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EMPLOYMENT TRIBUNALS

Claimant: **Ms E Caris-Hamer**

Respondents: **1. Ms C Haynes**
2. Ms J Shipp
3. Ms C Kerr
4. Mr M Muldoon
5. Academies Enterprise Trust

Heard at: **East London Hearing Centre** **On: 10-13, 17- 20 & 24 October 2017 & (in chambers) on 25-26 October 2017; and on 26 March 2018 & (further in chambers) on 27-28 March 2018**

Before: **Employment Judge C Hyde**

Members: **Ms J Houzer**
Mrs B K Saund

Representation

Claimant: Mr M Harris (Friend and lay representative)

Respondents: Mr D Panesar (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that the claim fails as set out below: -

(1) The complaint alleging unfair dismissal under section 98(4) of the Employment Rights Act 1996 was not well founded and was dismissed;

(2) The complaints alleging direct sexual orientation discrimination under the Equality Act 2010 were not well founded and were dismissed;

(3) The complaints alleging victimisation under the Equality Act 2010 were not well founded and were dismissed;

(4) The complaints alleging harassment related to sexual orientation and/or disability under the Equality Act 2010 were not well founded and were dismissed;

(5) The complaints alleging discrimination arising from disability under the Equality Act 2010 were not well founded and were dismissed;

(6) The complaints alleging failure to make reasonable adjustments under the Equality Act 2010 were not well founded and were dismissed; and

(7) The complaints alleging detriment by reason of having made protected disclosures (whistle-blowing) were not well founded and were dismissed.

REASONS

1 Reasons for the above judgment are provided in writing as the judgment was reserved. The reasons are set out only to the extent that the Tribunal considered it necessary to do so in order for the parties to understand why they have won and/or lost. Further the reasons are set out only to the extent that it is proportionate to do so having regard to the overriding objective in the Employment Tribunal's Rules.

Preliminaries

2 The claim was presented on 17 February 2017 and was subsequently amended on two occasions. The third amended claim form (pp129BL-129DM), which was the relevant one for the full merits hearing, was dated 1 September 2017. In due course the Claimant acknowledged that this claim was unwieldy, and close to the commencement of the hearing withdrew certain of the allegations as substantive allegations and agreed to a further amendment of the claim, reducing the substantive allegations, as was eventually set out in the 'table of issues' marked [R17]. In addition, a couple of the claims were dismissed by the Tribunal as a result of the interlocutory judgments about the inadmissibility of without prejudice material. These deletions were not resisted by the Claimant after the Tribunal had declared its judgment. More detail of this is set out below.

3 The Respondent presented a response and grounds of resistance dated 22 March 2017. It was subsequently directed to provide an amended response dated 22 May 2017 in relation to the issues which had been identified at a preliminary hearing which took place on 9 May 2017. Thereafter the claim was further amended and the

Respondent's amended response was dated 3 August 2017. That was the final version which was before the Tribunal at this hearing. This second amended ET3 was filed in accordance with a direction of the Tribunal. It was acknowledged by all that the usual order, namely the Claimant's amendment followed by an amendment from the Respondent had not been followed in this case in respect of the second amended ET3, but no technical points were taken.

4 At the Tribunal's urging to the Claimant at the commencement of the hearing to review which issues were likely to be the substantive ones, the Claimant responded positively by reducing the number of complaints. The Tribunal acknowledged the common-sense approach taken by the Claimant and Mr Harris in this respect. It was unnecessary to direct the Respondents to file a further amendment to the ET3 at that stage as the number of issues was reduced rather than being enlarged, and the Respondents' case had been set out in their earlier pleading.

5 The final version of the amended grounds of resistance which was relevant at the date of the hearing therefore was the version dated 3 August 2017 (pp 129AT-129BK).

6 Also at the commencement of the hearing a draft chronology and cast list were put before the Tribunal by the Respondents and marked [R4] and [R5] respectively. The 'cast list' set out the names and positions of some of the main parties referred to. The chronology was produced on the first day of the hearing and the Claimant had not had an opportunity to consider it and agree its terms. The Tribunal therefore treated it as the Respondents' chronology.

7 Further, Mr Panesar prepared an opening, set out in the first 8 pages of the document which was marked [R6].

8 An interlocutory hearing took place at the beginning of the hearing before the Judge alone. This came about because one of the lay members was unavailable to sit on the first listed date, so the Tribunal held a Case Management (Closed) Preliminary Hearing on 10 October 2017 with the parties to clarify the issues and discuss practical matters.

9 After the Tribunal had held the further closed preliminary hearing identifying issues and discussing practical matters with the parties for most of the morning and an hour or so in the afternoon on the first day, the Tribunal adjourned to read the witness statements and the relevant documents in the bundles. The Tribunal left various matters in abeyance to be decided by the full Tribunal. The hearing was adjourned to 10am on 12 October 2017 (day 3) in order to give time for the full Tribunal to read the witness statements. This also gave the parties the opportunity to prepare to deal with the reduced but still lengthy Table of Issues, and to consider their positions in relation to certain other matters.

The Bundle

10 At the commencement of the hearing, the parties produced an agreed bundle of documents in three lever arch files running to somewhere in excess of 1,000 pages [R1]. In addition, there was a file containing medical evidence relating to the Claimant which it was also agreed the Tribunal should see. This was marked [R2].

11 There had been some difficulty between the parties about the compilation of a hearing bundle. Given that there were some further documents added by agreement an amended index marked [R8] was put before the Tribunal on 11 October 2017.

12 At an early stage in the proceedings the Claimant produced a supplemental bundle which the Tribunal marked [C1] and which consisted of approximately 425 pages in a lever arch file. This bundle included documents which the Respondents did not consider were relevant and/or necessary to be included in the hearing bundle but which the Claimant wished to refer to. In the event the Tribunal had to decide as each document was referred to by the Claimant whether there was any objection to the document being admitted. Although the documents all appeared to be ones which had been disclosed during the disclosure process, the bundle of 425 pages approximately was not provided to the Respondents until the week before the hearing commenced. In the event, despite the contentious nature of this bundle during the hearing, the Tribunal admitted all the documents to which the Claimant wished to refer from that bundle apart from the without prejudice documents which were excluded as a result of the Tribunal's interlocutory judgment. However, the number of documents referred to from this bundle did not exceed 20 pages.

13 Finally, the Tribunal attached exhibit numbers to two sets of documents which had been produced on about the second day of the hearing by the Claimant but which had not been agreed by the Respondents and therefore to which reference was made on an ad hoc basis as agreed between the representatives or as permitted by the Tribunal. These were the Claimant's GP and other medical records. One bundle consisted of 39 pages and the second bundle consisted of approximately 66 pages. The bundles were marked [C11] and [C12] respectively. Reference was made to fewer than five of those documents during the hearing.

14 There was similarly only very limited reference to the documents in the voluminous hearing bundles which ran to three lever arch files.

15 There were also some further documents which were handed up to the Tribunal but which the Tribunal indicated we would not include in the bundles until such time as it became necessary to do so and/or until such time as it was agreed that we should review these documents or include these documents. On example was the full document from which a single page had been placed before the Tribunal in relation to the safeguarding policy. In the event the rest of the document was not referred to therefore it became unnecessary to add that to the bundle. It provided the context for page 131a. The Respondents produced the document but further questions were not asked about it so neither party asked for it to be included.

16 Among the matters determined or discussed in the preliminary hearing on 10 October 2017 (the first day) were the following:-

16.1 The status of bundle C1 and how this should be dealt with; whether the Claimant could call as a witness Grant Scott; discussion about the parties liaising in order to arrive at a timetable for the evidence; discussion about the Claimant giving consideration to reducing the list of substantive claims that she was asking the Tribunal to decide so that the most significant ones remained; further clarification of the claim to be provided by the Claimant such as the insertion of dates of events complained

about where these were missing on the spreadsheet/table of issues;

16.2 The order in which the case would be dealt with – as set out below the Employment Judge decided this issue sitting alone and directed that the Claimant's case would be dealt with first.

16.3 The issue of whether evidence about 'without prejudice' discussions could be given. This issue was adjourned to be decided by the full Tribunal. The Respondents did not seek to argue that the Tribunal would be unable to continue to deal with the case if it decided the issue of whether 'without prejudice' evidence could be admitted. In other words, Mr Panesar took a pragmatic approach given where matters stood in the light of the earlier consideration of this issue at the closed preliminary hearing before Employment Judge Prichard.

16.4 That the issues of *Polkey* and contributory conduct which were raised in the grounds of resistance were to be determined alongside liability for unfair dismissal under section 98(4); and

16.5 that the parties should clarify in the revised table of issues which of the individual allegations raised issues of jurisdiction/time limits. Currently the issue had simply been raised as a general point at the end.

17 Also during the course of the preliminary hearing on the first day, the Respondents raised the issue of clarification of the status of the reduced list of issues relative to the other documents setting out the Claimant's case and the claim form. The Tribunal asked the Claimant and her representative to consider the position and to indicate whether they were confirming that the issues highlighted by them after they had reviewed the longer list and come up with a much shorter list, would be the only issues that needed to be decided. The Tribunal asked for this to be confirmed one way or the other to the Tribunal on Thursday morning. Thus, the Claimant had a clear day to consider this. This was subsequently done and a direction was made by the Tribunal that the claim was amended in the form of the highlighted claims which were being pursued plus the two additional points in [C6].

18 The 'without prejudice' issue was dealt with on the morning of 17 October 2017 (day 5) after the weekend and the break on the Monday. This gave everyone an opportunity to review the legal position and to marshal their arguments.

19 As to the admissibility of Grant Scott's evidence and statement, this was decided by the Tribunal as a whole in the afternoon of day 3, namely Thursday 12 October 2017.

20 The Tribunal considered that it was not proportionate to have his evidence adduced. If he were called to give evidence about matters which were not the substantive claims in the case and which could simply be characterised as background evidence of a culture, about which notice had only been given to the Respondents a short period before the beginning of this hearing, the Respondents would be entitled to seek to call rebuttal evidence, by way of documents or witnesses to address the allegations in Mr Scott's statement. Further, there were no documents produced by the

Claimant in support of the allegations in Mr Scott's statement. He described matters which were quite old. Against the background in which the Claimant had put forward numerous allegations against the Respondents both internally and within the litigation, it was notable that the issues which Mr Scott described in his witness statement were not part of those. Further the earliest of the allegations before the Tribunal related to periods some two or three years after Mr Scott had left the Fifth Respondent's employment. This tended to suggest therefore that any evidence that he gave about culture would not be sufficiently current. He was a former student of the school.

21 Given the passage of time the Tribunal considered that it was unlikely that a fair and proper determination of the issues in his statement could now take place. The Tribunal also reminded itself that the issues described in Mr Scott's statement were best described as raising collateral matters and did not go to the substance of the claims being brought by the Claimant. The Tribunal took into account that Mr Scott's witness statement was only provided to the Respondents shortly before the commencement of the hearing. It was in all the circumstances therefore not proportionate or consistent with a fair hearing to allow the statement to be adduced.

Witness Evidence

22 One of the first matters which the Tribunal determined as a preliminary matter (i.e. Judge sitting alone) was the order in which the evidence would be heard.

