



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Dr K Schnelling**

**v**

**(1) Oxfordshire County Council  
(2) Governing Body of Mabel Pritchard School**

**Heard at:** Watford

**On:** 23 - 25 January 2017

**Before:** Employment Judge Bedeau

## **Appearances**

**For the Claimant:** Mr A Ratan, Counsel

**For the Respondent:** Mr J Dawson, Counsel

## **RESERVED JUDGMENT**

1. The claimant's constructive unfair dismissal claim is not well-founded and is dismissed.
2. The provisional remedy hearing listed on 16 May 2017, is hereby vacated.

## **REASONS**

1. By a claim form presented to the tribunal on 4 December 2015, the claimant made the claims of constructive unfair dismissal and disability discrimination arising from her employment with the second respondent as deputy head teacher.
2. In the response presented on 4 December 2015, the respondents gave a blanket denial to all claim with a detailed response to be presented once the claimant replied to a request for further information.
3. The claimant provided further information on 9 February 2016 but as it did not, in the respondents' view, address the issues relating to her disability

discrimination claims, they submitted in their letter dated 23 March 2016, that the claims were frivolous with little reasonable prospect of success and asked that the tribunal order that the claimant pay a deposit.

4. On 24 March 2016, Employment Judge Hill, sitting at Reading, clarified with the parties the claims and issues. The claims were identified as being constructive unfair dismissal and failure to make reasonable adjustments. Disability was in issue, namely whether the claimant's back injury fell within the definition of section 6, schedule 1 Equality Act 2010? The case was set down for final hearing to last four days from 12-15 September 2016.
5. On 22 April 2016, the claimant provided, as ordered, by Employment Judge Hill, further information in respect of her disability. The respondents, on 13 May 2016, served their response. They stated that the claimant was not dismissed but chose to resign and had previously stated that it was her intention to retire from teaching in 2015. They asserted that the effective date of termination was 31 August 2015 but denied that they had breached the claimant's contract of employment, namely the implied term of mutual trust and confidence.
6. Whilst acknowledging the claimant's disability, they asserted that the reasonable adjustment claim was presented out of time as the adjustment she was seeking, if it applied, had been in the summer of 2014 or within weeks thereafter. Accordingly, they requested a preliminary hearing to determine the out of time issue.
7. On 20 May 2016, before Employment Judge Lewis, the claimant's disability discrimination claim was struck out for lack of jurisdiction having been presented out of time and time was not extended on just and equitable grounds. The only claim to be heard at a final hearing was the constructive unfair dismissal.

### **The Issues**

8. The issues for me to hear and determine in respect of the constructive unfair dismissal claims were as follows:
  - 9.1 Did the respondents act in a manner calculated or likely to destroy trust and confidence between the parties?
  - 9.2 Did the claimant resign on 31 August 2015, in response to such conduct?
  - 9.3 Did the claimant affirm any conduct by the respondents and/or delay her resignation such as to prevent her constructive dismissal?
  - 9.4 Did any act or admission by the claimant materially contribute to any repudiatory contract by the respondents?
  - 9.5 If so, what reduction to any award is appropriate?

## The Evidence

9. I heard evidence from the claimant who called Miss Deana Barrett, school secretary and by Miss Doreen Foster, teacher. On behalf of the respondents evidence was given by Miss Jane Wallington, head teacher; Mr Damian Haywood, chair of governors and by Miss Amanda Makoka, assistant head teacher. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 279 pages. References will be made to the documents as numbered in the bundle.

## Findings of Fact

10. The claim is against, principally, Miss Jane Wallington, head teacher of Mabel Pritchard School. Although the claim was brought against the first respondent, Oxfordshire County Council, as the claimant's employer, by operation of the Education (Modification of Enactments Relating to Employment) (England) Order 2003, this provides that a claim must be brought against the governing body of the school. To all intents and purposes, all references to the respondent shall be to the second respondent.
11. The school is a special school for pupils with profound and severe learning difficulties with an age range of 2-19 years. It has, on average, about 75 pupils attending at any one time. Approximately one third of them are autistic, of which some have challenging behaviours. A further one third have profound multiple learning difficulties requiring daily moving and handling.
12. The classes are distinguished by colour. The Yellow class is for key stage 1 pupils with an age range of 5–7 years; the Blue, Red and Green classes are for key stage 2 pupils with an age range of 7–11 years. Each class has between 3–5 teaching assistants who accompany the qualified teacher. There two main buildings, the Upper School site and the Lower School site.
13. On 1 November 2000, the claimant commenced employment with the respondent as deputy head teacher of the school. In her job description, amongst her duties, it stated:

“To be responsible for high quality education and welfare of a group of .... children, providing an exemplary model as a classroom practitioner with a 0.6 teaching commitment on the primary site.”
14. The contract did not state the specific class she was required to teach, only a commitment to 0.6 full-time equivalent teaching.
15. Her other duties were teaching a small group of pupils for three days a week with the remaining two days being taught by another member of staff with whom the teaching duties were shared. The claimant was required to use the two non-teaching days to carry out her management tasks. She was

also the whole school co-ordinator responsible for health and safety. Her line manager was Mrs Jane Wallington, head teacher.

16. The claimant's case concerns, principally, allegations in relation to Mrs Wallington's conduct towards her. She listed 15 matters which formed her constructive unfair dismissal claim against the respondents. These were not disclosed to the respondents prior to her resignation and will be dealt with individually after completion of the chronology of events and my findings of fact.

#### Written warnings

17. In February 2011, the school governors upheld allegations that the claimant had failed to comply with health and safety procedures. She was given a written warning. Following this the claimant lodged a grievance against Mrs Wallington which was concluded in February 2012 with a recommendation by the governors that they, that is the claimant and Mrs Wallington, should enter into mediation to improve the communication between them. There subsequently arose a dispute as to who was at fault for mediation not being pursued.
18. In October 2012, the claimant administered medication to a child with epilepsy despite not having the appropriate medical training to do so and was in breach of the respondent's health procedures. As with her first disciplinary she was issued a written warning.

#### The claimant's work place injury

19. On 22 May 2013, while she was on her way to a classroom, a child, M, in key stage 2, ran past waiting staff in the reception area, through two sets of doors and along the corridor. She then jumped onto the claimant's back and grabbed her around her neck from behind, pulling her against a wall and a handrail. The claimant fell onto the floor sustaining an injury to her back. At the time of the incident she was a class teacher for Blue Class which included M and the teaching assistants, Miss Lorraine Fitzgerald and Miss Angela Hopkins.
20. I find the claimant did not inform Mrs Wallington on Thursday 23 May, that she had sustained an injury in an accident while at work. She worked the following day, Friday 24 May. As it turned out, the school's half term break was from Monday 27 to Friday 31 May 2013.
21. On Monday 3 June 2013, the school had an Inset Day, which was a staff training day, at which the claimant was due to lead. She did not arrive but telephoned by Mrs Wallington telling her that she was unable to attend work as she had sustained injury to her back. She later submitted her fitness notes covering the period from 3 – 16 June 2013, citing sciatica. In her fit notes from 24 June – 8 July 2013, the diagnosis was lower back pain. This was followed by a further three weeks again diagnosing back pain.

22. On 26 June 2013, Miss Caroline Baggs, business partner, schools HR Team, at Oxfordshire County Council, emailed the claimant stating the following:

“Dear Kate

I am sorry to hear that you are off work and there was an injury sustained at school.

If Jane is not already aware of the incident that caused the injury you should be telling her of it in sufficient detail as soon as possible so that she can make the necessary reports and take action to prevent further incidents if necessary. If you have been away for a week or more due to the injury the school has a legal requirement to report the incident, and therefore you need to let them know of the circumstances.

With appropriate detail the accident form could then be completed on your behalf by the school so it is on the record, and you can sign it at a convenient time, or be sent a copy to sign.

I would not normally expect a head teacher to be asking someone to complete work while they are away due to ill health. There are some circumstances when it may be appropriate for limited requests to be made. Have you been able to explain to Jane that you are unable to do the work for the reasons that you have given me? You could do this through Janet Keene and/or myself if that would be a support for you...” (87)

23. From the wording of the email it does not appear that the claimant had informed Mrs Wallington she had sustained the injury while at work. She was advised to let the school know as the school had a legal requirement to report the incident. As can be read the claimant complained about being instructed by Mrs Wallington to engage in work while on sick leave. This will be considered later on in the judgment.
24. As Mrs Wallington was unaware of the claimant’s email correspondence with Miss Baggs and as Miss Baggs advised the claimant to inform the school of her injury at work, I find that the claimant first notified Mrs Wallington, in an email dated 1 July 2013, that she considered her back pain was due to the incident at work shortly after Miss Baggs’ email to her on 23 June 2013. As can be seen from the email the claimant stated that Mrs Wallington “need to know of the circumstances” of her accident. She wrote:

“As you are aware, I am off work and that there was an injury sustained at school. This happened on the Thursday before I went off on the Monday. It was witnessed by Lorraine Fitzgerald and my injury was sustained due to MC jumping on me and pulling me over. I banged myself against the wall in the corridor. It resulted in my having severe pains in my left side and back and foot. The diagnosis has been confirmed as sciatica, torn ligaments.

