enough evidence to move to a formal disciplinary meeting. As previously discussed the ideal would be to have the three-year budget predictions to hand as part of the investigation."

5.10 On 1 December 2015 Paula Barclay was appointed as the investigating officer. She interviewed Hannah Wardle, Kellie Todd, Sarah Johnson and Steve Trotter and prepared draft statements for them.

5.11 A School Governors meeting took place on 8 December 2015. The claimant attended as did Sarah Nordstrom. The claimant provided a financial update. She referred to a shortfall in respect of the financial year of £29,000 on the 2015/16 budget.

5.12 On 9 December 2015 Paula Barclay sent an email to Sarah Nordstrom in which she provided advice with regard to speaking to the claimant in which it was stated:

> "I would start with
> There are some rumours in the school that there is going to be redundancies next year – what you know about this? and let her speak

If her response is she doesn't know anything about it probe a little by asking if she denies having any conversations with colleagues about redundancy, reducing hours etc.
Then ask her how this risk has not been brought to your attention and why it has not been reported on in the recent Finance meetings
If you believe the explanation about the budget stacks up you may choose not to suspend her. However, I think we both agree that she has stepped outside of her remit as Business Manager and SMT in divulging this information to colleagues. Therefore you can tell her you have concerns about this and an investigation will take place but you could do this with her still at work. However, unless she comes up with some plausible explanation which eliminate your concerns about funds the prudent approach would be to suspend her to allow a full and fair investigation to take place.
Explain to her that this is not disciplinary action and that she will be paid while she is off. She will receive a letter confirming the position and she should not speak to anyone about this"

5.13 On 9 December 2015 the claimant was called into a meeting with Sarah Nordstrom and informed that she was suspended. The letter confirming the suspension was sent to the claimant by Paula Barclay. This referred to the purpose of the suspension as being to remove the claimant from the workplace while investigation was undertaken into the following allegations:

"

- You had a conversation with a colleague about the risk of a reduction in the number of hours they work and the possibility of redundancy situations in the future. This issue has not been discussed by the Senior Leadership Team.

- Despite having this discussion, you have not raised your concerns with the Senior Leadership Team about any major concerns you may have with ongoing costs in relation to agreed budgets. In addition, you have not formally reported any risks related to major loss predictions for this financial year or for future years in recent Finance meetings."

5.14 Paula Barclay prepared an investigation report which was completed on 12 January 2016. Statements had been obtained from Sarah Nordstrom, Steve Trotter, Sarah Johnson, Kellie Todd, Hannah Wardle and the claimant. The recommendations were to consider moving to disciplinary proceedings to address inappropriate discussion with colleague. Decide if non- disclosure of financial concerns for 2016/2017 is a conduct or capability issue. Review Business Manager role and investigate the use and availability of financial tools to produce detailed budget position, including projections to provide guidance in early awareness.

5.15 On 15 January 2016 Paula Barclay wrote to the claimant indicating that she was required to attend a disciplinary hearing and the possible outcomes could be "First Written Warning or Final Written Warning".

5.16 The disciplinary hearing was originally scheduled to take place at the school. The venue was changed and a number of governors had declared a conflict of interest.

5.17 On 10 February 2016 Dave Marshall, the claimant's Trade Union representative, sent an email to Sarah Nordstrom indicating that, at a meeting on the Friday before he had tried to raise the issue of the continued suspension of the claimant. He stated:

> "Suspension is normally used for one of two reasons, to allow an investigation to take place, or because the alleged misconduct could result in dismissal. In this case the letter inviting Zena to the hearing makes clear that no dismissal as possible and the investigation was completed several weeks ago. In such circumstances, it is inappropriate to continue the suspension, indeed to do so could result in prejudice against Zena at the hearing, as it can result in Governors believing the case were more serious than it is.
> Could I ask that you review and lift the suspension with immediate effect?"

5.18 Paula Barclay sent an email to Dave Marshall stating:

> "Unfortunately only the Governing Body can end the suspension as stated in the Disciplinary Policy. Therefore, this decision will form part of their next meeting which is on Friday, 26 February 2016.

5.19 The meeting was arranged for 5 February 2016. The claimant attended and found that one of the governors on the panel was also an employee who reported directly to the claimant. The meeting was postponed and eventually took place on 26 February 2016.