23 The Tribunal directed that it would be most appropriate and convenient for the Claimant to give her evidence first having regard to the claims being brought, namely whistle-blowing detriment, discrimination claims under the Equality Act 2010 and unfair dismissal under the Employment Rights Act 1996. Whilst it was acknowledged that the burden of establishing the reason for the dismissal lay on the Fifth Respondent in respect of the ordinary unfair dismissal complaint, the Tribunal considered that in all the circumstances it would be most appropriate for the Claimant to give her evidence first. The Claimant was not legally represented, the claim involved a large number of discrimination allegations and even though many were not now being pursued, it would be more manageable and consistent with a fair hearing for the Claimant to give her evidence first and be questioned so that the parameters of the allegations could be fairly and accurately ascertained. Then the Respondents' witnesses would be heard.

24 In the event the Tribunal either heard from or considered witness statements from several witnesses on behalf of both the Claimant and the five Respondents. The witness evidence was as follows: On behalf of the Claimant, the Claimant herself gave evidence and relied on a witness statement as her evidence in chief which the Tribunal marked [C3]. The statement consisted of some 277 paragraphs and was set out in 61 pages. In addition, the Claimant relied on a disability impact statement which was marked [C4]. Although this statement was included in the bundle of medical evidence which was marked [R2], the Tribunal considered that it was appropriate to allocate an exhibit number separately to it. It consisted of some 12 pages.

25 Then following the order in which the witnesses' statements were marked, the Tribunal heard evidence from Mrs L Wood [C5]; from Mr B Barrett [C7]; and from Renee Kennedy-Edwards [C5] on the Claimant's behalf.

26 The Claimant also relied on the witness statements of Jessica Grey [C9] and

two further witnesses who were not called to give evidence. These were Susanna Young, a former pupil of the Fifth Respondent and Ms K Caris, the Claimant's spouse. Her witness statement was at pages 13-16 of bundle [R2].

27 On behalf of the Respondents the Tribunal first heard evidence from Mr Steven Ball (Human Resources) whose witness statement was marked [R10], on the issue of whether to allow the Claimant to admit the 'without prejudice' discussions into evidence. Mr Ball was the Human Resources employee on behalf of the Fifth Respondent who conducted negotiations with the representative for the Claimant. In the event the Tribunal declined to allow the Claimant to produce evidence about the 'without prejudice' discussions.

28 In relation to the substantive issues, the Tribunal heard on behalf of the Respondents from Caroline Haynes (First Respondent); James Saunders; Janet Shipp (Second Respondent); Connie Kerr (Third Respondent); Michael Muldoon (Fourth Respondent); and Karen Roebuck. Their witness statements were [R11-R16] respectively save that Ms Roebuck's was marked [R15] and Mr Muldoon's was marked [R16].

29 The parties liaised to agree upon a proposed timetable for the adducing of the evidence which was produced to the Tribunal on 13 October 2017. It was marked [R9]. Sadly, it was not possible to stick to that timetable in the event.

The Issues

30 On the first morning, 10 October 2017, the Respondents' Counsel produced a document headed Agreed List of Issues which was marked [R3]. This set out in text form the issues which were subsequently also listed in the table of issues. The table of issues contained references to the numbers attributed to issues in the list of issues. The list of issues reflected the issues that were agreed before Employment Judge Brown on 24 April 2017.

31 At the commencement of the hearing the Claimant also produced an amended list of issues which was marked [C2]. This document reflected the second half of Mr Panesar's opening [R6] which from pages 9 to 37 set out the issues in a tabular/ spreadsheet form. It was agreed that the Claimant would identify which aspects of the case she wished to concentrate on by way of highlighting the relevant sections of the table.

32 As a result of discussion between the parties and our interlocutory decisions, a further document marked [C6] was considered and two numbered paragraphs from that document, namely the complaints in relation to 26 May 2013 and May/June 2015 were added to the issues as they provided clarification of Issue 5.1/Item 10.

33 Mr Panesar then converted the list of issues into a spreadsheet which the Tribunal marked [R7]. Many of the boxes of the table contained statements of the relevant statutory provisions in respect of the complaint which was being made, not substantive allegations. For this reason and because of the sheer number of individual complaints being brought, the Tables of Issues were very lengthy.

34 The Respondents applied for the Tribunal to further amend the claim so as to be

clear that the claims that the Claimant was pursuing were limited to the highlighted issues in [R7] and the points of clarification of Issue 5.1 in [C6] at paragraphs 2 and 5. In the event this was done on the morning of 12 October 2017 before the Claimant began giving her evidence.

35 Just prior to closing submissions, the Tribunal asked for an updated table of issues to be agreed and produced, which reflected the position at that stage, as a few more of the Issues had been amended or withdrawn during the hearing. This was prepared by the Respondents' Counsel and marked [R17]. It was sent to the Tribunal on 22 October 2017 by Counsel for the Respondents having been agreed with Mr Harris on behalf of the Claimant.

Relevant law

36 In brief, the relevant provisions are as set out below.

Unfair Dismissal – section 98(4) Employment Rights Act 1996

37 The relevant principles applicable to unfair dismissal are as follows:

(i) In cases of misconduct the well-established test in ***British Home Stores v Burchell*** [1978] IRLR 379 applies namely that to dismiss fairly an employer must establish a belief that the misconduct occurred, based on reasonable grounds and having carried out a reasonable investigation in all the circumstances of the case.

(ii) The Tribunal must find, the burden of proof on this issue being neutral, that the decision to dismiss fell within the band of reasonable responses: ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, ***Midland Bank v Madden*** [2000] IRLR 288.

(iii) For a dismissal to be fair, it must be a reasonable sanction for the offence.

(iv) Inconsistent treatment can render a dismissal unfair, where decisions made by an employer in truly parallel circumstances indicate it was not reasonable to dismiss ***Hadjioannou v Coral Casinos Ltd*** [1981] IRLR 352.

Direct Sexual orientation discrimination - Section 13 Equality Act 2010

38 A person discriminates against another person unlawfully for the purposes of s.13 where they treat them less favourably than they treat or would treat others, because of a protected characteristic (in this case sexual orientation). A difference in treatment and a difference in protected characteristic will not, without more, be capable of supporting a finding of unlawful direct discrimination.

39 The Claimant bears the initial burden of proof i.e. establishing a prima facie case of unlawful discrimination as elucidated in ***Madarassy v Nomura International*** [2007] IRLR 246, CA. As was stated by Mummery LJ at paragraph 71 of the Judgment (in the context of a sex discrimination claim and in respect of an identically worded provision in

the Sex Discrimination Act 1975):

> *"Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy."*

40 The statutory burden of proof provisions can be found in section 136 of the 2010 Act. The statutory formulation for direct discrimination requires a causal link between the act complained of and the complainant's protected characteristic. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572 the House of Lords considered that there could be different ways of formulating the test, but that if the protected characteristic had a "significant influence" on the treatment complained of, this could suffice. Further, it was appropriate to ask "why" the treatment had occurred.

41 The 'reason why' approach was also approved in the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 and more recently by the Court of Appeal in the case of ***Bull and Bull v Hall and Preddy*** [2012] EWCA Civ. 83 at para 14.

Victimisation - s.27 Equality Act 2010

42 It is unlawful victimisation for an employer to subject a worker to a detriment because the worker has done a 'protected act' or because the employer believes that the worker has done or may do a protected act in the future (s.27).

43 A 'protected act', for the purposes of this case, is any of the following:

- bringing proceedings under the Equality Act;
- giving evidence or information in connection with proceedings brought under the Act;
- doing anything which is related to the provisions of the Act;
- making an allegation (whether or not express) that another person has done something in breach of the Act.

Harassment - s.26 Equality Act 2010

44 Unlawful harassment occurs, by virtue of section 26(1) of the 2010 Act, when A engages in unwanted conduct related to a protected characteristic which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for B. In deciding whether the conduct has that effect, a tribunal must take into account B's perception, the other circumstances of the

case, and whether it is reasonable for the conduct to have that effect (s.26(3)).

Definition of disability - s.6 Equality Act 2010

45 Section 6 of the Equality Act 2010 ('the Act') contains the statutory definition of disability:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Discrimination arising from a disability - s.15 EA 2010

46 S.15 of the 2010 Act provides that a person ("A") discriminates against a disabled person ("B") if A treats B unfavourably because of something arising in consequence of disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Duty to make reasonable adjustments s.20 EA 2010

47 The law relating to the duty to make reasonable adjustments is clear as set out in section 20 of the 2010 Act. It provides that "*where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*", then there is a duty on the employer to take such steps as are reasonable to have to take to avoid the disadvantage in question. A failure to do so will amount to a failure to make a reasonable adjustment. In determining the duty to make reasonable adjustments, employers are entitled to rely upon occupational health advice: ***Heathrow Express v Jenkins*** *UKEAT 0497/06 (*per Elias P at paragraph 82).

Protected disclosures

48 S.43A. ERA 1996 provides that a protected disclosure is a qualifying disclosure which is made in accordance with any of the sections at 43C to 43H (the sections which set out to whom the disclosure may be made).

Qualifying disclosures

49 S.43B ERA 1996 provides that a disclosure is a qualifying disclosure if, in the reasonable belief of the worker making the disclosure, it tends to show that any of the following applies, namely:

(a) That a criminal offence has been committed, is being committed or is likely to be committed,

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) That a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) That the health or safety of any individual has been, is being or is likely to be endangered,

(e) That the environment has been, is being or is likely to be damaged, or

(f) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

50 Further relevant principles established by case law with regard to the nature of the disclosure (and this list is not exhaustive) include the following:-

50.1 To be a qualifying disclosure, the disclosure should convey facts: ***Cavendish Munro Professional Risks Management Ltd v Geduld*** [2010] ICR 325, EAT.

50.2 *Where a Tribunal is considering 'reasonable belief' more might be expected of somebody with expertise in the area or with the ability and resources to assess the significance of the information:* ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2012] IRLR 4 (EAT).

Closing submissions and Efobi

51 The Tribunal invited both representatives to present their closing submissions in writing if they wished to do so as there was a considerable amount of factual material which was best presented in that format. The parties were then granted the opportunity to supplement their written submissions and to respond to the other representative's points. In the event each representative took approximately 50 minutes to an hour in accordance with prior agreement. The document presented on behalf of the Claimant was marked [C10] and contained some 135 paragraphs of submissions over 35 pages. The submissions presented on behalf of the Respondents were marked [R18]. Mr Panesar in effect annotated the table of issues in spreadsheet form. This yielded a rather lengthy document running to some 86 pages.

52 Attached to Mr Panesar's closing submissions was a printout of the case of ***Heathrow Express Operating Co Ltd v Jenkins*** [2007] UKEAT 0497/06/0902. Further, although a copy of the judgment was not produced, the Respondents drew the Tribunal's attention to the case of ***Efobi v Royal Mail Group Ltd*** judgment of the Employment Appeal Tribunal which was handed down on 10 August 2017 and marked UKEAT/0203/16. This last judgment set out the position in relation to the burden of proof in discrimination cases and what was then held to be the correct application of section 136 of the Equality Act 2010.