Please can you make the necessary reports and take action to prevent further incidents if necessary. As I have been away for a week or more due to the injury the school has a legal requirement to report the incident, and therefore you need to know of the circumstances.

With this appropriate detail please could you complete the accident form on my behalf by the school so it is on the record. I can sign it at a convenient time, or be sent a copy to sign. I have sought the advice of Caroline Baggs who said I should contact you so it can be completed on my behalf.

I will be absent up to 8-12 weeks according to my doctor so it looks like I won't be back before September. I have been advised to rest, take painkillers and attend physio exercised daily. So the good news is I will recover fully from it. I do feel quite poorly due to the constant pain so I hope it does work out. Sorry to see so many staff absent.”  
(Page 89)

25. Mrs Wallington emailed the claimant on 2 July informing her that she had given instructions to staff that she, the claimant, be sent a blank accident report form. As Mrs Wallington did not have all the details of the accident, she advised the claimant to return the form to the school once completed.  
(89)

26. On 4 July 2013, Mrs Wallington emailed the claimant attaching an occupational health referral form. In her email she wrote:

“Hi Kate

Hope the physio is going well and you are starting to feel better.

I've attached a referral form to occupational health having spoken to Caroline Baggs of HR (completed form at end of attachment).

Can you please provide a private email address for the form as I don't have one for you. If you are happy with this referral please forward to OH, copied to Carline Baggs and myself.

If you have any concerns/questions please get back to me.

Can you return the accident form I sent by post last week please.

Thanks,  
Jane” (92)

27. The claimant continued to be absent from work due to sickness as a result of lower back pain and spinal injury. She informed human resources on 14 August 2013 that she was due to have surgery on 3 September 2013 and would require some time to recuperate. In her email to Miss Baggs, she wrote, amongst other things, the following:

“If the operation is not successful I would like to know if I can retire on ill health? Currently I am in a wheelchair and cannot walk or stand. I am in constant pain despite the medication. This is a private and confidential communication to you and I am just thinking through alternatives if this injury that I received at work does not get better.

Do you have any suggestions etc?” (Page 101)

28. Miss Baggs responded two days later advising the claimant to send in fit notes and informed her of the procedure to follow in the case of ill health early retirement. (101)

29. The start of the school term was on 2 September 2013. Mrs Wallington arranged for the staff and the pupils to send the claimant fruits as a get-well

present and emailed her on 16 September expressing her hope that she was feeling better after her operation and that she, “liked the fruit the staff and children sent you.” She also emailed the claimant a new occupational health referral form to update her health and informed her that they have been asked to arrange an appointment to discuss her return to work. (108)

30. The claimant provided a statement to the first respondent’s Health and Safety Team on 14 October 2013, setting out details of the incident and the injury. One of the matters raised was an allegation that Mrs Wallington had failed to support her around the time of the incident in May and that she was asked to undertake some work duties while off sick. These matters were again raised in a formal grievance lodged by the claimant on 5 November 2013. (115-126, 133-135)
31. I do find that the claimant was supported by Mrs Wallington while on sick leave. The email Mrs Wallington sent to her on 4 July 2013, showed some concern for the claimant’s welfare and the email correspondence between them clearly demonstrated that they were in communication with each other. I do not find that the claimant was instructed by Mrs Wallington to complete the end of year reports as this was what the claimant had volunteered to do, which Mrs Wallington accepted. Mrs Wallington knew the limitations of her role in relation to those on sick leave and apart from the end of year reports, the claimant had not engaged in any work related activities. I, therefore, accepted Mrs Wallington’s evidence that the claimant volunteered to carry out that work.
32. In an occupational health report dated 5 November 2013, Dr Anthony Kurzer, occupational health physician, wrote that the claimant would have some back vulnerability with some discomfort although she had good mobility. He advised that she should be on a phased return to work and suggested one or two half days for the first week to be increased by an extra half day every one or two weeks depending on what to be agreed by her and the school as reasonable. He suggested that the best way of achieving an effective return to work would be for the claimant and Mrs Wallington to discuss the matter and consider temporary adjustments and changes to her duties. They should also discuss what the claimant would be able to do in practice, what support she may need, such as being able to sit down more often, and possible changes to her pattern of work such as whether she would be able to do more administrative work with less exposure to the pupils. Ultimately it was a management decision whether she would be able to carry out the duties required of her.
33. Dr Kurzer also made reference to the claimant’s hearing loss which was a condition she has suffered from since birth and had adapted by lip reading and other means. While off sick she had hearing aids fitted which improved her condition considerably. Dr Kurzer was not unduly concerned about the claimant’s back condition, which would improve, but he could not stress enough the need for regular meetings between her and Mrs Wallington in order to ensure that the necessary and reasonable adjustments were put in place. (136-137)

34. A health and safety executive RIDDOR report in respect of the claimant's accident was submitted by the claimant in September 2013. (95-96)
35. In her email to Miss Baggs, dated 26 September 2013, the claimant wrote that she had completed the report as Mrs Wallington had not done so and could forward a copy to the health and safety team. She also wrote that she was amazed that it had taken everyone such a long time to contact her, including Mrs Wallington.
36. As I have already found, I was satisfied that Mrs Wallington was in touch the claimant and even arranged for her to be sent fruits while on sick leave. I, therefore, do not accept the claimant's assertion that it had taken a long time for the school to get in touch with her. In addition, as the claimant had full knowledge of the accident she was in a far better than Mrs Wallington to complete the RIDDOR report. It was, in the circumstances, unreasonable to expect Mrs Wallington to be in a position to give a detailed account of the accident when she was not present. (113)
37. The claimant also submitted a detailed account of the accident as a personal injury statement on 14 October 2013. (115-126)
38. On 5 November 2013, she lodged a formal grievance against Mrs Wallington referring to an alleged lack of duty of care during her absence; inappropriate comments made during her absence to other members of staff, namely that the accident could have been prevented and that Mrs Wallington failed to discuss with her references sent to prospective employers as recommended following the stage 5 grievance appeal outcome report dated 6 February 2012. The grievance was investigated with an outcome given to the claimant and will be dealt with later in the judgment. (133-135)

#### Return to work discussion 15 November 2013

39. On 15 November 2013, the claimant together with her union representative, Miss Janet Keene of NAHT, the National Association of Head Teachers, met with Mrs Wallington and Miss Baggs. They discussed Dr Kurzer's report and his recommendation for a phased return to work. Mrs Wallington explained that due to a change in the school's insurance provider, she could only offer a phased return for two weeks to enable the claimant to regain her strength. She stressed that it was important that the claimant was strong enough to return to work. The claimant position was that a phased return should be determined by medical advice. Miss Keene then discussed the accident and whether it was covered by the provisions in the Burgundy Book, a collectively agreed document. It was accepted that the claimant sustained an accident at work resulting in her being on sick leave but Mrs Wallington's position was that for the Burgundy Book provisions to be triggered there had to be advice from an approved medical practitioner stating that the injury was caused by the accident. The claimant was advised by Miss Baggs that she should speak to the occupational health doctor. It was agreed that the following adjustments be put in place before the claimant's return, namely no handling or manoeuvring of pupils; no



physical intervention of pupils; as little bending as possible; provision of a chair within the classroom to allow the claimant to sit as and when necessary during the teaching day; and communication with teaching assistants working in the classroom to ensure that there was good understanding and support of the claimant in the event of challenging behaviour by the pupils.