5.20 At the disciplinary hearing on 26 February 2016, the hearing was before a Personnel Committee of the Governing Body. The claimant was represented by Dave Marshall. The minutes of the meeting show that the conclusion of the Committee was that:

> " (i) At the meeting, ZD acknowledged that she had engaged in a conversation with a colleague and that during the course of that conversation, redundancies had been discussed. Governors found that ZD was not able to give a satisfactory explanation as to how the subject of redundancy arose and the governors believed ZD should not have been discussing the subject with another member of staff. That said, it was accepted that this was unlikely to have been done with any malicious intent on ZD's part and bearing in mind her length of service and previous record, it was decided to take no formal action in this matter.
>
> (ii) With regard to the sharing of budget information ZD accepted

> that she was aware of the budget shortfall in the current and future years. This was a potentially serious issue for the school. However, ZD's representative's argument that this was due to a capability issue and was not as a result of misconduct was accepted. Therefore, no further action would be taken under the Disciplinary Procedure in relation to this allegation. As explained at the meeting, the matter would be dealt with in accordance with the Capability Policy for Support Staff. In addition the Business Manager role would be reviewed in terms of role responsibility and reporting lines."

5.21 The Tribunal had sight of handwritten notes taken of this meeting by Sarah Nordstrom in which she made references to PM (Performance Management). She also wrote on the handwritten notes 'severance'.

5. 22 It was agreed that suspension would be lifted with immediate effect to enable the claimant to return to work on Monday 29 February 2016.

5. 23 The claimant returned to the school at 9.30 on 29 February 2016. Upon her arrival, she found that her security pass had been disabled. She had to be let into the building by a Teaching Assistant. She was told not to go into her office and to wait in reception. She was taken to Sarah Nordstrom's office and Paula Barclay and Steve Trotter were also present. The claimant was informed that a performance improvement plan was to be put in place. The claimant would no longer have any line management responsibilities she was told that she was expected to work in the main office at reception updating the school's database until the performance improvement plan was in place. The claimant asked if she was, basically, a receptionist. Steve Trotter said that they wouldn't call it that and once she had updated the database she could do "officey things".

5.24 The claimant became distressed, she indicated that she would like to be considered for redundancy. The claimant was advised not to make any hasty decisions. Sarah Jolley gave her a lift home when she then remained off sick until her resignation.

5.25 On 11 March 2016 Paula Barclay sent two letters to the claimant, one of which was an invitation to attend a "Formal Absence Review meeting" to discuss the claimant's absence and consider measures to support her return to work. The second letter was an invitation to a "Protected Conversation meeting". The proposal was for the protected conversation meeting to take place at 11am and the Formal Absence review meeting to take place at 12 noon. In an email to Sarah Nordstrom Paula Barclay stated that if the protected conversation was fruitful they then may not need the absence review meeting but she thought it was necessary to pencil it in in case the early meeting did not go to plan.

5.26 The claimant did not attend those meetings but negotiations took place between the respondent and Dave Marshall, the claimant's Trade Union representative. Both parties waived privilege in respect of the negotiations and the Tribunal had sight of various documents in this regard. It appeared that an agreement had been reached whereby the claimant's termination date was agreed and a settlement figure. However, following the claimant obtaining independent

legal advice, a revised offer was made on her behalf which the respondent was not prepared to meet.

5.27 On 26 April 2016 the claimant wrote to Sarah Nordstrom resigning from her employment and giving three months' notice. In that letter the claimant stated

"I feel that I am left with no choice but to resign in light of the following:

a. Unnecessary suspension from my post without any informal discussion as detailed in the school's Disciplinary Policy. The policy states 'Headteachers/Managers should address issues informally, in the first instance, wherever possible'. This action was taken when it was known that it would cause me considerable reputational damage. The policy also states that 'The employee should also be given the name and contact details of a point of contact whom they can contact regarding any work related issues during the period of suspension. I was given no such contact and was left isolated.

b. Another member of staff was informed of my suspension before me, enabling them to remove my personal belongings (bag, coat, keys) from my office and place them in the reception area.

c. Although the disciplinary policy states 'the employee should not discuss any aspect of the case with other school employees…', You instructed all staff they must not contact me at all, leaving me further isolated over Christmas.

d. You allowed a member of staff who reported directly to me to sit on the panel of Governors at the initial Disciplinary hearing. Although the hearing was adjourned, the member of staff still had full access to the reports pertaining to my case. I believe this was a deliberate attempt to belittle me.