53 Before the Tribunal promulgated its Judgment, the ***Efobi*** case was overruled by the Court of Appeal in the case of ***Ayodele v Citylink Limited*** [2017] EWCA Civ. 1913. A telephone Closed Preliminary Hearing was held on 15 January 2018 before the Judge sitting alone to discuss with the parties the appropriate way forward in the

light of the change of law. A case management summary was sent to the parties after that hearing. In short, it was directed that a face to face hearing would take place after the parties had each been given a chance to make further written submissions. The parties would then be at liberty to request that the matter be considered further by the Tribunal without their attendance, if they so wished. The Tribunal would meet in Chambers again in any event to review the evidence further in the light of the clarification of the burden of proof in relation to the direct discrimination allegations.

Further representations after ***Ayodele v Citylink Limited***

54 As directed by the Employment Tribunal following the telephone Closed Preliminary Hearing about this issue, both parties took up the opportunity to submit further written submissions by 7 February 2018. The submissions sent in by the Claimant were marked [C14] dated 7 February 2018; and those from the Respondents were marked [R19] also dated 7 February 2018.

55 Both parties had the opportunity to supplement their submissions orally at the reconvened Tribunal Hearing on 26 March 2018. They both did so. Mr Panesar addressed the Tribunal first followed by Mr Harris.

56 In summary Mr Harris' case was that had the law been as the ***Ayodele*** case now confirmed it to be, during the hearing, the Claimant would not have withdrawn all the heads of complaint which were in fact withdrawn. Second, he contended that the Claimant should be entitled to resurrect issue 11.2. Finally, he submitted that the Tribunal should make an Order requiring further disclosure of documents from the Respondents relating to a telephone call which was the subject of dispute at the substantive hearing, in order to "*test the veracity of the evidence provided by Mr Muldoon*".

57 These further submissions are not quoted from in detail because they were committed to writing for the most part and both parties had copies of those submissions. It was apparent both in his written document and in his oral submissions that Mr Harris sought to make fresh submissions about various points which had been canvassed on the previous occasion. This was done however without specific reference to how the difference in the burden of proof would have affected the way in which the case had been run.

58 In opposing the submissions made by the Claimant, Mr Panesar made three succinct submissions which it appeared to the Tribunal were well founded. First, he contended that the changed burden of proof in the ***Efobi*** case was not a good reason for the Claimant to argue that she would not have withdrawn various heads of complaint. If anything, he submitted, the burden of proof being neutral under the ***Efobi*** case would have encouraged a Claimant to pursue certain other claims because there was a theoretical possibility that it would be easier to prove the cases.

59 The Tribunal also noted that the first reference to the ***Efobi*** case was that made by Mr Panesar towards the end of the hearing in October 2017. There had been no reference whatsoever by Mr Harris to that authority or the new principles in the judgment. In his submissions to the Tribunal on 26 March 2018, Mr Harris sought to describe the thought process he had gone through in assessing the way in which he should approach proving the Claimant's case.

60 The Tribunal also noted that the preliminary stages of this hearing had occupied the better part of a day and a half (on days 1 and 3), in addition to the two preliminary hearings which had already taken place before Employment Judges Brown and Prichard. At each stage of the discussion about the issues at the start of this hearing, the Tribunal had taken into account that the Claimant was not represented by a lawyer, and in accordance with this Tribunal's usual practice in any event, the Claimant had not been "put on the spot" in terms of any changes to or clarification of her case, but had been given ample opportunity to consider her position before the Tribunal accepted the stated change to her case. The withdrawal of certain claims was in line with an attempt to focus on the main complaints in a case which had been described by a previous Tribunal as 'unwieldy' and which self-evidently was.

61 It was also likely that if the Claimant withdrew certain claims in response to a request by the Tribunal to bring more focus to her case, that those claims which remained would be the ones that the Claimant thought were more likely to be successful. The Tribunal agreed that it was illogical and inconsistent to argue that the Claimant's action in withdrawing certain claims was likely to have been because of a misapprehension about the law on the burden of proof.

62 The next point Mr Panesar made which the Tribunal accepted was that the change in law from the ***Efobi*** position did not provide a justification for asking the Tribunal to resurrect issue 11.2. Issue 11.2 alleged victimisation under the Equality Act 2010 by Janet Shipp, in that she fabricated a complaint by Lyndsey Wood on 4 October 2015 ([C2 pp19 & 20). Mr Harris' submission was that this was "*the only issue which has been dealt with during the hearing under a different head of claim. This would ensure that no further evidence or cross-examination is necessary on this issue*." He distinguished this from the number of other issues which arose as he described "*in only one head of claim*" and expressed the fear that without a partial retrial, the opportunity for the Claimant to have her issues resolved by the ET would have been denied to her through no fault of her own. He continued that the Claimant recognised that this resolution would not happen.

63 The Tribunal did not consider that this plea should succeed. Even if this issue were to be resurrected, which the Tribunal did not agree it should, the Tribunal found in relation to the protected acts that only 9.2 the grievance alleging discrimination by Janet Shipp made on 10 October 2015 (p276) was established. Therefore, the treatment complained about by the Claimant at 11.2 pre-dated the protected act and therefore, as a matter of law and chronology, could not constitute victimisation in any event.

Findings of Fact and Conclusions

Outline Chronology

64 The Claimant commenced employment with the Fifth Respondent ("the College") on 1 September 2008 as a teacher. It was then known as Tendring Technology College but at the material times that the Tribunal was concerned with, it was one of a number of academies run by the Academies Enterprise Trust. The other four Respondents were all members of the senior management of the College at the

material times. Ms Haynes was the Executive Principal of the College, but has since retired; and Mr Muldoon succeeded her as Principal of the College.

65 When the Claimant began she was employed as Curriculum Leader for Law, Psychology and Sociology. She was then promoted to Curriculum Leader for Psychology, Sociology, Law & Health and Social Care. From the academic year 2015/16, she was Head of Faculty and Curriculum Leader. At that time also, the Claimant was based in and only taught students in the Sixth Form in the Frinton campus, but she also had responsibility for students aged 14 – 19 as a result of her Health & Social Care brief.

66 The Claimant is gay. She concluded a civil partnership in August 2012, and then after the change in the law, married her wife on 20 February 2015. It was not disputed that she had never concealed her sexual orientation during her teaching career of fifteen years. It was agreed that the College was a Stonewall Partnership School.

67 From at least February 2015, the Fifth Respondent was considering whether to offer A Level Law and A Level Politics the following year. This led to discussions with the Claimant and others, some of which were the subject of complaint in this case.

68 It was agreed that the Claimant first informed the College of her Type 2 diabetes by email sent on 3 February 2015.

69 Towards the end of September 2015 an incident took place involving the Claimant and two junior members of her department, Lindsey Wood and Rebekah Kelly. This incident was investigated under the disciplinary process and subsequently led to the Claimant accepting the disciplinary sanction of a first written warning in February 2016 (p444) in respect of allegations that she had behaved in an insulting, intimidating and aggressive way towards those two colleagues in Autumn 2015. The written warning was to remain on her file for the period of twelve months from the date it was imposed.

70 On 10 October 2015, the Claimant submitted a formal grievance against Jan Shipp who had been her first line manager since the previous Spring (pp276 – 281). The grievance was not upheld and was dismissed on 8 December 2015. The Claimant appealed against the outcome, and it was dealt with by Ms Kerr who also dealt with the disciplinary hearing.

71 On 11 December 2015, another senior member of the teaching staff, Daniel Woodcock was put in place as the Claimant's Senior Leadership Team ("SLT") link in place of Ms Shipp.

72 On 24 June 2016 the Claimant and one of her more junior male teaching colleagues attended a meal with a group of Social Sciences students who had just completed their final examinations. After the meal the group went to a pub. It was not disputed that all the students were 18 years old or over and that they were all female. It was also not disputed that both teachers had drunk alcohol both at the restaurant and at the pub. Most if not all the students had done the same.

73 The Claimant left the bar and went home after a while, having felt unwell for

most of the time that she was there. It was not disputed that she left her colleague Mr Barrett as the sole member of the College's teaching staff with the students. As a result of reports about excessive drinking and other possible misconduct by the Claimant during the evening, the College carried out an informal then a more formal investigation by Dr Haynes into various aspects of the outing.

74 Eventually the Claimant and Mr Barrett faced formal disciplinary charges of a similar nature. By a letter dated 8 November 2016 from Dr Haynes (pp656 – 657) she was invited to a hearing to address the following two allegations:

74.1 That she failed to follow College policy with regard to Facebook usage with students; and

74.2 That she behaved in a way that was less than professional and consequently raised safeguarding concerns specifically on 24 June 2016, that she and a colleague had a restaurant meal and then went to a public house with Year 13 students during which time Ms Caris-Hamer failed to stop an inappropriate conversation about another colleague, consumed alcohol and left her colleague with the students in the public house. In addition, the College alleged that the Claimant's afore-mentioned actions had brought the College into disrepute.

75 In the letter, Dr Haynes referred the Claimant to her disciplinary investigation report for more details of the charges faced. The report was dated October 2016 and consisted of 8 pages (pp 569 – 655). There were appendices of about 75 pages attached.

76 The disciplinary hearing took place on 18 November 2016 before Ms Connie Kerr, the Third Respondent. By a letter dated 25 November 2016 the decision to dismiss the Claimant with three months' notice was confirmed (pp696 – 699). The grievance appeal was also unsuccessful. She submitted an appeal against the dismissal. This was eventually heard on 27 April, 7 June and 14 June 2017 by a panel chaired by Mrs K Roebuck. The other panel members were Mrs A Crawford and Mrs R Ridley (p971). The appeal against the dismissal was not successful (pp1078 – 1084).

77 The Claimant's whistle blowing case was that she had made disclosures between July and November 2016 which caused her to be subjected to the disciplinary proceedings, and other detriments associated with it.

78 As there were disputed competing causes for the dismissal, and there were in the background a number of matters which were being alleged as unlawful discrimination, the Tribunal considered that it was best to deal with the complaints about events which preceded the disciplinary action and dismissal first, and in turn, under each head of claim.

Disability Discrimination

79 The first question was whether the Claimant was a disabled person. This appeared at Issue 12 (Item 84) of the table of issues. The Claimant contended that she was a disabled person by reason of her diabetes from April 2015 and by reason of her depression from September 2015. The Tribunal noted in this context that the

Respondents' case was that they had at all material times taken the relevant steps as if the Claimant was a disabled person, by way of seeking occupational health advice and following occupational health recommendations on the basis of the symptoms described by the Claimant.

80 The Tribunal however considered that as this was a disputed issue we had to make a determination about it. Chronologically, the acts complained of by the Claimant in relation to disability discrimination spanned the period 7 October 2015 (p66) to November 2016. In assessing this issue, we had regard to the statutory definition in the Equality Act 2010, to the Equality and Human Rights Commission Code of Practice on Employment (2011) ("CoP"), and to the Guidance on Matters to be taken into account in determining questions relating to the definition of Disability (2011) ("the Guidance") issued by the Secretary of State under section 6(5) of the Equality Act 2010.

81 There was a paucity of evidence before us in relation to the depression. No evidence had been brought forward by the Claimant from a single treating doctor to the effect that she was disabled, or as to the duration and effects of any impairment that she had on her ability to carry out normal day to day activities. Further she relied on a witness statement from her wife but her wife did not give evidence live. The Tribunal noted that the onus was on the Claimant to prove that she was a disabled person. This was not an issue which was affected by the ***Efobi/Ayodele*** cases.