40. As the claimant had three full days teaching and two days management time, there was a discussion about whether that pattern was most supportive having regard to her needs. Mrs Wallington suggested that it may be better for the claimant to teach half days and allow time for more management tasks in the afternoon. She also expressed concern that the claimant would be returning to a class with children who had unpredictable behavioural patterns and suggested that the claimant may return to Yellow Class as the children were manageable in their behaviours, would need fewer restraints and less handling. Both the claimant and Miss Keene questioned whether the claimant had sufficient knowledge to teach Key Stage 1 curriculum. Mrs Wallington's view was that the claimant had previous knowledge and was confident in her ability to teach that class. She was prepared to offer support by way of retraining, if that was necessary. The claimant felt that she knew the staff in Blue Class and that they would be able to protect her from any unpredictable behaviour. She was concerned about the amount of bending she may have to do in Yellow Class and felt that this would be a greater risk to her than the unpredictable behaviours in Blue Class. She said that a change of class would not be supportive of her return as she would feel more confident with Blue Class where she was more familiar with the children and the support staff. Mrs Wallington's view was that she was concerned about the claimant's return to any class as they all had a relatively high level of risk and was unsure whether it could be reduced to an acceptable level in either class but felt that overall the risks were lower in Yellow Class. She was prepared to accept that as the claimant regained her strength over the following three to four months the position may change in terms of the risks. The responded by saying that she did not accept that such a change in class would be helpful in supporting her return to work. There was then a further discussion about a risk assessment; the claimant's return to work on a phased return basis; and the division of her teaching and management tasks. She was required to produce a further fit note from her doctor. Miss Baggs agreed to contact occupational health regarding the provisions in the Burgundy Book. (141-144)
41. The relevant provisions in the Burgundy Book are in respect of full pay for injuries sustained at work which could be awarded up to a maximum of 12 months, if the relevant criteria were met. If this covered the claimant and she continued to be on sick leave beyond six months, she would not go on to half pay in December 2013 applying the Managing Sickness procedures but would continue to receive full pay for a further six months until June 2014.
42. I was satisfied that Mrs Wallington was keen for the claimant to work only when she was fit to do so and that the Burgundy Book provisions should be

explored to see if she would qualify for full pay for a further six months. From the notes of the meeting, which were amended by Mrs Wallington and the claimant, apart from the issue in relation to the class the claimant should teach, there were no further areas of disagreement.

43. The occupational health report dated 25 January 2014, confirmed that the claimant fulfilled the Burgundy Book criteria and recommended a phased return to work over a four weeks' period. (169)
44. The claimant continued to submit fit notes for December 2013 - March 2014 stating sciatica with the latest covering her up to 24 June 2014. (252-254)
45. Mrs Wallington emailed Miss Baggs and the claimant and copied in Miss Keene in relation to the return to work meeting. She wrote:

“.....

1. KS suggests she has detailed knowledge of pupils in Blue Class. Since September 2013 five new pupils have joined Blue Class leaving only four pupils KS had previously taught, the other pupils have left Blue Class and moved onto new classes. This fact does not support KS's claim.
2. KS would not need to “settle a new class, establish new management practices” as the class is currently well led by a post-threshold teacher with many years of experience at NSP (over 20 years). The teacher is currently working full time (nominally 0.6 contract) as part of KS's cover for her absence from work.
3. KS's teaching experience prior to being the DHT at MPS was a pre-school counsellor (13 years) and a teacher of 7-9 years olds at Bishops Wood School (2 years) according to her job application form for the post of DHT at NPS. In addition KS taught at KS2 (Red Class) at MPS for a number of years before moving to upper schools (KS4 Gold Class). KS returned to the primary site in 2011 (Blue Class) so in my opinion her teaching experience is predominantly at primary not secondary.
4. I can't believe KS's GP would have signed her off work for a further period of three months (end of February) just because KS could be entitled to another six months full pay. It is my view her GP believes she is unfit for work.
5. It is my decision where staff are placed at the school and I only have to listen to the advice of OH which is then put into the context of the school. As HT I have a duty of care to all the staff, including KS's, and the needs of all the pupils. This has been confirmed by the NAHT.
6. I did not ask OHU to advise on any injury sustained at work as this was not proven at the time of the referral (KS has only just confirmed in her email that her GP has subsequently sent a letter confirming this).
7. KS's salary would not be “stopped” at end of six months but moved to half pay. Julie Tanner could not amend this until HR had told Payroll her case was covered under the Burgundy Book.

I do not agree with comments or new information as suggested by KS after the return to work interview should be included in the minutes of the meeting. The

minutes are there to reflect what was actually discussed and agreed not subject to changes after the event.” (149)

46. When Mrs Wallington was informed by Miss Baggs, on 16 January 2014 that occupational health stated that the claimant was covered under the Burgundy Book and was, therefore, entitled to a further six months full pay, she replied:

“Thanks Caroline. Excellent news for Kate” (160)

Miss Tracey Jameson

47. Miss Tracey Jameson, assistant head teacher, previously worked at the school as a classroom teacher but left to spend some time in Peru. She returned in September 2012 and now works as an assistant head teacher. During the claimant’s absence on sick leave, both she and Mrs Wallington, in addition to their own responsibilities, took over the claimant’s work. When Mrs Wallington became aware that the claimant had issued a grievance against her, she became stressed and harassed. She had a discussion with Miss Jameson who wrote to Mr Damien Haywood, chair of governors of the school, on 20 January “2013”, but I accept that that date is incorrect and should read 2014 because the claimant’s grievance was lodged on 5 November 2013.
48. In Miss Jameson’s letter she alleged that Mrs Wallington had been harassed by the claimant. She was aware of friction between the two of them while she was working as a Key Stage 2 teacher from 2002 – 2007. When she returned from Peru and took up employment at the school in September 2012 as assistant head teacher, she became “acutely aware of the issues and tensions caused by their relationship”. She further stated that she had witnessed the strain it had caused Mrs Wallington and felt that she must bring the matter to Mr Haywood’s attention. She listed the claimant’s alleged behaviours as witnessed and wrote that the claimant’s negativity was also directed at the school as she would exclaim, “I hate the school”.
49. The claimant was working was working in the Upper School and was later transferred to the Lower School. According to Miss Jameson, the claimant expressed her dissatisfaction at having been transferred.
50. Miss Jameson continued by stating that she was saddened when she observed Mrs Wallington looking tired for the first time and enquired whether she was alright. Mrs Wallington explained that she was under pressure from the claimant who had filed a grievance against her. She then became tearful but would not disclose the details of the grievance. She did, however, say that it had reached the point where either the claimant leave or she would as she could not continue to lead the school under the shadow of harassment and negativity created by the claimant. Miss Jameson then wrote:

“I urge you as chairman of the board of governors to back your head teacher: she deserves this support and it is in the best interests of the students and the school. Certainly she has my support: if Jane feels she has to resign over this issue, then I too will resign. Even writing this makes me terribly sad: I absolutely love my job; I am also a single parent with a mortgage and a dependant child. However, such is my esteem for Jane, I could not continue at Mabel Pritchard School if she were to leave because of this intolerable situation....” (130(i) – 130(ii)).

51. Mr Haywood told me in evidence that he could not recall when he received the letter but when he read it he took the view that Miss Jameson did not want to take the matter further. He assumed that Miss Jameson was stating the truth and had every right to go to the governors as she was assistant head teacher. He never thought that Mrs Wallington had encouraged her to send the letter to him and did not discuss the letter with either the claimant or with Mrs Wallington. Moreover, he did not refer the letter to the grievance appeal panel. Although the letter referred to “back your head teacher”, Mr Haywood was of the view that he was impartial and objective and could not recall the letter playing a part in his decision.
52. Miss Jameson’s letter was referred to by the claimant as evidence that Mr Haywood must have been influenced by it as he was urged to support Mrs Wallington but he said in evidence that it did not influenced him and did not interview Miss Jameson. I am satisfied that the letter did not play a part either in Mr Haywood’s investigation or in his recommendations.

#### The grievance investigation

53. In the claimant’s grievance, she made reference to comments allegedly made by Mrs Wallington while on sick leave. The source of that information was Miss Doreen Foster, teacher, someone who I regard as not being favourably disposed towards Mrs Wallington. She is, in my view, is a good friend of the claimant who would sit together with the claimant at staff meetings.
54. Mr Haywood did not interview Miss Foster as part of his investigation into the grievance. He met with the claimant and her union representative on 16 January 2014. This was followed by his interview of Mrs Wallington. (178-179, 189-194)
55. In his report he found the following:
  - 54.1 The complaint about the lack of duty of care during sickness absence was not upheld; that the claimant had been kept abreast of school matters through her work email address and had responded to her emails up to 2013; and that there had been several exchanges by texts, emails and notes through other channels. Mrs Wallington had showed him her computer and he was satisfied the claimant was sent numerous emails during the relevant period.
  - 54.2 The complaint about inappropriate comments made to other members of staff was not upheld. Mrs Wallington had denied making the comments alleged to have been said during the claimant’s

sickness absence. The claimant was unable to disclose the names of the other staff members to whom the comments were made. Mr Haywood took the view that he did not have any direct evidence to verify the alleged comments.