e. The letter I received after the Disciplinary Hearing was significantly different to what was actually discussed in the hearing. Although the letter refers to the Capability Policy, that was not mentioned at the meeting whilst I was in the room and I had to request a copy of the policy for information at a later date.

f. Upon my return to work following the Disciplinary Hearing, the removal of my office and duties without any consultation – in effect, demoting me to 'Receptionist' and being told by Mr Trotter to do' officey things'. Although you stated the Business Manager would now work in the Headteacher's room, my computer had already been set up in the main office with the school administrator's computer in your office.

g. Staff whom I had managerial responsibility for were told to

no longer report to me; instead, they should see either Mr Trotter or Ms Jolly.

h. Within a week of submitting a sick note from my GP declaring me unfit for work due to work related stress, I was informed that a formal Absence Management Review would take place, although I had not hit any of the agreed triggers for reviews. To my knowledge, no other member of staff has been treated in such a way. The letter was sent in the same envelope as an invitation to a Protected Conversation meeting. Clearly, this absence management review was being used as a lever to broker a settlement agreement.

I consider these to be fundamental and unreasonable breaches of the contract on your part"

5.28 On 3 May 2016 Sarah Nordstrom wrote to the claimant stating as follows:

"I am disappointed that you have decided to resign but I must disagree that you had no choice but to do so. As you are aware, the School operates a detailed Grievance Procedure which is designed to resolve issues which are of concern to staff, such as you raise in your resignation letter and you could have chosen to use this to try to resolve these issues rather than resign.

I feel I should respond to your points, as some of your assumptions and facts are incorrect.

a) The budget is key to the School's successful operation and when this is in deficit, this is a very serious issue with serious implications for the School. The initial belief was that you had failed to keep the School informed of shortfalls in the budget which was potentially very serious and potentially misconduct. That was why you were suspended. Also, suspension allowed a full investigation to be carried out into the facts. I disagree that you had no contact, your contact was Paula Barclay, the School's HR Advisor, and both you and your Trade Union representative were in regular contact with Paula during your suspension.

b) The Acting Head was informed of your suspension but bearing in mind his position, this had to be the case. Arrangements regarding your personal belongings were made to try and assist you at a difficult time and allow minimal disruption for you and other members of the office.

c) Staff were instructed not to contact you regarding the suspension or the reasons for it. At no time were staff instructed not to contact you at all.

d) It is the School's Business and Governance Support provider, not the Head teacher who was responsible for organising the Governors at Disciplinary Hearings. Unfortunately they were not aware that one of the Governors they had convened worked part-time at the school and was therefore unsuitable. Once this came to light the hearing was adjourned and reconvened without that Governor. This was a genuine error on their part and was not in any way designed to belittle you.

e) Again, it is the School's Business and Governance Support provider who are responsible for preparing the notes of the meeting and as far as I am aware, these were an accurate reflection of what was said in the meeting and were accepted by the Governors. The argument that was put by your Trade Union Representative was the issues that had arisen had not arisen as a result of any misconduct on your part but was an issue of capability and that these should be dealt with as a capability issue rather than a misconduct one. The Capability Policy for Support Staff is the correct one to use in these circumstances. This information is set out in both the notes of the meeting and in the outcome letter for you. I do not really understand what you feel is the discrepancy.

f) There was no demotion or intention of demoting you on your return to work and I'm surprised by this comment. The reason for the reorganisation of the desks was linked to the requirement for an existing member of staff to cover the financial tasks associated with the Business Manager role. Due to the inexperience of this cover regular contact with the LA Finance Department was necessary and these calls were taken on loudspeaker to allow them and the Acting Head teacher to be involved in discussions and ultimately decision-making. Therefore it made sense for them to share an office. During this time your office was used to store school uniform stock and to provide a designated work station for PPA duties, we found this worked better than previous arrangements. As explained to you on your return to work; a support plan was to be agreed, linked to a set of targets, with key success indicators and training. Therefore whilst this support plan was in place the cover would continue to carry out financial tasks with their temporary base in the Acting Head teacher's office, allowing you to concentrate on the support plan temporarily based in the main office. Once the support and relevant training had been administered that you would have moved into the Head teacher's office with the cover returning to their substantive role in the main office. It also provided much-needed resource in the main office.

g) In your absence and whilst you are on a support plan, the key decisions linked to finance have and will be led by Mr Trotter

and Mrs Jolly. All members of staff needed to be informed of this. It is normal practice when looking to improve performance to amend duties to allow staff to focus on key activities, in your case budget activities.