82 The other evidence relied upon by the Claimant in respect of depression was as follows:

82.1 Pro forma fitness notes;

82.2 A letter from Toward Wholeness Counselling Service dated 10 November 2016 (p84) which stated that the Claimant had received counselling between October 2015 and February 2016;

82.3 A letter from a nurse practitioner dated 6 December 2016 (p85) stating that the Claimant was exhibiting marked depression and anxiety symptoms. However, she did not actually diagnose the Claimant with depression and she described the Claimant's symptoms as '*reactive*' in nature;

82.4 An Occupational Therapist's letter dated 16 June 2017 (p92) which stated in response to the question 'what is my mental health impairment?': *"Ms Caris-Hamer does not have a specific diagnosis in her medical notes and as an Occupational Therapist I am not qualified to provide a diagnosis."*

83 Although the Occupational Therapist then went on to list a series of symptoms observed in Ms Caris-Hamer or described by her, and the classification by the Access and Assessment Team, there was no discernible doctor's diagnosis.

84 The Claimant's case was that she continued to be disabled by the time of the hearing to the same extent that she was when employed by the First Respondent, albeit slightly improved. She was able to give extended evidence without the effects of

any impairment being apparent. The Tribunal considered that it was likely that the process of giving evidence was more demanding than normal day to day activities.

85 The Claimant also relied on a letter dated 25 January 2017 to her from the team secretary of the Brief Intervention Team, in the records of North Colchester Health Centre (p25 of 39 of [C11]). The Claimant told the Tribunal that this team provided a psychological/psychiatric service. The letter simply stated:

> "*Following an assessment by one of our Clinicians you were referred to the Brief Intervention Team for support. This has now completed, therefore, we are discharging you from the team back to the care of your GP.*
>
> *Please do not hesitate to contact your GP who can re-refer if you feel your mental health has deteriorated."*

86 In a similar vein in the clinical records contained in [C12] also from North Colchester Centre at page 86 of 96 in a letter dated 20 October 2016, Jeff Woods, Advanced Nurse Practitioner in the Access and Assessment Team wrote to Dr Ahmad about the Claimant as follows:

> *"This lady's case was discussed in our multi-disciplinary meeting today and the following plan was agreed:*
>
> *<u>Plan</u>*
>
> - *Brief intervention team to follow up with request to monitor mood and risks. Appointment at the Abberton Centre to be sent in next 1 – 2 weeks.*
>
> - *Advice GP to increase Citalopram to 30mg and effects will be reviewed by brief intervention at review".*

The latter correspondence obviously preceded the former. It appeared however that by January 2017 the Claimant had been discharged. That evidence was not consistent, even if accepted on its face, with the presence of disability which had sufficient long-term effects on the Claimant to meet the statutory definition.

87 It appeared to the Tribunal therefore, from the evidence in the case, that the Claimant had not met the definition of being a disabled person during the time frame that she sought i.e. from September 2015 in respect of depression, taken on its own.

88 The Tribunal also considered whether the Claimant was a disabled person by reason of the effect on her of her condition of diabetes. The Claimant was diagnosed with diabetes in about February 2015. On 3 February 2015 Ms Caris-Hamer wrote to Dr Haynes informing her that whilst she was undergoing tests for a possible colon condition, she had been diagnosed with type 2 diabetes (p239). She indicated that she would update the appropriate Human Resources ("HR") officer to amend her medical records if required. The Claimant wrote to Ms Julia McFarlane, HR Manager at the School by email sent on 9 April 2015 informing her that she had been diagnosed with Type 2 Diabetes (p251). She informed Ms McFarlane that she had to have medication to control this and named the medication that she was currently on as Metformin. She continued "*I should not need to bring these into work except when I have parents' evening or open evenings because I must take them immediately after food*". She

continued "*I am having regular various tests e.g. eye tests, two day conference related to food and diet and support groups. These are all completed during holidays or after School hours*."

89 It was obvious from that communication that the Claimant was not indicating that there were any adverse effects on her of the diabetes, at least while she was on medication, which would impinge on her work. She certainly did not ask for any adjustments to be made at that stage.

90 There was then, some months later, another reference to rectal bleeding, a symptom from which she had suffered before the diabetes diagnosis, in an email dated 3 December 2015 (p303) in the context of the Claimant asking not to be used as cover on that date. This was a brief email, copied to Samantha Jinks and Daniel Woodcock, in which she informed Ms Shipp that she had not been sleeping at all well for a while now "*due to stomach and bowel issues*". She indicated that it was "*particularly prominent*" on that day. She concluded by saying that she was unsure whether this was due directly to the medication she was on due to diabetes or current stress levels. The Tribunal noted that at this stage there were also disciplinary proceedings ongoing.

91 Prior to that, there was a note of a return to work meeting which took place on 6 May 2015 (p255), attended by the Claimant and Janet Shipp. The issue of recent diagnosis of Type 2 Diabetes which was said to relate to February 2015 was discussed. Support actions which were discussed related to tiredness and it was said there would be an adjustment made to achieve a better balance, and that in relation to eating, the Claimant must take half hour lunch breaks. The Tribunal considered that it was highly likely that these adjustments were related to the effects of the diabetes on the Claimant. The note also recorded that the Claimant was due to attend a one-day diabetes course in the summer.

92 In the light of this evidence, the Tribunal considered that it was likely that the Claimant met the definition of a disabled person by April 2015 when she was prescribed medication for diabetes, albeit that she had been diagnosed as having diabetes in February 2015. The Tribunal took into account that we had to assess the effect on the Claimant without the benefit of medication. However, there was a shortage of evidence before us as to what specific effects of her diabetes were on the Claimant and which effects the Claimant was relying on for the purposes of this case. The Tribunal noted that the Claimant had other conditions as well, especially the condition relating to her colon.

93 In the list of issues in the section relating to alleged failures to make reasonable adjustments, it was stated at Issue 20.1/Item 120 that she suffered a substantial disadvantage in comparison with people who were not disabled. She then contended that "….*low blood sugar and B12 levels related to her diabetes medication, and her depression meant that the Claimant was unable to process information quickly and provide clear answers promptly*." As set out elsewhere in these reasons, there was no evidence produced to substantiate these contentions.

94 We also considered whether the Claimant was a disabled person by reason of the combined effects on her of diabetes and depression. The Tribunal did not consider that our conclusion on this would be any different because as set out above there was scant evidence of the effect of depression on the Claimant in the material timeframe.

95 The next issue was Issue 12.2 (Item 86) as to whether the School had knowledge of the Claimant's disability or whether they ought reasonably to have known that the Claimant was a disabled person.

96 We considered that the School had knowledge of the Claimant being a disabled person from April 2015 having regard to the evidence referred to above in respect of diabetes. There was however much less clarity as to what the specific effects on the Claimant were, beyond those discussed at the return to work meeting, namely tiredness and the need for regular eating.

97 We noted also the Respondents' submission that neither of the occupational health reports expressed an opinion about whether the Claimant was a disabled person. However, as we set out above, given that we were required by law to consider the effect of the condition on the Claimant without the benefit of medication, we considered that it was likely that without medication her condition would have had a substantial adverse effect on her ability to carry out normal day to day activities. We were however in difficulty in terms of identifying which particular aspects this would have affected.

98 The next point the Tribunal considered in relation to disability discrimination harassment was in Item 89 – Issue 13.2 - namely, that on 7 October 2015 the Respondents called the Claimant to a meeting with Caroline Haynes [R1] without telling her that Janet Shipp [R2] would be present. The School accepted that the Claimant was called to a meeting on 7 October 2015 and that she was not told in advance that Janet Shipp would be present.

99 It was material to set out a little bit of the immediate background to this meeting. By an email sent on 4 October 2015 (p265) the Claimant herself had written to Ms Shipp requesting a meeting with her "*as soon as possible*". She indicated that she was agreeable to using the time already scheduled for her APR meeting to discuss these matters as she felt that the meeting was "*very important*". She continued that she needed an opportunity to express to Ms Shipp in person a number of serious concerns that she had had for a period of time which were becoming "*unbearable*". She also expressed her belief that these concerns were adversely affecting the working relationship between the Claimant and Ms Shipp as Curriculum Leader ("CL") and Senior Leadership Team ("SLT") link respectively. She expressed the view that she felt unheard and unsupported and that the approach that Ms Shipp took to managing her was not a coaching and mentoring style. She concluded by saying that she thought it was only fair that she discussed these concerns with Ms Shipp directly as this was causing her a great deal of stress.

100 Ms Shipp forwarded this correspondence to Dr Haynes on 5 October 2015 and they discussed whether Ms Shipp should have Mr Muldoon, who was then Principal, present during the meeting. Ms Shipp indicated that she had arranged to see the Claimant on 6 October and that her intention had been to discuss with Ms Caris-Hamer what she needed to say at the Wednesday curriculum meeting. She had also intended to discuss issues relating to the APR and after this she had planned to arrange to see the Claimant on the Friday so that she could tell her her concerns. She had intended to have Mr Woodcock present to take notes and she was not intending to respond to the Claimant's concerns, just to listen. She asked for Ms Haynes' view on this

approach.

101 Dr Haynes agreed with Ms Shipp's proposed approach. Both she and Ms Shipp were of the view that it was not appropriate to discuss the issues of the relationship between the Claimant and Ms Shipp with the other issues about the running of the department. The intention, which unfortunately was not communicated to the Claimant, was that this would be addressed separately.

102 They also thought that the Claimant should present the changed arrangements in terms of the management of Ms Kelly and Ms Wood as a way of showing that she had ownership of it. It was a management decision, and they believed that this was a way of presenting the Claimant in a good light, but, in the event, as the Claimant felt that this was not her decision, she saw it as negative, and as being required or urged to be dishonest with her team.

103 In oral evidence Dr Haynes accepted that by instructing Ms Shipp to take management action i.e. to have a word with the Claimant about this after the Claimant had written the email on 4 October 2015 to Ms Shipp, Dr Haynes inadvertently caused or contributed to problems between the Claimant and Ms Shipp. Evidence of this was the grievance of 10 October which the Claimant subsequently submitted against Ms Shipp. It was also apparent however, that at this time the transition of the Claimant's management to Mr Woodcock had not yet been completed although it was clearly underway (p281A). When instructed to have a word with the Claimant, Ms Shipp was still the relevant line manager.

104 The meeting between the Claimant and Ms Shipp did not go well at least as far as the Claimant was concerned. There was a contemporaneous note made by Ms Johnson, PA to the Executive and Associate Principals (p272), recording that the Claimant had come to her office in tears as she wished to make a formal complaint following the meeting with Ms Shipp because she had expected certain matters to be discussed and Ms Shipp had not discussed them. She had felt that she was not being listened to. She had thought that the meeting would be in response to her email referred to above.

105 It was common ground that around about this time and because of the concerns about the students' attainment in some subjects, some of which fell under the Claimant's remit, the School was rearranging certain responsibilities in an effort to address the attainment issue. It was a matter that the Claimant interpreted as a removal without justification from her of some of her previous responsibilities. Ms Johnson's note of her interaction with the Claimant on Tuesday 6 October 2015 (p272) recorded that Ms Caris-Hamer expressed this concern to her. There was no dispute that Ms Johnson was Dr Haynes' PA (C3 para 73). By way of Ms Johnson's record of her interaction with the Claimant, Dr Haynes was then notified about what was going on.