- 54.3 The complaint about failing to properly assess the risks was not upheld because the class teacher was responsible for carrying out the risk assessment for his or her class and the claimant did not complete one.
- 54.4 The complaint about the references was considered to be out of time.
56. Mr Haywood's conclusion was that there was no case to answer in respect of the grievance complaint. He, however, recommended that mediation be restarted and should be explored to improve communication between the claimant and Mrs Wallington upon the claimant's return to work. The previous arrangements could not continue because the county council had terminated the service, therefore, an alternative provider would need to be found. Mr Haywood also recommended that the senior managing team should ensure meetings continue with the full co-operation of all involved. He advised that one-to-one meetings between the claimant and Mrs Wallington could be part of their return to work discussions. (189-194)
57. Having regard to the respondent's grievance policy, I was satisfied that Mr Haywood's role was not to decide on the grievance but to investigate and to prepare a report to put before the governing body.
58. The policy also provides how anonymous evidence should be dealt with. It states:
- “Anonymous evidence should not be used. The only exceptions to this would be
- (a) Where the allegations are serious and can be verified through independent investigation, or
- (b) If a potential witness had a real fear, reasonably held, that they would suffer substantial detriment if they were to sign their statement.
- The latter case would be very rare and, if the situation arose where this was alleged, the County Solicitor should be asked for advice through the Children, Young People and Families Directorate Hr Section.” (257-265)
59. The claimant did not say to Mr Haywood that those who had told her about statements allegedly made by Mrs Wallington, also believed that they would suffer substantial detriment if they were required to give signed statements. Accordingly, Mr Haywood did not interview them anonymously.
60. The claimant appealed against Mr Haywood's findings on 7 May 2014 and provided detailed grounds on 23 May 2014. (199-200)
61. The appeal hearing took place on 20 June 2014, attended by her and Miss Keene. Mr Haywood presented management's case and his findings. The

appeal was heard by a panel of three governors, Mr Jason Smith, who chaired the panel, Alex Harper and Alice Noakes. Also before the panel was documentary evidence in an email sent by Miss Foster.

62. In the outcome letter sent by Mr Smith to the claimant, dated 27 June 2014, he wrote that the panel, having considered the evidence, generally upheld the findings in Mr Haywood's investigation report. He went on:

“For the health and safety of all staff and children at the school, governors would like to affirm that when members of the SMT [Senior Management Team] are off-site for any length of time, this should be communicated to all SMT members, so appropriate reporting processes can be implemented and action can be taken in their absence.

Governors would be pleased to see the re-establishment of clear communication channels between the head teacher and deputy head teacher, whether by restarting mediation or other regular meetings between the two parties. They felt that maintaining such clear communication is for the benefit of all staff and children at the school”  
(217-218)

63. Although the claimant was advised of her further right of appeal, she did not pursue it.
64. I find that Mrs Wallington having raised concerns previously about the claimant's conduct which led to disciplinary action against her, this led the claimant to submit her first grievance resulting in mediation. While she was on sick leave she submitted a further grievance which, in my view, bore no relation to Mrs Wallington's conduct towards and treatment of her.

Return to work meetings on 14 March and 4 June 214

65. A return to work meeting was held on 14 March 2014 with the claimant, Miss Keene, Mrs Wallington and Miss Baggs. Miss Kelly Horsburg, Mrs Wallington's NAHT representative, was also present. The claimant produced a further fit note which stated that she was unfit for work until 2 June 2014. They discussed adjustments to the claimant's work. The claimant again restated that she felt that teaching Yellow Class involved more bending and said that she was unfamiliar with the Key Stage 1 curriculum. Mrs Wallington agreed to provide her with training. The meeting, however, did not end in agreement in relation to the adjustments to the claimant's work. (186-188)
66. A further return to work meeting took place on 4 June 2014 at which the claimant attended with Miss Keene. Mrs Wallington and Miss Baggs were also present. They discussed risk assessments, adjustments, as well the claimant's phased return to work. After having taken into account medical advice, the adjustments to be put in place for the claimant, upon her return to work, were as follows:-
- 66.1 A timetable be drawn up for a five weeks phased return;
- 66.2 A risk assessment undertaken;

- 66.3 A move to Yellow Class where fewer children have challenging behaviours;
- 66.4 Regular movement around the classroom;
- 66.5 The claimant was not expected to play with the children at floor level;
- 66.6 She could use a high backed chair purchased by the school;
- 66.7 She was not expected to use any form of physical intervention, hoist or to manually handle the pupils;
- 66.8 She was to have regular rest periods;
- 66.9 She was not expected to undertake lunch time duties usually undertaken by the deputy heads; and
- 66.10 Miss Judith Crump, a part time teacher and oral support staff, to be informed of the claimant's risk assessment.
67. It was accepted that the claimant's back condition was long-term but could be managed and that she, most likely, came under the protection of the Equality Act 2010. (204-207)
68. I was satisfied and do find as fact that there was no suggestion in the medical advice that the claimant should teach a specific class upon her return to work. She returned to work on 5 June 2014.
69. In a further occupational health report dated 22 July 2014, the occupational health nurse wrote that she had discussed the risk assessment with the claimant who said that she was experiencing some difficulties in the class she was teaching mainly due to frequent bending. The nurse then wrote:
- “OH opinion
- Thank you for the adjustments that have been made to accommodate Kate in her role. She notifies me that in general she is coping well.
- Management advice
- In my opinion Kate is fit to continue in her post with the adjustment that you have mentioned in your risk assessment. She, however, feels that she may benefit with working more management days than teaching days as a way of reducing the risk. If it is operationally feasible may you please arrange a meeting to discuss the possibility of the above and consideration in the change in the class that she teaches.
- Review date
- No further occupational health review is required.” (221- 222)
70. I find that the claimant continued to work in the Yellow Class and did not make any further complaints about the arrangements. Both she and Mrs Wallington regularly met for their 8.30 morning teaching briefings, weekly teachers meetings and the weekly senior leadership team meetings in

addition to regular ad-hoc meetings. During those meetings, I do further find that the claimant did not raise any concerns or issues in relation to the adjustments made by the school.

Complaint by Miss Judith Crump

71. The claimant job-shared with Miss Judith Crump, who worked with the Yellow class Monday to Wednesday, the claimant worked Thursday and Friday. In an email dated 23 October 2014 sent by Miss Crump to Mrs Wallington, she complained about the claimant's conduct. She wrote, amongst other things, the following:

“... I explained to you that I thought that the principal issues I have with job-sharing with Kate are not routine job-share issues that may arise from time to time, but more importantly Kate's lack of commitment and professionalism as a teacher. In my view it is clear that Kate does not meet the basic Teaching Standards to engage in effective classroom practice. This is the reason that I said that a simple conversation about 'times to plan work' between myself, you and Kate would not resolve the issue....

I explained that I felt that if I continued to have dialogue with you and point out further information that the job share would not be sustainable. I also said that, quite simply, in my view there exists a professional gap in our approaches that is too great to allow us to work together effectively either on a professional or personal level. My view is that the potential progress being made and to be made by the children in the class is seriously being put at risk.

I explained that I have kept a log of significant events that in my view have had a detrimental effect on the children's education. I shared with you my tally of significant events over the first seven weeks of this academic year regarding Kate's unprofessional actions. These included, amongst others, failure to plan the curriculum, deviating from the agreed curriculum plan, failing to provide and set up resources effectively, failing to provide educational challenge and repetitive poor communication with me. I also explained that this is probably only the tip of the iceberg as I do not work with Kate in the classroom as the TA team do.....

....You said that you were not surprised about the detail of our discussion and that you had hoped that Kate might come back with a positive attitude and job sharing may result in her acting in a more professional manner.....

I shared with you that Kate has told me and others she will be retiring next year.

You came up with suggestions for solutions which you are going to investigate and then discuss with the Governors.

...I explained that I would rather take on full time work again this year if this means not job sharing with Kate. It is clear that I do not want the situation to continue, for my sake, the school's sake and most importantly the children's sake. I urge you to provide an imminent resolution....”