h) It has been common practice within the school to hold a sickness review meetings at the earliest convenience, specifically where the illness could be related to stress. This is in order to be as supportive as possible to the member of staff and to sign post additional external support. You returned to work on 29 February 2016 and stayed for a period of less than three hours. You asked if you could leave early which I agreed to and you called in sick the next day and have not returned to work since. As the reason for your absence was given as work-related stress, an early intervention meeting was arranged with a view to discuss obtaining an Occupational Health report – this is entirely in line with the recommendations of the Attendance Management Policy. It was your Trade Union Representative who asked us, on your behalf, to consider a Settlement Agreement. This was not a proposal made by the school and it was not a route the school had planned to go down. Discussions were only started at your request.

I do not feel that the School have done anything which caused you to resign and feel the best course of action for you to have resolved these issues would have been to raise them and allow the School to address them."

5.29 During her notice period, the claimant became aware that the first respondent had begun advertising her role and that a new job description and person specification had been prepared by Barry Huitson, the School Business Manager at New Silksworth School. The requirement for the appointed person to hold a School Business Manager qualification such as the DSBM or CSBM had been reduced from an essential requirement to a desirable requirement.

5.30 Barry Huitson was appointed to the role of School Business Manager for the school in September 2016. He did not hold either the DSBM or the CSBM qualification.

5.31 On 17 October 2016 the claimant presented a claim to the Employment Tribunal. She claimed unfair dismissal and Age Discrimination.

6. Mr Legard and Ms Jeram provided detailed and helpful submissions. These are not set out in their entirety in these reasons. However, the Tribunal has considered all of the submissions in reaching its conclusions.

The law

Constructive Dismissal

7. Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct". The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence. That is expanded upon in a well known passage from the judgment of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347**:-

> "It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

8. Next, there is the significance of what is colloquially called a final straw. This was considered in the Court of Appeal judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR page 35**:-

> "In order to result in a breach of the implied term of trust and confidence, a final straw, not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective".

9. Further clarification of the objective nature of the test is provided in the Court of Appeal judgment in **Bournemouth University Higher Education Corporation v Buckland [2010] IRLR page 45**:-

> "The conduct of an employer who is said to have committed a repudiatory breach of the contract of employment is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one of the tools in the employment tribunal's factual analysis in deciding whether there has been a fundamental breach but it cannot be a legal requirement".

10. In **Meikle v Nottinghamshire County Council [2005] ICR**, Keane LJ said:-

> "There may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It is suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far in questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by repudiation by one party which is accepted by the other … The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation. It follows that, in the present, it was enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer".

11. The test was put in slightly different terms in **Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013)**, in which Langstaff P endorsed a test first propounded by Elias P in **Abbey Cars West Horndon Limited v Ford UKEAT 0472/07**:-

> "The crucial question is whether the repudiatory breach played a part in the dismissal … it follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon".

12. The cases were considered by his Honour Judge Burke QC in **Barke v Seetec Business Technology Centre Limited** [2006] UKEAT 0917, in which he formulated the following propositions from the judgments:

(1) Where in a constructive dismissal case a course of conduct culminating in a last straw on the part of the employers is relied upon as amounting to a fundamental breach by the employer of the implied term of trust and confidence, the tribunal must consider whether the course of conduct cumulatively amounts to such a breach; it is not necessary for each individual incident which makes up the course of conduct or the last straw to be of itself a breach of contract (Lewis, Meikle). The question is – does the cumulative series of acts or omissions taken together (our emphasis) amount to a breach of the implied term;

(2) The conduct which is said to constitute the last straw need not be unreasonable or blameworthy; but it must contribute something to the breach of the implied term, although what it adds may be relatively insignificant; but it will not be sufficient if the last straw is an entirely innocuous act (Omilaju);

(3) The employee must leave in response to the repudiation; but it is enough that the employee resigns at least in part in response to the repudiation; the repudiation does not have to be the effective cause of the resignation (Meikle).