106 The Tribunal took into account in considering these events that by now matters had come to something of a head within the department, as there had also been the reports to Ms Shipp by others about difficulties in the department involving the Claimant.

107 Dr Haynes' evidence was to the effect (para 14 of her witness statement [R11])

that she and Ms Shipp agreed that Dr Haynes would attend the meeting between Ms Shipp and the Claimant, to discuss the Claimant's email and that this was why she called the Claimant to a meeting on 7 October with herself and Ms Shipp. Dr Haynes acknowledged that the Claimant said that she was not happy with Ms Shipp and did not want her to be her SLT link. The Tribunal considered that this was consistent with the email which the Claimant had sent to Ms Shipp on 4 October referred to above. In response to the Claimant expressing a concern about Ms Shipp being her SLT link, Dr Haynes told her at the meeting that a new SLT link would be put in place on a temporary basis. This was subsequently arranged to be Mr Daniel Woodcock, a very experienced curriculum leader, about whom the Claimant raised no complaints in this case.

108 It appeared likely on the balance of probabilities that Ms Haynes believed she was simply giving the Claimant an opportunity to address the issues that were raised in her email. The Tribunal considered that there was no reason why Dr Haynes should have believed that the Claimant would see it as intimidatory or an act of harassment to have Ms Shipp present at the meeting on 7 October given that the Claimant had just two days earlier asked to discuss the matters of concern directly with Ms Shipp and had not proposed that there should be a third-party present. A meeting therefore directly between the Claimant and Ms Shipp, at which Dr Haynes was also present, appeared to the Tribunal to have presented a far less threatening and a much safer forum for the Claimant.

109 In relation to issue 13.2 the submission on behalf of the Claimant was that this meeting was designed to pressurise the Claimant into withdrawing her pending complaint. As to the submission that the Claimant was not informed of the nature of the meeting or of the attendance of Ms Shipp, this was admitted by the School. The Tribunal did not however consider for the reasons set out above that this was intended to harass the Claimant or that it was reasonable that she should have interpreted it as such.

110 Finally, Mr Harris submitted in this context that if the Claimant had been informed of the attendance of Ms Shipp, she would have requested a postponement and that therefore the treatment was unwanted. The Tribunal rejected this submission. First of all, it was inconsistent with the Claimant's request for face to face meeting with Ms Shipp on 4 October, even allowing for the fact that the subsequent meeting between the Claimant and Ms Shipp had not gone as well as the Claimant had expected or intended. Also**,** the Claimant shortly thereafter submitted a formal complaint against Ms Shipp by way of a detailed grievance which ran to approximately 5 pages which the Claimant presented on 10 October 2015. In it, she did not complain about the meeting of 7 October, although she did about the meeting of 6 October 2015 with Miss Shipp as evidenced by the contemporaneous note also by Ms Johnson about the effect of the meeting on her (p272). We considered that this omission was inconsistent with the Claimant having seen the presence of Ms Shipp at the meeting of 7 October as an act of harassment.

111 Further and in any event, the Claimant did not assert any connection with her diabetes or any effects of the diabetes.

112 For all those reasons, allegation 13.2 was not well founded.

113 By Issue 13.5 the Claimant alleged that on 15 October 2015 Janet Shipp reprimanded her for accepting a lift home from Lindsey Wood. The Tribunal noted that Mr Harris addressed Item 92 or issue 13.5 under the general head of harassment related to both sexual orientation and disability in closing. However, it was clear from the list of issues that issue 13.5 was put forward during the hearing as an act of sexual orientation harassment only. It was not consistent with a fair hearing to allow a case to be put in closing which had not been put that way earlier. Thus, the only allegation of disability harassment was issue 13.2 (point 89).

114 Issue 13.5 is dealt with later in the context of the sexual orientation harassment.

115 The Tribunal next considered Item 104 or issue 17 which alleged discrimination arising from disability. The Tribunal noted, as was acknowledged during the hearing, that in transposing the issues from the Claimant's original list of issues [C2] to Mr Panesar's table of issues some headings and sub headings were inadvertently misplaced or omitted, apparently for technological reasons. Thus, it is clear if one views the items in the Claimant's original list of issues that the matters set out from points 104 to 118 (issues 17 to 19) are all allegations of discrimination arising from disability. This is confirmed also by the fact that both the representatives addressed the allegations under that head in their written closing submissions.

116 The first matter complained of as discrimination arising from disability was issue 17.1 namely failing to carry out.

116.1 a risk assessment of the Claimant's disability; or

116.2 a referral to occupational health.

117 The Claimant alleged in closing that throughout 2015 she sent emails and updates to the Fifth Respondent detailing her medical condition and the unique characteristics of her response to the medication prescribed. She contended that the Fifth Respondent was fully aware that Metformin was resulting in rectal bleeding and this affected both her confidence and state of mind. As set out above, the Claimant was not prescribed metformin until after she had sought medical help for the rectal bleeding (pp232, 239 & 251). Further, in making that submission, in his written document, Mr Harris did not refer to any oral evidence or to any contemporaneous documentary evidence which corroborated it. In the context of determining the question whether the Claimant was a disabled person, the Tribunal has reviewed above, what little evidence there was before the Tribunal, and indeed contemporaneously before the Fifth Respondent, about any effects on the Claimant of her diabetes. Mr Harris continued that the Respondents did not assess any risk to the Claimant in carrying out her daily duties nor did they make a referral to the Occupational Health Service which could have advised on adjustments to be made. He contended therefore that no adjustments were ever considered which would have removed barriers the Claimant experienced and which led to an exacerbation of her mental state and eventual need to be medicated for depression. The Tribunal has already referred to the absence of any medical evidence in the case about any connection between the Claimant's diabetes and her depression. Further, our findings about the extent of the depression have been set out above. This seemed to have led to a discharge from the psychiatric/psychological services in January 2016.

118 In resisting this complaint, the Respondents contended that they had not failed

to carry out a risk assessment in consequence of something arising out of the Claimant's disability. They further contended that even if the Tribunal found that this was the case, the School was justified in not carrying out a risk assessment.

119 The Tribunal found that prior to the completion of the occupational health report dated 17 October 2016 (pp555 – 557), in which a risk assessment was suggested as a possible adjustment, no request had been made for a risk assessment and there was no apparent need for an occupational health referral prior to this.

120 Further, the suggestion of a risk assessment in that report was made solely in relation to the Claimant's return to work, not in relation to disciplinary proceedings. Ms Wreford, Occupational Health Adviser who prepared the report and conducted the assessment of the Claimant on 17 October 2016 was asked the question *'what reasonable adjustments do we need to consider to keep the employee at work or to assist the employee back to work?'*. In that context, she replied among other things in the first bullet point *'a stress risk assessment to identify work place stressors so as to put control measures in place. I attach a pro-forma with guidance for your perusal and to help with the assessment'.*

121 The referral to Occupational Health, which generated this report, was not in relation to the disciplinary process. The Claimant did not in the event return to work, therefore there was no necessity in actuality for a risk assessment.

122 The Tribunal also took into account that during this period there had been continual communication between the Claimant and Dr Haynes in relation to the Claimant's diabetes (pp239 – 240).

123 In relation to the specific complaint about the Claimant not being referred to Occupational Health, the Claimant had failed to establish the primary facts as she clearly was referred to Occupational Health as set out above.

124 It was not disputed that once an occupational health report was prepared, the steps advised were implemented. There were various matters listed under the answer to the question "*please provide advice on adjustments to enable the employee to attend a formal meeting*" (p555, paragraph 2).

125 Further, at no point did the Claimant put forward a case, supported by any medical evidence, that her answers in the investigatory meetings or the disciplinary hearing were affected by or caused by the effect of her diabetes.

126 The Tribunal accepted the Respondents' submission that it was not likely on the evidence before us that the decision not to carry out a risk assessment was in consequence of something arising from the Claimant's disability. Even if that were the case, the Fifth Respondent was justified in not carrying out a risk assessment in light of the Occupational Health advice which did not suggest that one was necessary for the purposes of the disciplinary process. The failure to have a risk assessment was justified as a proportionate means of achieving the legitimate aim of not conducting risk assessments where they were not advised or necessary.

<u>Issue 17.2 – Point 106</u>

127 In this issue, it was alleged that in 2015/16 and throughout the grievance process, the Fifth Respondent never gave consideration to making reasonable adjustments. The Claimant added that the Fifth Respondent was palpably aware of the Claimant's impairment. The specific dates identified by the Claimant in respect of this issue were 3 February 2015, 24 March 2015, 19 April 2015, 3 December 2015 and 26 March 2016.

128 The first adjustment complained of was set out at point 129 (issue 22.4) namely whether it would have been a reasonable adjustment for the Fifth Respondent to have removed "*the prohibition on the Claimant not talking to colleagues in her department*" (sic). The prohibition complained about was said to have been imposed initially by Dr Haynes on 4 October 2015, was said to constitute an act of victimisation and was dealt with in issue 11.4/point 62 elsewhere in these reasons.

129 It was also necessary to consider the complaint about failure to make reasonable adjustments alongside this complaint, because of the nature of it.

130 We considered that maintaining the prohibition was reasonable. Relationships were still strained between the Claimant and Ms Kelly. Lindsey Wood may have been happy to resume contact with the Claimant but that did not necessarily apply to Ms Kelly. In any event the allegations were still under investigation at that point.

131 The second adjustment sought was set out in point 149/issue 26.4. The PCP relied upon was that the Fifth Respondent required disciplinary proceedings to proceed without any postponements – point 145/issue 26. It was a complaint that the Fifth Respondent failed to make a reasonable adjustment of postponing the disciplinary hearing for two weeks to allow the Claimant to adjust to her medication. This allegation relates to a period around November 2016.

132 It was disputed that the Claimant had established the PCP. Certainly, as far as her own situation was concerned, it was disputed by the School that it had required the disciplinary proceedings to proceed without postponement. It was not disputed by the Claimant that the disciplinary hearing had in fact been delayed by at least three weeks after the OH report, although this delay preceded the Claimant's request for a postponement on 14 November 2016. Further the subsequent hearing of the appeal was held over 3 separate days on 27 April, 7 June and 14 June 2017. The School had invited the Claimant by letter dated 10 February 2017 to an initial appeal hearing to take place on 2 March 2017. The Claimant sought and was granted postponements on 2 occasions in the appeal process.

133 The Occupational Health Report indicated that the increase in the Claimant's medication was specifically considered. It was her anti-depressant medication dose which had been decreased not her diabetic medication. Taking that increase into account, the advice of Occupational Health in October 2016 was clear that it was in the Claimant's best interests for the disciplinary hearing to proceed.

134 Further, apart from citing the increase in her medication, the Claimant did not provide any medical evidence to the effect that she was placed in any difficulty caused by the increase in her medication from participating in the appeal and indeed she participated very fully in the appeal both in writing and in person. In the List of Issues at point 146/issue 26.1, she stated in support of her contention that the PCP relied on

put her at a disadvantage, that her GP having changed her medication in 2016, '*the Claimant was suffering from severe tiredness, diarrhoea, rectal bleeding and cognitive impairment, so that she was not able to concentrate on preparing for, or participating in a meeting..*' This contention was not supported by relevant evidence.