72. Miss Crump then listed, in date order, her concerns about the claimant's conduct and behaviour from 3 September 2014 to 19 October 2014 covering three whole A4 pages. (222(i) – 222(vi))



73. What prompted Miss Crump to lodge a formal grievance against the claimant was her argument with her on 12 January 2015. She alleged that the claimant had failed to prepare teaching materials for a class which she, that is Miss Crump, was due to teach that day. Mrs Wallington investigated the grievance and interviewed the teaching assistants who witnessed the incident on 12 January 2015. Miss Mandy Leach and Miss Pat Newman heard the claimant say words like, “piss off, fuck off and silly bitch”. They heard Miss Crump say words such as, “You obviously don’t give a shit” after the claimant had sworn at her. The claimant then apologised to Miss Newman and to another assistant, Miss Jackie Slade, at lunchtime on the same day. She also apologised to Miss Leach the following morning.
74. In Miss Slade’s interview with Mrs Wallington, Miss Slade said that the claimant had said words like, “It had been a difficult day last Friday”. Miss Slade then said that very quickly “Everything blew up” and heard the claimant use swear words. She then went to set up the classroom. At that point the claimant left the room. (240-241).
75. The claimant was interviewed on 21 January 2015 by Mrs Wallington. She explained that the previous Friday had been a difficult day as three out of the four teaching assistants were off work and no-one was left behind to clear up or put out activities for the following Monday. She left some items on the floor. She had to clean the tables and did not want to put the equipment on the wet tables. She had no keys for the literacy and mathematics cupboard. She went to Yellow Class and Miss Crump started shouting at her saying something like, “What’s the matter with you, you are so lazy. I am sick of you.” The claimant then walked out of the classroom. Miss Crump never asked her why nothing was put out.
76. Mrs Wallington asked the claimant whether she had emailed Miss Crump on Friday to let her know the situation. The claimant confirmed that she did not. She said that she remembered Miss Leach, Miss Newman and Miss Slade being in the room drinking tea but were not asked why they did not put out any of the equipment. The claimant said that she could not recall any swear words being used. She recognised that she should not have reacted the way she did but there were lot of things happening at her home at the time and asserted that everything had to be Miss Crump’s way. It had to fit in with what she wanted. She did not like working with her and that she was a cold person. The claimant then claimed that she did not feel valued or listened to, was often in pain and that people did not realise at the time. (243)
77. Mrs Wallington again met with the claimant on or around 27 January 2015, in her office and informed her of the outcome of the grievance. She said to the claimant that she thought she needed to apologise to Miss Crump and to the teaching assistants. At that point and I do find as fact, the claimant said that she was thinking about retiring at the end of the summer term. I further find that Mrs Wallington’s response was to say that as the relationship between the claimant and Miss Crump was difficult that if she wished to retire, she, Mrs Wallington, could arrange for the last six months to be more pleasant for her by engaging her in more management work. She

suggested that the claimant be removed from teaching Yellow Class for the remainder of her time at the school and work in the Nursery. This would mean that her teaching duties would be reduced further to one day and her management duties increased to four days. The claimant agreed to provide an apology to Miss Crump and to the teaching assistants who had witnessed her behaviour.

78. The claimant said in evidence that she had never seen the notes of Mrs Wallington's interviews with the witnesses and Miss Crump's grievance, (234-245). She acknowledged that she did meet with Mrs Wallington on 21 January 2015 and that Mrs Wallington's notes of that meeting were a broadly accurate account and further stated that on a later date, Mrs Wallington had shown her notes of the meeting with her but did not give her a copy. She said that Mrs Wallington then told her that Miss Crump had further complained that she had shouted at and was rude to her. She said that Mrs Wallington had said she had told Miss Crump to take out a grievance against her and that she would be commencing disciplinary action against the claimant who responded by saying, "That's a bit OTT" and "You know I've got a bad back and I can't bend and lift." Mrs Wallington then said, according to the claimant, that she would not take disciplinary action if she, the claimant, resigned and that if she did then she could engage in office based management duties four days a week and would teach at the Nursery one day a week during her notice period until the end of the academic year, 31 August 2015 as the school could afford it. The claimant maintained that she did not say either at that meeting or at any subsequent meetings, that she was planning to retire at the end of the summer of 2015.
79. She then said in the morning of, she believed, Friday, 29 January 2015, Mrs Wallington asked her if she had decided to resign because she needed to know immediately as she had to put an advertisement in the paper. The claimant's response was to say that it was "A bit sudden" but she would let Mrs Wallington know the following week. About an hour and a half later, she, the claimant, received an email from Mrs Wallington asking for her resignation. The claimant stated that at point she had not said she was going to resign. She agreed that Mrs Wallington had asked her to apologise to Miss Crump but she refused but did apologise to the teaching assistants. She said that she had never been informed that the complaint against her was upheld. There had never been a hearing and she had not seen Miss Crump's grievance against her. She alleged that she was only told that it could be resolved if she resigned and would then be moved from Miss Crump's class while working out her notice.
80. The claimant's case is that the events from 12 January 2015 were the last straw and she resigned with effect on 31 August 2015, by a letter dated 2 February 2015. She felt that it was the last straw due to the constant stress of being harassed and bullied in the context of the past disciplinary and grievance history.
81. It is clear to me that Miss Crump lodged a formal grievance against the claimant. Even from the claimant's account, there was a strained and somewhat unfriendly relationship between the two of them. It was further

clear that the cause of the complaint was Miss Crump's view that the claimant had not set out materials for teaching the following Monday. The complaint having been lodged with Mrs Wallington, as head teacher, she was under an obligation to investigate it. I am satisfied that she did speak to the teaching assistants as well as to Miss Crump. She also interviewed the claimant on 21 January 2015 in respect of Miss Crump's grievance and obtained an account from her. The account, as set out in Mrs Wallington's notes, the claimant agreed, was broadly accurate.

82. Having met all of those involved in the incident, the next stage was to inform the claimant of the outcome of the grievance. I am satisfied that the meeting on or around 27 January, in Mrs Wallington's office, was held to inform the claimant of the grievance outcome. When Mrs Wallington suggested that she should apologise to the teaching assistants and to Miss Crump, the claimant was prepared to apologise only to the teaching assistants. In response to the statement that she should apologise to Miss Crump, she said, "Well I'm retiring next year". I accept that she said those words as Mr Haywood said in evidence that he was also of the view that the claimant wanted to retire. She had also said the same to Miss Crump. She clearly was unhappy working as deputy head teacher at the school and had a less than amicable relationship with Mrs Wallington and had been looking for work outside of the school. I do accept Mrs Wallington's evidence that if she wanted to remove the claimant from the school she only had to invoke the disciplinary process in relation to the outcome of Miss Crump's grievance. She did not do so as the claimant indicated that she intended to retire.
83. On 29 January 2015, Mrs Wallington emailed the claimant stating the following:

"Hi Kate,

I've spoken to Judith and Anna.

To make things easier for you and Anna I'm suggesting you teach the nursery all day on a Friday so you have four clear management days – Anna is ok about this. You would be in Anna's nursery in the morning with Rosemary and PMLD pupils and again in Anna's nursery in the afternoon when all pupils come together.

I can implement this from Monday, 23 February if you let me have your resignation letter as soon as possible so I can then write to parents and let them know about the changes with some decent notice.

Thanks  
Jane" (230)

84. I do find that this email was sent in the full knowledge that the claimant had stated her intention to resign on giving six months' notice. Mrs Wallington had to ensure that the necessary steps were taken to accommodate the claimant over the following six months and she intended to inform the parents of the changes. She needed the claimant to confirm in writing her resignation because she also had to reorganise the teaching in both the Nursery and Yellow Class and had to ask Miss Crump whether she would

consider working full-time. She could not take these necessary steps unless and until the claimant confirmed her intention to resign to take up retirement.

The claimant's resignation on 2 February 2015

85. On 2 February 2015, the claimant handed in her resignation letter in which she wrote:

“Dear Jane Wallington,

I wish to confirm that I am resigning my post of deputy head teacher at Mabel Pritchard School with effect from 1 September 2015. My last date of employment will thus be 31 August 2015.

I will be retiring and will need to complete a retirement form.

I shall ensure that my remaining time working with staff, parents and students will continue to be as supportive and successful.” (231)

86. She was contractually required to give three months' notice but gave six months' notice and worked under the new arrangements of four days management time and one day teaching at the Nursery. This continued until the end of term on 22 July 2015.
87. Having observed the claimant give evidence, I am satisfied that she is not the sort of person who would give up without a fight and was quite articulate in expressing herself. From the documentary evidence, she was well able to express herself raising a range of issues in relation to her treatment at the hands of Mrs Wallington but did not state in her resignation letter that she was resigning due to the events on 23-29 January 2015, as being the last straw. I did not accept her account in relation to what occurred on those days.
88. On 30 January 2015, Mrs Wallington wrote to Miss Crump setting out the outcome of her grievance. She stated the following:

“Re Grievance against Kate Schnellling.

Since discussion your formal grievance with you I have now met with the three named witnesses and Kate.

The witnesses support your description of the events which took place on Monday, 12 January 2015 in the Yellow Classroom. They do remember swear words being used by Kate in addition to feeling rather embarrassed witnessing the event.