(4) The test as to repudiatory conduct is objective (Lewis, Meikle, Omilaju);

13. Mr Legard, on behalf of the claimant, referred to the issue of suspension indicating that the existence of a power to suspend does not necessarily validate every exercise of the power, or justify excessively lengthy suspension. He referred to the case of **Gogay v Hertfordshire County Council [2000] IRLR 703** and also the comments of Elias LJ in **Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402** as follows:

> "It appears to be the almost automatic response of many employers to allegations of this kind [mistreatment of a vulnerable patient] to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established… It [suspension] should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them…"

14. Where the claimant waits too long after the respondent's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. As Lord Denning said in **Western Excavating v Sharp 1978 ICR 221** the employee must "make up his mind soon after

the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"

15. In **Cantor Fitzgerald International Ltd v Bird and Ors 2002 IRLR 867** the High Court held that the claimants had indicated their discontent with the employment and given clear signs of their intention to leave.' Affirmation' was "essentially the legal embodiment of the everyday concept of 'letting bygones be bygones"

16. Where an employee brings an unfair dismissal claim for an Employment Tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Capability is a potentially fair reason for dismissal under section 98(4).

17 Further, a Tribunal should take heed of the Employment Appeal Tribunal's guidance in Iceland Foods Limited v Jones [1982] IRLR 439 a conduct case but still relevant in the circumstances. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. Once an employer has shown the Tribunal that one of the potentially fair reasons for dismissal applies, the Tribunal must determine whether the employer acted reasonably for dismissing for that reason. In doing this, the Tribunal must apply the "band of reasonable responses" test – ie consider objectively the standards of the hypothetical reasonable employer rather than impose their own view of what would have been appropriate for the employer to do in the circumstances.

<u>Direct discrimination</u>

18. Section 13 of the Equality Act 2010 provides;

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 4 of the Act defines the protected characteristics, one of which is race and another is sex.

18. In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he

> or she is less favourably treated than the comparator who did not share the prohibited characteristic."

19. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome, see Lord Nicholls in **Ngarajan v London Regional Transport** [1999] IRLA 572**.**

20. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Carter v Ashan** [2008] ICR 1054. The Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

21. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved facts from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

22. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him or her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

23. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

24. Since the House of Lords Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, **Ladele, Amnesty International v Ahmed** [2009] IRLR 884, **Aylott v Stockton on Tees Borough Council** [2010] IRLR 994, **Martin v Devonshires Solicitors** [2011] ICR 352**, JP Morgan Europe Limited v Cheeidan** [2011] EWCA Civ 648, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

25. For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nhgarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established

26. <u>Harassment</u>

Section 26 of the Equality Act 2010 provides

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

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

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

(i) Violating B's dignity, or

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

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

(a) The perception of B;
(b) The other circumstances of the case;
(c) Whether it is reasonable for the conduct to have that effect.

27. Burden of Proof

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –
(a) an Employment Tribunal."

28. Time Limits

Section 123 of the 2010 Act:

(1) [Subject to section 140A,] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

Conclusions

Constructive Dismissal

29. The Tribunal has considered whether there was a breach of the implied term of mutual trust and confidence in respect of the conduct/treatment referred to in the list of identified issues.

30. It was submitted by Ms Jeram, on behalf of the respondent, that the suspension, viewed objectively, was not done in a manner calculated or likely to destroy the trust and confidence between the employer and the employee and it was done with reasonable and proper cause. She submitted that the suspension was necessary in order to carry out a complete investigation into the true state of the school's finances. The length of the suspension was submitted to have been unavoidable.

31. Mr Legard, on behalf of the claimant, submitted that the suspension was wholly unjustified, in breach of procedure and went unreviewed for approximately nine weeks.

32. The Tribunal accepts that there were concerns about what the claimant had done and those concerns did justify an enquiry. The respondent's Disciplinary Policy and Procedure provides that the Chair of the Governing Body and the Head Teacher both have the power to suspend where they are of the opinion that exclusion from school is required to facilitate a full and fair investigation "e.g. where a child or children are at risk, or where the allegations are so serious that dismissal for gross misconduct is possible…. Only the Governing Body may end the suspension." It is also provided that steps shall be taken to finalise proceedings without unreasonable delay in order to end the suspension.

33. The suspension of the claimant in these circumstances was unjustified and in breach of the respondent's own policy. An investigation had commenced in respect of the claimant's conversation with Kellie Todd. However, a number of witnesses had already been interviewed prior to the claimant's suspension and the Tribunal is satisfied that it was not necessary or appropriate for the claimant to be excluded from work to carry out an investigation into this issue. The investigation was well underway with regard to the conversation with Kellie Todd. Sarah Nordstrom agreed that her opinion of this was that it was mere tittle tattle and dismissal was never an option.