135 The Tribunal also noted that the Claimant made an open request on 17 November 2016 for a postponement (p683D) and it was not expressed to be limited to two weeks. Further, the First Respondent, Dr Haynes, had to balance all the relevant factors when deciding whether to grant a postponement. This was the second request for postponement. The first postponement request (p682A) having been a grievance. They had to weigh up Occupational Health advice about getting the disciplinaries over and done with and the advantages of taking that course. Further, the detailed documents which the Claimant was able to send to the School also tended to suggest that she would be able to deal appropriately with the disciplinary hearing.

136 Finally, the Tribunal accepted the Respondents' evidence which was cogent that it was difficult logistically to set up disciplinary hearings. This was also a relevant consideration in assessing the reasonableness of the adjustment sought.

137 In the event the disciplinary hearing proceeded on 18 November 2016.

138 In all the circumstances, the Tribunal concluded that there was no failure to make a reasonable adjustment to postpone the disciplinary hearing of this matter.

139 The next set of issues considered, was in relation to the sexual orientation complaint.

140 The first allegation under this head was an allegation of direct sexual orientation discrimination. The substantive complaint under Issue 5.1 was that the Fifth Respondent did not treat the Claimant's complaints as grievances. The timeframe for this issue in Item 10/issue 5.1 was stated to be "*ongoing*". This was particularised by the Claimant in [C6] and then the Tribunal directed that points 2 and 5 of [C6] were the points for consideration. The timing of those matters also raised issues of whether they were out of time. [C6(2)] alleged that on 26 May 2013 the Claimant made a complaint to Caroline Haynes about homophobic comments that she had suffered from. [C6(5)] was a complaint that in May/June 2015 Brian Barrett and the Claimant complained to Michael Muldoon about how Ms Shipp was treating the Claimant. Those were the two allegations of direct sexual orientation discrimination that the Tribunal had to consider.

141 The background to these allegations was that at about this time complaints had been received by the School about the Claimant suggesting that she had inappropriately discussed private matters relating to sexual orientation in class. Specifically, the parent of one of the students had written to complain.

142 The Fifth Respondent's grievance policy provided:

142.1 (p151) That the employee should first raise the matter with the person concerned, or if not willing to do so, with their Line Manager (p156, Clause 3.1).

142.2 That if informal action did not resolve the grievance, the matter should be

promptly raised formally (p156 – Clause 3.2).

142.3 To raise a formal concern, the employee must put their concerns in writing to an appropriate manager (p157).

142.4 In the letter of grievance, the employee should … be clear that they are raising a grievance and indicate what redress they seek (p157).

143 The Claimant demonstrated that she knew how to raise a formal grievance because she did so against Janet Shipp on 10 October 2015 (p347). No complaint about homophobic comments was raised as a formal grievance.

144 In respect of allegation [C6(2)], the Claimant generated two documents at about the time she complains of. The first was undated, but was probably produced on about 23 May 2013 (p223) in the context of a meeting she had at that time with Ms Shipp (and possibly Caroline Haynes). It was the Claimant's response to the complaints from the parent of a student about the Claimant discussing her personal matters in class. She explained what she discussed with students and sought to justify it. She then stated: *"I have reflected upon the comments made, and in moving forward I will adopt a more guided stance in bringing personal experiences into a lesson discussion"*. That document contained neither a statement nor any indication that the Claimant wished to raise a grievance. Indeed, the Tribunal considered that the text just quoted indicated a contrary intention. It was evidence that at the time the Claimant clearly acknowledged that there was a valid reason for her being questioned about comments that she may have made during a class.

145 In all those circumstances therefore, the Claimant had failed to establish the primary facts on which this complaint of direct sexual orientation discrimination was based.

146 The second document was an email sent on 26 May 2013 (p226) to Caroline Haynes by the Claimant and was headed "*Apology*". This is the date referred to in the allegation. The Claimant apologised for being defensive in her last meeting with Dr Haynes, probably the meeting which she prepared the document above (p223) for. In the course of apologising, the Claimant mentioned in passing that part of the reason for her being defensive was just that certain individuals "*(recently) have not supported my option to be openly gay*". In the email, the Claimant did not identify the individuals or say that she wished to take out a grievance against those or any colleagues or that she sought to redress in any way. In fact, the email did not mention any homophobic comments at all.

147 The Tribunal noted also that the Claimant had not raised any grievance in May or June 2013 nor did she ask for her comments to be treated as a grievance. Further, in the email of 26 May 2013 (p226), the Claimant stated to Dr Haynes that in relation to her decision to be openly gay, "*I can say that in the past you have supported me 100% in this matter*". She then later stated "*thank you for reading this email and the support you have given me in the past. I am very grateful for all of your support in this matter*".

148 We concluded therefore, that the Claimant had not established the primary facts on which she relied in alleging that the School had failed to treat her complaint of homophobic comments made to Caroline Haynes as a grievance.

149 In any event, given the dates on which the event was said to have occurred or the failures to have occurred, these matters would be considerably out of time. There was no cogent evidence put forward that this allegation ([C6](2)) was part of a continuing act. There was a long interval between these events in May 2013 and the next matter complained of in 2015. Further the Claimant's own comments about Dr Haynes in her email of 26 May 2013 undermine an allegation of continuing discrimination either by her or, given Dr Haynes' senior position, by the School.

150 No adequate reason was advanced as to why it would be just and equitable to permit such stale allegations to be brought out of time.

151 Subsequently, in the notes of a meeting on 5 June 2013 with Mr Saunders (p227), the Claimant was noted as having said that there were two staff members who were not supportive, but she did not share with Mr Saunders who they were, despite his asking her. In all those circumstances therefore, there were no adequate grounds to extend time.

152 The second direct sexual orientation discrimination allegation ([C6](5)) was an allegation about not following through with the Claimant's complaint as a grievance in May/June 2015.

153 Once again there was no evidence before the Tribunal of a written complaint by the Claimant about Jan Shipp's treatment of her or of any other matter in this time frame. The Tribunal refers to the provisions of the grievance policy as set out above. The Tribunal has already referred to the later grievance raised against Janet Shipp on 10 October 2015 (p276). When the Claimant raised the grievance on that occasion it was immediately taken forward by the Fifth Respondent. Gayle Lewis was appointed to investigate the matter and a report was produced. This tended to demonstrate therefore that when the Claimant actually raised a grievance it was treated as such by the School.

154 The Tribunal also took into account that in the June 2013 meeting with Mr Saunders he had attempted to elicit further information from the Claimant about the generalised allegation of discrimination made.

155 The Claimant's former colleague and a witness on her behalf, Brian Barrett, corroborated the allegation to the extent that he said he reported to Mr Muldoon concerns about the way Ms Shipp was treating the Claimant ([C7] para 13). However, there was certainly no suggestion in his evidence that this was characterised as an allegation of sexual orientation discrimination. This did not feature in Mr Muldoon's evidence about his knowledge of the concerns in May/June 2015 either. Indeed, the Claimant also gave evidence about her concerns about Jan Shipp in May/June 2015, for reasons that were unrelated to sexual orientation (cf para 38 of [C3]).

156 If the Claimant's complaint was simply that in similar circumstances if such a report of a teacher/Leader being treated unfairly by their line manager was made about anyone else who did not have the same protected characteristic, then the School would have responded proactively, there was no evidence in this case to support such an inference.

157 Mr Muldoon's evidence, which the Tribunal accepted on the balance of

probabilities on this issue ([R16] para 6), was to the effect that he met with Mr Barrett to discuss the concerns he had raised about the Claimant being unhappy with having Ms Shipp as her SLT link. It was undisputed that by May 2015 as the Claimant's newly appointed first line manager, Ms Shipp had had to deal, to some extent or another, with about 3 complaints about the Claimant from parents about one of her courses, and with the issue already referred to above about her inappropriate comments in the classroom. We concluded that this background was relevant to the Claimant's perception of unfair treatment by Ms Shipp. No adequate evidence of such unfair treatment however was put before us.

158 Thus, we concluded that the Claimant failed to establish the primary facts on which her complaint was based and the Tribunal was satisfied that if she had raised a grievance the Respondent would indeed have dealt with it as such appropriately. There was further no basis whatsoever, for suggesting that there was any disadvantageous treatment of the Claimant on grounds of sexual orientation at this stage.

Issue 5.5 (Item 14)

159 The Claimant complained that she was subjected to sexual orientation harassment in that on 23 May 2013 she was made to answer allegations concerning her marriage in a same sex relationship and the Fifth Respondent failed to take any action about the same.

160 Self-evidently, the first issue for the Tribunal to decide was whether it had jurisdiction on the basis that the complaint was out of time. Second, this matter was factually related to the matters just discussed above. We were satisfied that the Claimant was asked to address allegations raised by the parent of a pupil and that it was legitimate for the Fifth Respondent to ask the Claimant for an explanation. The Claimant accepted in her oral evidence that the Fifth Respondent had to investigate. We also were satisfied that the Fifth Respondent investigated the parent's allegations appropriately in relation to the Claimant's role as Teacher. Finally, as set out above the Claimant accepted that she could improve her practice going forward. She made this concession in a document generated by her as part of the explanation.

161 In all those circumstances therefore, the Tribunal rejected the implication in Issue 5.5 that the Claimant was being discriminated against in some way by being asked to provide an explanation in relation to the allegation. Also, the complaint was not about the Claimant being in a same sex marriage. It was about comments which the Claimant accepted were probably inappropriate which she had made about her sex life. The Tribunal accepted the Respondents' submissions about the evidence about these matters set out in the Respondent's closing submissions at R18 (p34) et seq. In particular there was a background of the Fifth Respondent having received complaints from more than once source about the Claimant making inappropriate comments in class relating to her sex life.

Issue 5.14 (Item 23)

162 This was an allegation that on 29 September 2015 the second Respondent, Janet Shipp seized upon an argument within the faculty involving the Claimant – sexual orientation harassment.

163 It was necessary to set out findings about the run up to this complaint. First there had been difficult conversations between members of the Faculty on both 28 and 29 September 2015. They did not directly involve Ms Shipp but she was approached by others affected and she therefore had to inquire into this. It was appropriate to consider the contemporaneous written evidence which was sent to Ms Shipp about this matter albeit it slightly post-dated 28 and 29 September 2015.