Kate does not recall using swear words but accepts her behaviour was inappropriate supported by the fact that she apologised to the TA's at a later date (agreed by the TA's).

I have asked Kate to apologise to you.

I have made an offer to Kate which would result in you no longer job sharing with Kate – I'm just waiting for confirmation from Kate. If for some reason this is not

forthcoming I will need to meet with Kate and yourself to try and resolve the issues to the job share to the satisfaction of both parties.

I will keep you informed about Kate's decision once received." (244)

89. On 4 February 2015, Mrs Wallington informed Miss Crump that the claimant would no longer be her job sharer as from Monday 23 February 2015 and confirmed that she, Miss Crump, agreed to teach Yellow Class full-time on a casual basis from Monday 23 February to the end of the summer term. Mrs Wallington expressed the hope that the steps taken were to Miss Crump's satisfaction and was a positive outcome to her grievance. (245)
90. On 13 March 2015, the claimant was reminded by Mrs Wallington, in an email, that she had to be at work by 7.45 in the morning as Mrs Wallington had noticed that her attendance was getting later and later.
91. On 13 March 2015, she arrived for work at 8.25 in the morning and was reminded that she should be at the Nursery from 7.45am to 12.45pm on Fridays when she was teaching. She was also told by Mrs Wallington that she should not be leaving the site until 3.30pm. (245(i))

#### The claimant's Further information

92. As referred to earlier in the judgment, in the claimant's document entitled "Further particulars of Claim" she relied on 15 matters in support of her constructive unfair dismissal claim. They shall now be dealt with in turn.

"1<sup>st</sup> On her return to work on 5 June 2014 following an absence with a work related back injury, the respondent refused against medical advice to allow the claimant to teach her old class (KS2 Year 5/6) and would only agree to her teaching KS1 Year 1/2 which the claimant complained would involve more bending and lifting even though a teacher was leaving a KS2 (Red) class."

93. I was satisfied that neither Mrs Wallington nor the respondents refused, against medical advice, to allow the claimant to teach her old class. The claimant did not have the right to teach Blue class. She was required to teach any class as part of her duties as a teacher. Mrs Wallington had set out, quite clearly, in the return to work meeting and in discussions with the claimant and Miss Keene, that some of the pupils in Blue Class had moved during the claimant's sickness absence, therefore, Blue Class pupils were more physically demanding than Yellow Class pupils. It was not in Mrs Wallington's interest to expose the claimant to danger with the possibility of further legal action against the school and the council. Mrs Wallington had taken into account medical advice and in discussions with the claimant and her trade union representative, Miss Keene, had set out the adjustments to be made to the claimant's working conditions. Ultimately it was her responsibility to allocate work and she carried it out in a way that was reasonable taking into account the pupil changes. The claimant would not have been aware of the changes in Blue Class while she was on sick leave, that would have been within Mrs Wallington's knowledge and responsibility.

“2<sup>nd</sup> In Autumn term the claimant complained to JW that she was finding it difficult in Yellow Class because of her back injury and the bending and lifting even though a teacher in KS2 (Doreen Foster) offered to JW to swap with the claimant so the claimant could job share her (DF) in KS2 rather than with JC in KS1, JW refused.”

94. It is correct to say that the job share gesture was raised on 4 June 2014 before the claimant started to teach the Yellow Class. Miss Doreen Foster was prepared to work three days in Green Class and two days in Yellow Class. The claimant acknowledged that Mrs Wallington considered the suggestion and gave reasons why it would not be a good idea. The points she made were valid in that the pupil who jumped on the claimant's back was moved to the Green Class.
95. Miss Foster, in her evidence under cross-examination, acknowledged that pupils in both the Green and the Yellow Classes, following her proposal, had two different teachers instead of one, and that Mrs Wallington had to take that into account. Mrs Wallington said in evidence that about one third of the school pupils have multiple learning difficulties; another third are on the autistic spectrum with challenging behaviours and the remaining third had severe mental difficulties. They would spread across all ages and at both school sites. She looked at all of the classes and on the basis of the assessment of risks, she chose the Yellow Class. In Yellow Class there was a huge emphasis on play and in her view, the claimant would be able to move around the class thereby strengthening her leg muscles. She did not need to get down to floor level with the pupils. The risk assessment was approved by the claimant, Miss Keene as well as by Mrs Wallington.
96. I accept that Mrs Wallington had good reasons for not agreeing to the offer that the claimant job share with Miss Foster.

“3<sup>rd</sup> During Autumn term 2014 and in January 2015 JW regularly belittled the claimant in front of staff at daily morning staff meetings.”

97. The claimant gave no details of this allegation in her witness statement. She was, however, asked by the chair of governors during the claimant's grievance investigation about who were making the comments but she refused to disclose their identities for fear that they may be bullied and harassed. Her case was that she had heard about the comments allegedly made by Mrs Wallington from three different independent sources. She said that Miss Foster had reported them to her as she was upset by them. One such comment, apparently, was, “If she is as ill as they say she is....” casting doubt on the genuineness of the claimant's sickness.
98. Miss Foster said that she did witness what she would describe as unpleasant behaviour, namely Mrs Wallington belittling the claimant in Autumn term 2014. She said that she believed that the incident was just before a local authority health and safety inspection. She alleged that during a teachers' morning meeting, Mrs Wallington thrust an armful of papers at the claimant and said “Here's something for you to read”. Miss Foster said that she was shocked at what she had witnessed as were some of the other teachers. In cross-examination, she acknowledged that her statement

was written on or around September 2016, some two years after the alleged incident. She further acknowledged that if Mrs Wallington had given the claimant something to read it would not be objectionable. She said that she had written about it in her diary, but the diary was not produced as part of the claimant's disclosure. If the incident did occur in the manner described by Miss Foster, it was not raised with the chair of governors or with Mrs Wallington. Certainly, none of the other teachers who were present were called to give evidence in support of Miss Foster's account.

99. I do not accept the account given by Miss Foster as the matter had not been reported either to Mrs Wallington or to Mr Haywood. Mrs Wallington only became aware of it in Miss Foster's witness statement and do not recall the incident. If she did give the claimant some papers they might have been in relation to the claimant's class or to her management responsibilities.

“4<sup>th</sup> During Autumn Term 2014 at weekly SLT meetings JW would regularly let the claimant go and continue discussions with the assistant head teacher Tracey Jameson.”

100. Mrs Wallington, the claimant and Miss Jameson would attend regular senior leadership team meetings. The claimant said in evidence that she would leave at the end of the meetings but, invariably, Miss Jameson would stay behind with Mrs Wallington as they are friends. She asserted that it was like having another meeting and it would go on for some time in her absence. It was put to her that she was in the habit of leaving work early which she denied but would leave early for medical appointments.

101. When Mrs Wallington was cross-examined about this she acknowledged that the claimant would leave at the end of the meeting and she would stay in the office with Miss Jameson. Neither the claimant nor Miss Foster would be aware of the subject matters discussed. As Miss Jameson worked at the Upper School it was an opportunity for Mrs Wallington to comment on her performance and to be briefed on events at that school. There was nothing to suggest that the matters discussed impinged upon the claimant's work or that the claimant was deliberately excluded from those discussions.

102. I was satisfied that there was no evidence to suggest that the SLT meetings continued following the departure of the claimant.

“5<sup>th</sup> Autumn Term 2014. The claimant's requests (she estimates that she asked at least three times in early autumn term 2014) for weekly meetings with JW were always refused or met with the response “I'm too busy”. JW had previously been told by governors to meet regularly with the claimant.”

103. The claimant said that following the panel's grievance outcome decision which was communicated to her on 27 June 2014, she wanted to meet with Mrs Wallington as part of the mediation as recommended. This was quite apart from the management meetings they would normally have concerning the school.

104. Mrs Wallington said in evidence that she was prepared to meet with the claimant as part of mediation but the claimant did not ask for regular one-to-

one meetings with her. Even if she did ask, such a request would not have been ignored and she denied telling the claimant that she was too busy to meet with her.

105. It is difficult to accept that the claimant had made a specific request for mediation as she regularly met with Mrs Wallington and other staff members at morning staff briefings at 8.30am and at weekly senior leadership team meetings with herself, Mrs Wallington and Miss Jameson. During the week, as part of the management of the school, she would meet with Mrs Wallington on an ad-hoc basis as their offices were not that far away at the opposite ends of a corridor.
106. The claimant lodged grievances and had commented to Miss Baggs and to others about her treatment. If she had requested one-to-one mediation meetings with Mrs Wallington and was refused on three occasions, I would have expected her to have complained either to Miss Baggs, the chair of governors or to Miss Keene, her union representative. There was no documentary evidence that such a course of action was taken by her. She said that she was advised to keep notes of events and had made notes on pieces of paper which she handed to her legal representatives. Neither the notes nor a transcription of them were part of her disclosure. She is an articulate, assertive person orally and in writing, who is quite capable of expressing herself.