34. With regard to the financial issues, the Tribunal finds that there was little evidence of any need to remove the claimant from the workplace in order to investigate this. Sarah Nordstrom referred to a number of people in the Local

Authority who were involved in the investigation. Most of the investigations appear to have been in respect of electronic evidence. There was reference to some physical documents and the need to speak to Sarah Jolley. However, the Tribunal is satisfied that it was wholly unjustified to suspend the claimant in the circumstances.

35. The claimant was informed that the likely sanction would be a written warning or a final written warning. The claimant's Trade Union representative asked for the suspension to be lifted. However, it went on for approximately nine weeks. There was reference to the suspension of another employee which had been lifted with alacrity and a meeting of the Governors which had arranged for this purpose at short notice in view of an imminent OFSTED visit.

36. The decision to suspend the claimant and its continuation, in the circumstances, was in breach of the respondent's own policy and was inappropriate and unreasonable.

37. The next conduct/treatment complained of was disciplinary action. It was submitted by Ms Jeram, on behalf of the respondent, that the decision to invoke the disciplinary procedure was not a decision that was calculated or likely to destroy the trust and confidence within the employee/employer relationship.

38. Mr Legard submitted that there was never any basis whatsoever for a disciplinary investigation, let alone disciplinary action to be taken against the claimant. The issue with Kellie Todd was, at best, tittle tattle. With regard to the finance issue, the claimant had reported to the Governors in March and December and she had passed on Neil Lawther's information in very good time to both Steve Trotter and Stephen Scott, the link Governor for finance.

39. The Tribunal is satisfied that the respondent had concerns that it wished to look into, but the inception of the disciplinary procedure was not reasonable or necessary in the circumstances.

40. With regard to the "demotion", Ms Jeram submitted that the decision to place the claimant on a Performance Improvement Plan was in line with the capability procedure and not a decision that was calculated or likely to destroy trust and confidence.

4 1. Mr Legard submitted that the treatment of the claimant on her return was reprehensible, she was demoted, turned out of her office and stripped of all her main job functions without warning, consent or discussion and was not informed of any timeline for the capability process.

42. The findings of the personnel panel at the disciplinary hearing were not entirely clear. Both parties appear to accept that the claimant had not been found guilty of any misconduct. The conclusions in respect of the finance issues were that the panel accepted the claimant's representative's argument that it was a capability issue and not as a result of misconduct and no further action would be taken under the Disciplinary Procedure. The claimant was of the view that the matter would be dealt with by way of Performance Management which was different to a Performance Improvement Plan and would be a review of the means of reporting financial issues through the normal annual appraisal process.

43. The conclusions of the Personnel Committee referred to the matter being dealt with in accordance with the Capability Policy. There was no clear conclusion that the claimant had failed in her duty and that capability action was required. Sarah Nordstrom's handwritten notes referred to PM and the claimant felt that she was to return to work on the monday morning and issues would be dealt with through the appraisal process. Sarah Nordstrom and Paul Barclay reached the conclusion that the claimant needed to be subject to a Performance Improvement Plan.

44. When the claimant returned to work her financial duties were removed, her line management responsibilities were removed and she no longer had an office. She was told that she was expected to work in the main office at reception updating the school's database and Steve Trotter said that she should do "officey things". The claimant was not clearly informed of the length of time that these measures would remain in place. The Tribunal is satisfied that, viewed objectively, the treatment of the claimant upon her return to work was a breach of the implied term of mutual trust and confidence.

45. The invitation to a Formal Absence Review after nine days' absence was in breach of the respondent's Attendance Management Policy. The respondent's witnesses relied upon sections of their policy which referred to long-term absence which was defined as a single period of absence which had lasted over four weeks. Within that section of the policy it referred to earlier referrals to Occupational Health where it was indicated that the absence may be long-term or the complexity or nature of the illness suggested it may be beneficial. It also states that managers should promptly refer employees to Occupational Health where the absence is stress-related. There was reference to another case involving another employee suffering from stress in which the respondent had asked the employee to a meeting at an early stage. However, it was not clear whether that was in order to invoke a formal attendance management review meeting, the outcome of which, under the policy, could include no formal action, first warning, final written warning or dismissal with notice.

46. During cross examination, the claimant appeared to agree that such a meeting was intended to be supportive. However, the Tribunal finds that her response was more with regard to the generality of such meetings and not in respect of this specific meeting. It was clear from the particulars of claim, the claimant's witness statement and in the submissions, that it was maintained by the claimant that this was the final straw. It is clear from the claimant's letter of resignation that this was part of the reason that she left. This was an action that was inappropriate and, when considered together with the other treatment, a breach of the term of mutual trust and confidence.