164 The first contemporaneous document referred to is a letter sent by email from Mr Barrett who was called as a witness on behalf of the Claimant in these proceedings on 4 October 2015 to Janet Shipp (p264C) as follows:

"Here goes:

- *Initially I was called by Lindsey about how upset Rebekah was regarding her APR targets. Discussed with Lindsey about how they should go into school the following day (last Monday 28th Sept period) and talk to her about them.*

- *Monday I was texted by Lindsey about it saying Emma-Jane went nuts and started yelling at us and said "if you want a 9 – 5 job then teaching is not for you" "if you are overwhelmed, maybe you should prioritise your weekends and not travel".*

- *I called her and asked if she yelled and Lindsey said "not yelled but strongly raised her voice at her. Rebekah was crying the whole time".*

- *Tuesday morning I came in and Emma-Jane told me about it and I said why an APR target of going from ALPS 7 – 5 was unreasonable because I was going to do it. Then we argued and Hamer told me she never said those things that Lindsey and Rebekah said she did and that was the catalyst for her shouting later that morning. Then when Lindsey and Rebekah came in they went into room 3 and I heard Emma-Jane yelling at them for a solid 10 minutes. Rebekah came out crying and went to the toilet in floods of tears.*

- *Emma-Jane left the room, I went next door and they both looked terrified.*

- *They said Emma-Jane stood up and squared off to them in an aggressive manner and she said, I said, she was a crap curriculum leader, which I was "maybe she needs to learn how to run a department". She came back in and we left.*

- *They went upstairs and I went in my room and did not speak to Emma-Jane until Thursday night.*

- *During that Thursday night conversation, it took me almost an hour to get her to realise what we mean by "drowning" and "Emma-Jane does not listen to us". I said how there was a stressful, anxious and excessive level of pressure in our department that comes from her attitude and idea*

of work. She said if I did that it was unintentional and she did not mean to do that but I reiterated that that was why we are speaking out finally because it is unbearable.

- *She asked why it has taken so long to speak to her. I said that because when we do tell you things we find you in your room or the office crying and you take things "both inside and outside the department" way too personally. I spoke to her about what message it sends by crying about the AS psychology results the first couple of days of school and the amount of pressure we have on us is not fair.*

- *I said rightly or wrongly we tried to not upset you and just agree but now it is getting too much to handle.*"

165 Mr Barrett then concluded with a statement that his relationship with the Claimant was "*fine*" and that they communicated.

166 Although in his witness statement and when he gave evidence for the Claimant at the hearing, there were attempts to portray a different picture from that set out in this account, the Tribunal considered that on the balance of probabilities this was likely to have reflected a true account of the events witnessed by Mr Barrett shortly beforehand and was also a true statement of his view of how the Claimant ran the department and the effect it was having on her colleagues.

167 In addition, Ms Shipp heard from Ms Lyndsey Wood who had also made a contemporaneous record of events (pp273 – 274). She described running into the Claimant on 1 October 2015 at school. She stated, among other things, "*we briefly talked and I explained that what she did was terrible and that she was incredibly intimidating and I had felt very scared that day*".

168 Ms Wood recorded that she had told Ms Caris-Hamer that it was she who had called Brian Barrett on Monday night and that the Claimant had said that Ms Wood "*had every right to talk to who* [she] *wanted*". She further recorded that Ms Caris-Hamer had said that she was not sleeping very well and that Mr Barrett "*had provoked her Monday morning"* and that Rebekah Kelly and Ms Wood "*were the ones to get the consequences of that discussion*". Ms Wood concluded her note of that interaction on 1 October by saying that she had wanted to get out of the room as soon as possible.

169 When later interviewed about these matters on 22 October 2015 (p397) after acknowledging that as someone who had qualified the previous year she had found Ms Caris-Hamer and Mr Barrett to have been fantastic and very supportive (p397), she also made the following comments: that the Claimant "*works hard but does not listen*"; and that Rebekah Kelly had asked for her help to speak to the Claimant, that they met with the Claimant and that Rebekah Kelly ended up crying during the meeting. She stated that the Claimant "*was twisting and manipulating what Rebekah Kelly was trying to say*" (p398). She also described the Claimant having said to Rebekah Kelly "*you want to go to Caroline Haynes and say that you are a crap teacher?*" Ms Wood considered that Ms Caris-Hamer was thereby twisting what Rebekah Kelly was trying to explain. She described that during the meeting she was also crying and that "*it was awful*". These comments were made on 22 October 2015 and Ms Wood was describing a meeting between the Claimant, Ms Kelly and herself on 29 September

2015. There were further very negative descriptions of the meeting set out in the interview with Ms Wood.

170 Ms Wood gave evidence on behalf of the Claimant in the hearing and there was an attempt to portray Ms Wood's evidence as less damning than it had been. The Tribunal considered that these contemporaneous documents recording what she said in an interview but also generated by Ms Wood herself were reliable and truthful accounts of matters as Ms Wood saw them at the time. In particular at the time that these were generated Ms Wood would not necessarily have anticipated that they would be shown to the Claimant. It was also apparent in the account that she bore the Claimant no ill-will.

171 Further, there was an interview with Ms Kelly on 22 October 2015 (p403). She was a junior teacher and the Claimant was her Line Manager and Curriculum Leader. In her interview she described the meeting between herself and the Claimant on 28 September 2015 which led to Ms Kelly becoming upset (p404).

172 She further described that on 29 September the Claimant had required Ms Kelly and Ms Wood to go into a room and then treated them in a manner that she described as "*horrendous*" and that as a result she felt "*intimidated, scared and upset*" (p405).

173 The statements of Ms Wood and Ms Kelly were consistent in portraying intimidatory and angry behaviour from the Claimant towards them both at the meeting on 29 September. Mr Barrett's email corroborated their accounts.

174 Ms Kelly also corroborated that the Claimant had acknowledged that she had spoken to Brian Barrett the day before about the meeting on 28 September.

175 Further, in the course of her interview (p406) Ms Kelly stated that she had considered leaving the profession due to this matter. She believed that she could not do it anymore and that she could not work under these conditions even though she "*adored*" students. As a result, she had gone to speak to Janet Shipp.

176 Subsequently Rebekah Kelly left the Fifth Respondent's employment and the teaching profession on 31 May 2016. Before doing so, she completed a leaving questionnaire. Even at that stage some seven months after the events, she described the Claimant as being "[a] *bully, intimidating*"; that the department was fearful of the Claimant who brought her personal life into her job which she described as inappropriate; and how she felt "*forced out of what I always wanted to do at the school I wanted to work at. Mental health has been affected. Serious concern about recent comments regarding my work – from CL*". It was not disputed that CL was a reference to the Claimant as Curriculum Lead.

177 Finally, when this matter came to formal proceedings the Claimant accepted the allegations against her in that on 4 October 2016 her behaviour had been inappropriate with regard to events at the end of September 2015. She signed an acknowledgment of a written warning (p444). The warning was in respect of allegations that the Claimant had behaved in an insulting, intimidating, aggressive way towards colleagues and she expressly accepted the allegations made against her and that she had indicated her acceptance of this warning.

178 The Tribunal has not quoted every negative piece of evidence which was available or made known to the Fifth Respondent, and Ms Shipp in particular about the events on 28 and 29 September 2015. However, the Tribunal considered that the picture clearly emerged of such disturbing interaction between the Claimant and her subordinates on both those days that it left the Fifth Respondent with no option other than to investigate. The contrary suggestion was ridiculous. Rather than Ms Shipp seizing upon "an argument" within the Faculty, the Tribunal considered that there was evidence of potential serious misconduct on the Claimant's part which was brought to the attention of Ms Shipp and this was a matter which the Fifth Respondent had ample evidence about and which it would have been wrong for them not to have investigated.

179 The Tribunal therefore considered that the Claimant had failed to establish the primary facts relied upon and that in any event the Tribunal was satisfied that there were valid and ample reasons for Ms Shipp to have investigated the matter. The Claimant's subsequent acceptance of liability and penalty for these events was consistent with those findings.

180 It was also unlikely that the Claimant's sexual orientation affected the Fifth Respondent's response to this matter. The discussions between the Claimant and her subordinates, concerned work performance. There was no reference to anything which related to sexual orientation. The Claimant had therefore failed to establish any facts which would lead the Tribunal to consider that a prima facie case of discrimination on grounds of sexual orientation had been raised, which would then lead to the burden of proof shifting to the Respondents. This complaint was therefore not well founded on its facts.

181 In addition, the issue of jurisdiction was also relevant here. The allegation related to events which had occurred some seventeen months before the presentation of the claim. No adequate reason was advanced about why it would be just and equitable to permit these allegations to be brought out of time. Indeed, the Claimant only really argued that they were matters of continuing discrimination. As the Tribunal did not find any of these matters to be substantive they could not constitute continuing discrimination. For this reason also, this complaint was not well founded.

182 In her oral evidence the Claimant was dismissive of the suggestion that her interaction with her colleagues on the first occasion on 28 September was evidence of potentially serious misconduct. This was reflected also in the nature of this allegation.

183 The Tribunal considered that Ms Shipp tried to step back from the issue when the Claimant indicated that she objected to her involvement. This also undermined the allegation that Ms Shipp seized on an argument in the Faculty involving the Claimant. Whilst with hindsight, the Fifth Respondent could be criticised for not having communicated better with the Claimant about its view on the potential conflict of interest in terms of Ms Shipp's role, the Tribunal considered that Ms Shipp appropriately thought that there could be a conflict of interest and discussed this with the Claimant in terms of what was going on at the time. This was around the time when the Fifth Respondent made arrangements for Ms Shipp to cease being involved in the management part of the Claimant as Ms Caris-Hamer had indicated an intention to complain about her. She subsequently put in a complaint against Ms Shipp.

184 There was also an element of this allegation in which the Claimant suggested

that Ms Shipp continued her involvement by influencing Ms Wood and Ms Kelly against the Claimant as she was their mentor. First, the Tribunal has had regard to the contemporaneous accounts of Ms Wood and Mr Barrett which substantiate the later account of Ms Kelly as to what had happened at the end of September in those two meetings. At the time the Claimant spoke to Mr Barrett Ms Shipp was not involved and indeed there was no suggestion that Ms Shipp influenced Mr Barrett.

185 Further, although Ms Wood was called as a witness for the Claimant she gave no evidence which could possibly be interpreted as saying that Ms Shipp had tried to influence her against the Claimant. Finally, as set out above it was clear that even by the time Ms Kelly left the Fifth Respondent, her very negative view of the Claimant's behaviour towards her persisted.

186 On the balance of probabilities therefore the Tribunal concluded that there was no basis for finding that Ms Shipp had sought to influence either Ms Wood or Ms Kelly and as set out above there was no connection whatsoever with sexual orientation.

Issue 5.22 (Item 32)

187 There were two parts to this sexual orientation harassment allegation. The first was that the Fifth Respondent conducted a flawed disciplinary investigation in that the Claimant was not provided with evidence that the complaint was actually made. The second was that the disciplinary investigation was flawed in that the meeting notes did not reflect the content of the meeting. These were said to have occurred between 11 November 2015 and 16 December 2015.

188 The Tribunal has set out in the earlier findings that complaints were clearly made about the incidents on 28 and 29 September 2015 by Ms Wood and Ms Kelly to Ms Shipp. Further, the Claimant set out her side of matters in a statement of events (p260) to Ms Shipp on 1 October 2015.

189 The Claimant was invited to an investigatory meeting by a letter dated 8 December 2015 (p358). At that point the meeting was scheduled to take place on 16 December. In the event the Claimant attended an investigatory interview on 14 January 2016 at which she was asked about and gave an even more detailed account of the events of 28 and 29 September 2015. Subsequently she was informed on 15 January 2016 (p441) by Mrs Gail Lewis, Senior Assistant Principal that the School considered there was a case to answer and that a disciplinary hearing would take place. No disciplinary charges were set out in that letter and no date stated for the hearing. However, before the disciplinary hearing could be arranged the Claimant accepted the allegations against her (p444). This was confirmed in a letter dated 4 February 2016. The letter referred back to a meeting which had taken place on 14 January 2016 with Dr Haynes, and at which she was accompanied by her Trade Union representative, Steve Townshend of the NUT.