“6<sup>th</sup> In the Autumn Term 2014 JW would not speak to the claimant unless she had to.”

107. This allegation is similar to the 5<sup>th</sup> allegation above. The claimant alleged that she would say good morning to everyone but Mrs Wallington would not answer. She denied, when cross-examined, that it was Mrs Wallington who spoke to her first thereafter she would answer.
108. I do not accept that Mrs Wallington would not speak to the claimant unless she had to. They both were responsible for managing the school and had to work together notwithstanding their strained relationship. For example, I do find that the claimant had a calendar of training for staff which she discussed with Mrs Wallington. As already stated, they met at the senior leadership team meetings on Mondays; at staff meetings in the mornings; and on an ad-hoc basis. Further, the claimant in preparing training would draw up a plan and discuss it with Mrs Wallington who would make suggestions such as the need to have a speech therapist.

“7<sup>th</sup> In Autumn Term 2014 JW withheld information from the claimant; for example in September 2014 that particular children (twins in Nursery Class) already had an allocated social worker, causing the claimant (who was the safeguarding co-ordinator) to make an embarrassing referral to social services.”

109. The claimant alleged that on the second day of the autumn term, twins attended Nursery Class and had an allocated social worker. As the safeguarding co-ordinator, she was unaware of this and made what she described as an embarrassing referral to social services. The mother of the twins arrived on the second day of term with one of her twins and was very drunk, smelt of alcohol and was unbalanced on her feet. The claimant took



her to the school nursery and asked the class teaching assistants about the new child but they were unaware of the child's needs. She then asked Mrs Wallington about the child and whether the twins had a social worker but Mrs Wallington replied that she did not know. At that point the claimant informed Mrs Wallington that she would contact social services immediately as she was very concerned about the child going home later in the day with his mother. She discovered from the social services duty officer the name of the social worker and that the family were on their records. She then asked that her concerns be logged. She then spoke to the class teacher, Miss Anne Panter, who, apparently, expressed surprise that the claimant did not know about the twins and the allocated social worker.

110. The claimant felt that she should have been informed about the twins who were new to the school and whether they had a known contact in social services. She asserted that Mrs Wallington should have told her as this was a safeguarding issue and as such, she was required to attend joint agency meetings for children who were on the child protection register. She claimed that Miss Panter knew the name of the social worker and had been given that information by Mrs Wallington. She said Miss Panter expressed surprise that Mrs Wallington had not told the claimant, as the safeguarding officer, about the twins' circumstances. She was of the view that such conduct was part of Mrs Wallington's bullying and harassment of her.
111. In cross-examination Mrs Wallington said that the school would be sent referrals throughout the academic year and would not, in every case, receive the paperwork before the child or children start school. She was unaware of the social worker who had been allocated to the twins. She said that one of the boys attended her school, the other the mainstream school and asserted that it might have been the case that the mainstream school had the paperwork, not her school.
112. The claimant did not call Miss Panter to give evidence to corroborate her account.
113. I was not satisfied, on the balance of probabilities, that there was evidence in support of the claimant's case that Mrs Wallington knew about the social worker allocation and had disclosed that fact to Miss Panter and not to her as part of a harassment and bullying campaign. There was no evidence that Mrs Wallington had the information in her possession at the time or before the twins entered the school. Accordingly, this allegation cannot be supported based on the evidence before me.

“8<sup>th</sup> In autumn term JW instructed the claimant to undertake fundraising activities for the school. The claimant had previously been successful at this. In January 2015 JW commented “I'm sick of all this fundraising, it is taking away from the core function of the school.”

114. The claimant said that in September 2014, Mrs Wallington instructed her to undertake fundraising activities for the school. She had previously been successful at this and it was part of her performance review. She said that she did not want to be a fundraiser as she was a teacher and manager. She subsequently did take on fundraising but not as part of her role as deputy

head. Miss Deana Barrett, school secretary, asked for her help as the school playground equipment and sensory rooms were in a poor state of repair. She agreed to help raised funds for the project.

115. Miss Barrett said in cross-examination that they had arranged a fundraising event on a Saturday in January 2015, for playground equipment for the benefit of the school and children in wheelchairs. A lot of equipment had to be moved for the event which were put into two minibuses. She and Miss Foster were involved but the claimant took the lead in the fundraising.
116. The week following on from the event there was a joint teachers' meeting during which the claimant alleged that Mrs Wallington said to those present that she was sick of all the fundraising activities and that it took away from the core purpose of the school. Miss Barrett was upset at Mrs Wallington's comments and responded by saying that the children were the core purpose of the school, she was tearful and left the meeting. She asserted that the comment was directed at the claimant.
117. Although Miss Barrett was upset at the meeting she said that Mrs Wallington was not obstructive to fundraising. The problem was that Miss Barrett's preference was to conduct a fundraising event either in the school hall or on the school's playground but said that the caretaker would be required to open up the hall. She was not aware that the hall been hired out on that Saturday. As part of her duties involved bookkeeping she did not recall any money being received by her for the hiring out of the hall on the day of the fundraising.
118. In evidence Mrs Wallington denied that in September 2014 and December 2014, she had instructed the claimant to undertake fundraising activities for the school. She asserted that the claimant had volunteered to raise funds for a new playground to which she agreed. The comments referred to by the claimant she denied saying but did recall stressing to the teachers in a morning de-briefing meeting that teaching and learning were the primary objectives and that more time should be spent on those rather than on fundraising. The comment was made after the school had spent many hours planning and organising a whole day fundraising event which took a lot of time away from the claimant's role as deputy head teacher.
119. I found that this part of Miss Barrett's evidence to be convincing. She conveyed to me that she had spent a lot of time and effort being involved in fundraising as she was passionate about the needs of the pupils and what would help them at school. She had planned and managed the fundraising event the Saturday prior to the meeting when she became upset. She could only have been tearful if a something was said at the meeting which affected those involved in the fundraising. I do, therefore, find that Mrs Wallington had said that she was sick of the fundraising and that it was taking resources away from the main purpose of the school. This caused Miss Barrett to become tearful who then left the room. I accept that the statement did offend all of those who were involved in the fundraising including the claimant.

- “9<sup>th</sup> The claimant ‘job-shared’ her Key Stage 1 (Yellow) Class with another teacher Judith Crump on her return to full time work at end of summer term 2014. The claimant was in class Wednesday to Friday and JC Monday and Tuesday.”
- “10<sup>th</sup> On Monday 26 January 2015, JW told the claimant she needed to see her urgently. JW told the claimant that JC had complained about the claimant allegedly not having put some materials on tables on Friday 23 January. The complaint was unjustified and trivial. JW instructed the claimant to go to help JC even though there were four teaching assistants (TA’s) having coffee. JC shouted at the claimant words to the effect of “you didn’t do this....” The claimant pointed out that JC had four TA’s and asked “why do you have to Jane (JW)?” JC shouted at the claimant again whereupon the claimant said “I’m tired of all of this” and walked away.”
- “11<sup>th</sup> On Tuesday 27 January JW told the claimant to stay behind at 8.50am after the morning staff meeting. She said that JC had further complained that the claimant had shouted at and was rude to JC the previous day (which was not true) and that she (JW) had told JC to take out a grievance against the claimant and that she would be commencing disciplinary action against the claimant. The claimant said “that’s a bit OTT” and “you know I’ve got a bad back and I can’t bend or lift”. JW said that she would not take disciplinary action if the claimant resigned and that if she resigned the claimant could then do management/office based/duties four days a week and teach in the Nursery one day a week for the notice period.”
- 12<sup>th</sup> On the morning of Friday 29 January 2015 JW asked the claimant if she had decided to resign because she needed to know immediately because she needs to put an ad in the paper. The claimant said that that was “a bit sudden” and that she would let her know next week.”
- 13<sup>th</sup> About an hour and a half later the claimant received an email from JW again asking for her resignation. The claimant had not at this point said that she was going to resign.”
- 14<sup>th</sup> The claimant felt that the events from Friday 23 to Friday 29 January were the ‘last straw’ and she resigned with effect from 31 August 2015 by a letter dated 2 February 2015. She felt it was the last straw due to the constant stress of being harassed and bullied, in the context of the past disciplinary and grievance history.”
120. The 15<sup>th</sup> matter was the claimant’s summary of the points in support of her constructive unfair dismissal claim.
121. From paragraphs 9 to 14, the claimant referred to her relationship with Miss Crump and the events on Friday 23 and Monday 26 January 2015 which I have already dealt with in my earlier findings. I have also made findings with reference to the meeting at which Mrs Wallington allegedly threatened the claimant with disciplinary proceedings if she did not resign. My findings were not in support of the claimant’s account of events.
122. The claimant did not complain by way of lodging a grievance after September 2014. After 2 February 2015, she attended staff meetings and SLT meetings. She also met with Mrs Wallington on a daily basis. She stated and I do find as fact, that instead of giving three months’ notice she

gave six months as she wanted to finish the fundraising work because it was a big project. In so doing it was her intention to spend more time with the pupils. She did not involve her union between January to February 2015 to discuss her alleged treatment by Miss Crump and Mrs Wallington. She also did not complain to the chair of governors. She said that there were no further incidents after 2 February 2015 and that it did not occur to her to go in April 2015 as she had to deal with a number of safeguarding issues as well as fundraising. At the end of the summer term she realised that she could bring a constructive unfair dismissal claim as she felt that she had been bullied and pushed out.