47. It was not made clear to the Tribunal how the "disingenuous" response to the claimant's resignation amounted conduct which was part of the breach of mutual trust and confidence. It was a response to all the points raised by the claimant. Sarah Nordstrom put the respondent's point of view and it came after the claimant's decision to resign.

48. The Tribunal is satisfied that the claimant did resign in response to the breach of the implied term of mutual trust and confidence. This is set out clearly in

her letter of resignation. There had been negotiations in respect of achieving an agreed settlement. However, the claimant had not affirmed the contract or waived the breach. The fact that there were attempts to avoid litigation and to agree terms of severance does not amount to affirmation in this case. The Tribunal does not accept that the claimant's attempts to agree the terms meant that she was agreeing that the contract should continue in order that she could then bring it to an end. The Tribunal does not accept that the claimant unreasonably delayed submitting her letter of resignation.

49. The fact that the claimant resigned following the respondent's refusal to increase an offer of settlement does not mean that the repudiatory breach of contract on the part of the respondent was not the reason or a significant part of the reason for the claimant's resignation. The Tribunal is satisfied that the claimant left as a result of the conduct of the respondent which considered as a whole constituted an indication that it no longer intended to be bound by an essential term of the contract. The respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence and there was no reasonable and proper cause for that conduct.

50. Although it was not set out in the agreed list of issues or mentioned in submissions, the Tribunal having found that that the claimant was constructively dismissed, has gone on to consider whether that dismissal was fair in all the circumstances. There was a breach of the implied term of mutual trust and confidence and the claimant resigned in response to that breach. It was not put forward by the respondent that the dismissal was by reason of the potentially fair reason of either conduct or capability but it appears that the reason for the conduct of the respondent leading to the claimant's resignation was said to be on grounds of capability. The Tribunal is satisfied that the dismissal was outside the band of reasonable responses available to the respondent. There was no reasonable and proper cause for the conduct of the respondent and no reasonable employer acting reasonably would have treated the claimant in the way that the respondent did. The Tribunal finds that the claimant was unfairly dismissed.

Age Discrimination

51. It was submitted by Ms Jeram that the claims for Age Discrimination were out of time. Mr Legard submitted that the claimant contended that her resignation itself was a discriminatory dismissal and that her claim was, therefore, in time. Also, the claimant's knowledge of facts that gave rise to her strongly held suspicion that age was behind the treatment of her which culminated in her resignation did not arise until she became aware that Mr Huitson had been appointed to her role. If any part of her claim was out of time, the claimant contended that the matter should be considered as conduct extending over a period or it would be just and equitable to extend time taking into account the conduct of the respondent, the claimant's ill-health and the absence of any prejudice to the respondent.

52. During cross examination the claimant confirmed that she knew she was going to bring a claim to the Tribunal before she was aware of Barry Huitson's appointment. However, at that stage it was just a claim of constructive dismissal and it was in August 2016 when the claimant became aware of Mr Huitson's

appointment. The Tribunal accepts that the claim was presented within time and, if it had not been, then the Tribunal finds it would be just and equitable to extend time.

53. Ms Jeram, on behalf of the respondent, submitted that the claim simply didn't pass muster. The claimant was unable to accept that there were question marks over her capability. It was accepted that she had been an excellent School Business Manager but there were concerns that emerged as a result of issues in November 2015. The claimant could not understand why she had been treated as she had. Once she heard that Barry Huitson had been appointed to replace her the claimant had developed the case so that it became an allegation that the situation had been orchestrated to force the claimant out. The claimant was in her late 50s and anyone who might replace her was likely to be younger. The allegation would have to be that the Head Teacher and the Board of Governors had behaved in an orchestrated way to remove her and replace her with someone in their 30s. Indeed, the claimant had been involved in some informal succession planning herself in that she had been training Sarah Jolley to take over from her. Sarah Jolley was in her 40s.

54. It was submitted by Mr Legard that there was strong evidence from which the Tribunal could conclude, in the absence of any explanation from the respondent, that the reason the claimant was treated in the way she was had been because of her age. It was said that the claimant had produced the 'something more' rather than a simple assertion of difference in treatment and age. It was submitted that the claimant had easily met the 'Igen threshold' and the burden of proof had passed to the respondent who failed to provide a credible and proper explanation as to why it acted as it did. It was submitted that this was to be found, in part, within the email from Paula Barclay dated 25 November 2015.

55. The email from Paula Barclay referred to issues being linked to earlier comments made by the claimant with regard to her retirement and that it would be ideal if she was made redundant around that time. The Tribunal has considered this issue carefully and is not satisfied that this was indicative of age discrimination. Also, the handwritten word 'severance' on the notes of the disciplinary hearing did not provide an indication that the treatment of the claimant was on grounds of age.

56. Mr Legard referred to the respondent's obsession with the claimant's retirement plans.

57. The Tribunal does not accept that the claimant has established the 'something more'. There was no credible evidence of any obsession with the claimant's retirement plans. The suggestion was made that the respondent had been considering its application to secure Academy status and that it wished to replace the claimant with Mr Huitson because he was younger. There was absolutely no credible evidence that this was the case. Indeed, the Tribunal found the evidence of Paula Barclay and Sarah Nordstrom was credible in this regard. They had legitimate concerns. The fact that their treatment of the claimant following this was unreasonable does not provide evidence from which the Tribunal could conclude that the underlying reason was the claimant's age. The only credible piece of evidence that could be considered to be with regard to the

age discrimination claim was the email of 25 November 2015. The Tribunal finds that a mere reference to comments made by the claimant in the past regarding being made redundant around the time of her retirement and that issues could be linked to those remarks is not sufficient to establish a prima facie case and shift the burden of proof. The Tribunal finds that there was no obsession with the claimant's retirement plans established. The respondent was of the view that a joke made by the claimant might be linked to a perceived failure of the claimant to carry out her job.

58. With regard to the handwritten comment of Sarah Nordstrom, on her notes of the Governors' meeting, in which she had inserted the word "severance". The Tribunal is not satisfied that this is evidence of age discrimination or that any inference of age discrimination can be drawn from this. It was merely an indication that severance was a consideration.

59. The allegation in respect of Barry Huitson's appointment was not claimed as a discrete detriment within the issues that were agreed. It appeared to be claimed as evidence from which the claimant then viewed her treatment as being on grounds of her age. He wrote the job description for the role and then applied and was appointed. This was after the claimant had resigned and to infer a conspiracy to replace the claimant with a younger Business Manager from the very start is purely supposition with no credible evidence to support such an inference.

60. There was no actual comparator identified by the claimant. Barry Huitson was not suggested as an appropriate comparator as his circumstances were materially different from those of the claimant. In any event, there was no evidence that he would have been treated any differently to the claimant in the same circumstances. Also, if a hypothetical comparator is constructed, this would be someone in the same position as the claimant with no material differences save for the protected characteristic of age, being in her late 50s. The claimant suggested that a comparator would be a skilled business manager in his or her mid-30s to early 40s. There was no credible evidence that such a comparator would have received treatment that was different from that received by the claimant.

61. The Tribunal is acutely conscious that it is very unusual to find direct evidence of discrimination and it is necessary to consider what inference it is proper to draw from all the relevant surrounding circumstances. The Tribunal has considered the totality of the relevant circumstances and the overall picture presented by the evidence.

62. There was no credible evidence that would support such an allegation of age discrimination or the allegation of harassment which was based on the same issues. The claimant had been treated unreasonably but there was no credible evidence to establish that this was, on grounds of or related to, her age. There was unwanted conduct and it did have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. However, there was no credible evidence that this was on grounds of the claimant's age.

63. If the burden of proof had shifted to the respondent, the Tribunal is satisfied that the respondent has shown that its treatment of the claimant was in no way whatsoever on the ground of her age. The respondent had genuine concerns about the claimant's discussions with Kellie Todd and with regard to the financial situation. The handling of the claimant in respect of those concerns was entirely unreasonable. However, this was not related to claimant's age. There was an overreaction and resultant unreasonable treatment of the claimant but the reason for that treatment was the respondent's concern about the financial situation of the school.

64. In all the circumstances, the Tribunal finds that the claim of unfair constructive dismissal is well-founded and succeeds. The claims of direct age discrimination and harassment on the grounds of age and not well-founded.

65. A further hearing will be listed in order to determine the appropriate remedy in respect of the successful claim of unfair dismissal. Further directions will be necessary particularly in respect of the relatively substantial and complicated pension loss calculation and with regard to the claimant's attempts to mitigate her loss.

Employment Judge Shepherd

Date 25 April 2017

Sent to the parties on:

26 April 2017
For the Tribunal:

G Palmer