123. The respondents called Miss Amanda Makoka, assistant head teacher, who was recruited in March 2010 as a part time teacher and job shared with the claimant. She said in evidence that she had worked alongside the claimant and had witnessed her unprofessional and inappropriate behaviour. She said that when Mrs Wallington was present at meetings, the claimant would sit next to Miss Foster and would be whispering and giggling, making comments and generally behave in a manner that was rude and disrespectful. They would make faces and would comment loudly when Mrs Wallington was speaking. Her conduct was both undermining and distracting for those present. Miss Makoka was of the view that the claimant did not like Mrs Wallington and was undermining her, whereas Mrs Wallington would behave in a professional manner and would not admonish the claimant openly at meetings. She said that Mrs Wallington's office was by the foyer by arrivals and her door was always open. The claimant's office was at the far end of the corridor. Mrs Wallington was aware of each member of staff's problems and was supportive of their career progression. She also wanted what was best for the children, the school and staff.
124. I accepted the evidence of Miss Barrett in respect of Mrs Wallington's manner in relation to the fundraising comment. She said that Mrs Wallington liked to be in control and that, that is Miss Barrett, tried to improve how the office worked but Mrs Wallington would not let go; kept charge of her own diary and would open the mail.
125. Mrs Wallington told me and I do accept and find as fact, that being in charge of 75 pupils with a variety of behavioural problems as well as staff, can be quite stressful as well as demanding. I did not get the sense from the evidence that based on her personality, attitude and conduct that there was a queue of teachers ready to leave their employment. What came across, quite clearly, was that there had been, from the point at which disciplinary proceedings were invoked by Mrs Wallington and disciplinary action taken by the governors against the claimant, her relationship with the claimant had become strained. I also find that there was a group which the claimant was part of comprising of Miss Foster and Miss Barrett and a group supportive of Mrs Wallington comprising of Miss Jameson and Miss Makoka. I do not in any way imply that there was hostility between the two groups but I have to take into account that there was an element of partisanship in their evidence.

126. Having observed Mrs Wallington give evidence, she came across to as calm, in control of what she was saying and was unruffled by the questions put to her in cross-examination. She was quite convincing when she said that although she is head teacher of the school, she is also human being and was very emotional and upset when told that the claimant had lodged a complaint against her and expressed her concerns to Miss Jameson. She acknowledged that it was a difficult decision to make to refer the claimant to the governors in respect of her conduct on two occasions for which she had received warnings. She felt she had to do it as the claimant's behaviour was serious and she did not want to come across as not being professional in her approach in such matters. She understood that as a result of the warnings, her relationship with the claimant had become somewhat less than cordial. She, however, had to manage their relationship and the school in a professional manner. She conveyed to me a lifetime commitment to teaching, the children of the school and to the staff. In the main I preferred her evidence save for the fundraising comment to which I shall refer to later in my conclusion.
127. The claimant has two adult boys, one aged 28 years and the other aged 26 years. They both live at home. She asserted that they are financially dependant on her, therefore, she would not have resigned when she did. I do find, however, that the younger son graduated from university in 2016 and supports her financially. The older son is training to become a Rabbi.
128. Mrs Wallington told me and I do find as fact, as it was not challenged, that a member of staff could take their retirement at 60 years of age

## Submissions

129. I have taken into account the very detailed written and oral submissions by Mr Rattan, counsel on behalf the claimant and by Mr Dawson, counsel on behalf of the respondents. I do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, as amended. I have also taken into account the cases they have referred me to.

## The Law

127. Section 95(1)c Employment Rights Act 1996, provides,

“(1) For the purposes of this Part an employee is dismissed by his employer if .....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

128. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an

employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

129. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

130. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the “last straw” doctrine that,

“...the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?”, Glidewell LJ.

131. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

“A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase ‘an act in a series’ in a technical sense. 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 earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’ conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be.... .

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.”, pages 37 - 38.

132. The test of whether the employee’s trust and confidence has been undermined is an objective one, Omilaju.

133. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

“The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a ‘question of fact for the tribunal of fact’. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.

In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker.”

134. In addition I have considered the cases of Bliss v South East Thames Regional Health Authority [1987] ICR 700, a judgment of the Court of Appeal, Dillon LJ gave the lead judgment in which it was held that as the employer had given the claimant time to whether to return to his post and to pay his salary in the meantime, his action in doing so did not amount to an affirmation of the contract nor did it preclude him from electing to treat the contract and end.

135. His Lordship, in referred to it being a “formidable argument” a passage in the judgment of May LJ in the case of Peyman v Lanjani [1985] Ch. 457, who held at page 454, the following:-

“... I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him.”

136. In the Employment Appeal Tribunal judgment in the case of Cockram v Air Products plc [2014] IRLR 672, Simler J, President, held that where the employee gives notice to terminate the contract beyond the contractual period, the additional performance may be consistent only with affirmation of the contract.

“It is a matter of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.”, page 675, paragraph 25.

## **Conclusions**

130. I have made findings of fact which I found that Mrs Wallington did say to those present at the staff meeting on the Monday following the Saturday fundraising event, that she was sick of the fundraising as it was taking away from the core purpose of the school. However, I accept that it was said in the context of refocusing the school’s resources on teaching and the pupils rather than spending a large proportion of time on fundraising activities. In

that regard she was reminding the staff of those core responsibilities. The statement had more of an impact on Miss Barrett than on the claimant. It was not the act the claimant relied on as the last straw in support of her constructive unfair dismissal claim. Whilst the statement was upsetting for those involved as they wanted to spend more time on fundraising. There was clearly a difference in views about the school's priorities. Objectively viewed, the comment on its own did not breach, in a fundamental way, the implied term of mutual trust and confidence.

131. In relation to the other matters as set out in the claimant's Further Information or Further Particulars of Claim, paragraphs 1–15, I have not found in the claimant's favour in my findings of fact. In particular, the events from 23 January to 2 February 2015, do not support her claim that she had been forced to resign. When Mrs Wallington invited her to apologise to Miss Crump, she said that she was due to retire anyway. It was in respect of that statement that Mrs Wallington engaged with the claimant in a discussion about her retiring. The claimant without any external pressure, decided to retire. She had reached 60 years of age and wanted time, in her case six months, to focus on fundraising and safeguarding issues which was given to her. She had not referred in her resignation letter, to the 15 matters in her Further Information. She is quite an expressive and assertive person and I would have expected, if she had been coerced into resigning, that it would have featured in her resignation letter. Instead she stated that she “wish to confirm that I am resigning.” This followed on from her discussion with Mrs Wallington. At the age of 60 years, a teaching member of staff could take their pension and this was what she decided to do. I have, therefore, come to the conclusion that the claimant voluntarily and freely decided to resign to take up retirement and effectively terminated her employment on 31 August 2015.
132. I do not accept, as she had asserted, that her two boys are financially dependant upon her. The younger of the two help her financially, the older one is training to be a Rabbi but they are both adults.
133. I do accept that the claimant was not aware of right to present a constructive unfair dismissal claim before an employment tribunal until after her notice had expired and after having taken legal advice. According to Dillon LJ in the Peyman case, this would have been a relevant consideration in relation to whether there was possible affirmation.
134. It follows from my conclusions that the matters relied upon by the claimant do not support her constructive unfair dismissal claim and, in any event, she voluntarily resigned from her employment. Accordingly, the constructive unfair dismissal claim is not well-founded and is dismissed.
135. The provisional remedy hearing listed on 16 May 2017, is hereby vacated.



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Employment Judge Bedeau

Date: 24 April 2017

Sent to the parties on: .....

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For the Tribunal Office