190 Matters therefore never got to the stage where the Claimant was called to a disciplinary hearing, at which point it would have been expected that the Claimant would have been given details of the evidence on which the School based the disciplinary charges.

191 Having accepted the charges and accepted the disciplinary sanction of a first written warning, it was somewhat surprising that the Claimant criticised the disciplinary

investigation process in this litigation.

192 Finally, as with the other complaints about the School's reaction to the events of 28 and 29 September 2015, the Claimant had failed to raise a single matter which was related to sexual orientation. She simply brought a procedural criticism, which the Tribunal found was premature. In all the circumstances, the complaint in the first part of this Issue was therefore not well founded.

193 The second part of the complaint (Issue 5.22(B)) alleged that the Respondent conducted a flawed disciplinary investigation in that meeting notes did not reflect the content of the meeting and she set this allegation in the timeframe from 11 November to 16 December 2015.

194 The Claimant's grievance against Ms Shipp dated 12 October 2015 was investigated by Mrs Gail Lewis also in a combined process in which she looked at the issues concerning the Claimant's dealings with Ms Kelly and Ms Wood in late September 2015, and the grievance by the Claimant about Ms Shipp's management of her, lodged on 10 October 2015 (pp276 – 281). By a letter dated 8 December 2015 (p357) to the Claimant Mrs Lewis informed her that she had concluded that Mrs Shipp had no case to answer. The Claimant initially lodged an appeal against the decision, but she subsequently decided not to pursue the appeal. This was confirmed in a letter dated 11 January 2016 (p431) from Mrs Cains, Chair of Governors, to the Claimant.

195 It was not completely clear even by the end of the hearing exactly what the Claimant was referring to as having been erroneous or wrong about the meeting notes, and which meeting notes she was referring to.

196 Given the dates the Claimant referred to, the Tribunal considered that it was likely that she was referring to the notes of the second investigatory meeting into the allegations against her, held on 3 November 2015 (pp338 – 343). At page 129CE which was part of the amended ET1 of 1 September 2017, the Claimant indicated at paragraph 68 that the minutes of a second meeting held in early November 2015 were inaccurate and that she contested their authenticity. She continued that the changes were made to the minutes of the meeting "*as a strategic and cynical attempt to undermine her grievance and to denigrate her reputation*". She was concerned that incidents that she had raised relating to discriminatory behaviour, bullying and vindictiveness by Ms Shipp were ignored and that there was no reference to the comment that she alleges Ms Shipp made: "*we know you are gay Emma-Jane, you don't need to shove it in our faces*". Ms Shipp stoutly denied having made this comment at any stage.

197 At paragraph 90 of her witness statement, the Claimant repeated her complaint about the minutes of the meetings held both in October and on 3 November 2015, both of which she was given after the meeting on 3 November 2015.

198 At page 292 of the bundle there was an email exchange between the Claimant and Mrs Lewis of the Fifth Respondent. After the meeting, by an email of 11 November 2015 Mrs Lewis invited the Claimant to amend the copy (of the minutes) that she had and to hand it to Trish. She indicated that she would check against the handwritten notes and if they had missed something that the Claimant said, they would add it or add what the Claimant had written as a later addition. This email from Mrs Lewis was

in response to an email from the Claimant earlier that day in which she indicated that there were some amendments that needed to be made. She stated "*as there are a few could you please send me an e-copy so that I can highlight areas and type amendments alongside. This will save me copying out chunks of information*".

199 The Tribunal considered it normal that participants at a meeting might want to make amendments to the minutes afterwards. Indeed, the email correspondence confirms that the Fifth Respondent was prepared to take on board the Claimant's amendments where appropriate, and thus correct any errors in the minutes.

200 Ms Caris-Hamer complained in her witness statement that the amended version of the minutes was still inaccurate, but she confirmed in her witness statement that she took up the course proposed by Mrs Lewis of having all her requested amendments included as an attachment to the School's minutes. She stated that on that basis, she was happy to sign the minutes, which she did on 21 November 2015.

201 The Tribunal struggled to see any adequate basis for complaint, let alone for an allegation of sexual orientation harassment in this account of events.

202 In the chronology at the beginning of the report (pp381 – 388) by Mrs Gail Lewis into these matters, she noted that she interviewed the Claimant (pp390 – 395) on Friday 23 October and then she conducted a second interview with the Claimant on 3 November 2015. This first stage investigation which also included interviews with Ms Wood and Ms Kelly, Mr Barrett and Ms Shipp was then followed by the formal disciplinary investigation meeting which took place eventually on 14 January 2016. The correspondence between Ms Lewis and the Claimant referred to above of 11 November 2015 was in relation to the notes of the two meetings in October and November 2015.

203 Out of an excess of caution, the Tribunal considered whether, despite the dates provided by the Claimant to the Tribunal, and the other evidence referred to above, she was actually referring to the notes that Mr Panesar addressed in his closing submissions ([R18] p42), which were the notes of the formal investigatory disciplinary interview which took place in January 2016 (p433 et seq).

204 The notes of this disciplinary investigation meeting were very detailed. They were taken by a dedicated note-taker Patricia Johnson whose previous note was referred to during the Tribunal hearing in relation to when the Claimant came to see her on about 5 October 2015 after being upset by the meeting with Ms Shipp. No-one suggested that those notes were not accurate.

205 Further, the Claimant was accompanied by her NUT representative Mr Steve Townshend at the meeting. No complaint was forthcoming from him that the meeting notes were inaccurate. Finally, Mr Steven Ball who gave evidence in these proceedings for the Respondents was also present at the meeting. His evidence in the Tribunal was that these meeting notes were accurate.

206 Lindsey Wood also confirmed (paragraph 11 of [C5]) that the notes of her interview on 22 October 2015 for the disciplinary investigation into the Claimant were accurate (p397 and following). These notes were also taken by Ms Johnson. The Claimant did not clarify what notes or text she was referring to in this complaint. There was nothing in the time frame cross-examined about or in closing submissions.

207 The Tribunal was satisfied therefore that the Claimant had failed to establish the primary facts on which her complaint was based. In any event there was nothing in the surrounding circumstances which would lead the Tribunal to conclude that there was any connection between what may have happened in relation to the notes of her disciplinary interview and her sexual orientation generally. Finally, any complaint about these matters which took place on or before 14 January 2016 was out of time and it was not connected with anything which was in time which would make it a continuing act.

208 The next sexual orientation harassment complaint was at Issue 13.2 (Item 89) in which it was alleged that on 7 October 2015, the Claimant was called to a meeting with Caroline Haynes and not told that Janet Shipp would be present. As this was also an allegation of disability harassment, relevant factual findings have been set out above in that context.

209 The Tribunal made the following further findings.

210 In her email to Janet Shipp sent on 4 October 2015 (p265) the Claimant made no reference to any matter related to sexual orientation. There had been a recent history of issues purely relating to work arising between the Claimant and Janet Shipp. Thus, as set out above in relation to the allegation about a complaint not being proceeded with by Mr Muldoon in May/June 2015, Mr Barrett had raised his concerns about Ms Shipp's treatment of the Claimant also with Chris Collins. Further difficulties had arisen between the Claimant and Ms Shipp as a result of Ms Shipp trying to address the causes of the poor examination results of the Claimant's department in the summer of 2015.

211 Further, by 30 September 2015 the Claimant had sent a statement to Janet Shipp about what had happened on the Tuesday morning. This was a reference to the interaction with Ms Kelly and Ms Wood. There was no basis for a finding that there was any connection with sexual orientation.

212 As set out above the Claimant was called to a meeting on 6 October between herself and Ms Shipp. Ms Shipp refused to discuss the issues in the email. Ms Shipp clearly failed to tell the Claimant that she would be at the meeting with Dr Haynes on 7 October 2015 nor indeed did anyone else. The Tribunal considered that at most this was discourteous. It was put to Dr Haynes and Ms Shipp that having to discuss the detail of the grievance against Ms Shipp in front of her was humiliating for the Claimant. The Tribunal considered that that was the correct process for grievances. Further the Claimant herself had asked for a meeting with Janet Shipp in the email of 4 October (p265) for just this purpose.

213 The Tribunal did not consider this complaint was well founded and therefore we rejected it.

<u>Issue 13.5 (Item 92)</u>

214 The Claimant alleged that on 15 October 2015 Janet Shipp reprimanded her for accepting a lift home from Lindsey Wood (the Claimant contends on the grounds of sexual orientation). This was said to constitute sexual orientation harassment.

215 The factual background to this was that because of the as yet unresolved allegations, Ms Wood, the Claimant and Ms Kelly had been instructed that they must maintain distance from each other. This instruction had been given prior to 15 October 2015. The Tribunal considered that it was a reasonable and proper management instruction by the School, given the situation and the allegations, and to protect the interests of all parties following the interactions of 28 and 29 September 2015.

216 We noted as set out in paragraph 25 of Ms Wood's statement that Ms Shipp informed Dr Haynes on 15 October 2015 that Ms Caris-Hamer had carried out a learning walk on her and therefore Ms Wood was called to a meeting with Dr Haynes in her office. Dr Haynes again told Ms Wood that she was not to discuss anything with Ms Caris-Hamer and also that she was not to take Ms Caris-Hamer home. Ms Wood told Dr Haynes that she was still following her instructions.

217 Dr Haynes' instruction was reasonable and consistent with the previous instruction about keeping apart from the Claimant.

218 There was some contemporaneous evidence about the events of 15 October 2015. At 8:23am Lindsey Wood emailed Janet Shipp about the proposed learning walk (p284C). Ms Wood said that she felt that she was in an awkward position and asked for advice (p283A). At some point after the email from Ms Wood and before midday, Janet Shipp had a conversation with Ms Wood about this (p284C). Ms Wood's attitude to resisting the lifts was set out in pages 284C and 283A. Ms Shipp noted that it was Ms Wood's choice in relation to the lift home.

219 The Tribunal accepted Ms Shipp's description ([R13 para 22]) of how the discussion about the lift home with Ms Wood first came up in a conversation between them on 28 September 2015. It was a matter that was raised during the meeting by Ms Wood and therefore Ms Shipp gave advice about this as well. The purpose of this was clearly to protect each of the staff members' interests. Indeed, as Ms Wood described when she was interviewed (p273 – 274), she was put in a difficult situation by the Claimant when the Claimant asked if she could give her a lift home on Wednesday. She described explaining to the Claimant that she had been told that she was not to take her home as it put Ms Wood in a compromising situation. Ms Wood went on to explain to her employers in the interview that she tried to explain to the Claimant that she was "*stuck between a rock and a hard place*" and that she would prefer for Ms Hamer not to ask her for a lift until the situation was resolved. She noted that she seemed to make the Claimant annoyed by this comment.

220 This evidence suggested that Ms Wood perceived a degree of insensitivity and lack of insight on the Claimant's part in not appreciating that Ms Wood was indeed somewhat embarrassed and in a difficult position because of this request.

221 The Tribunal did not consider that there was any connection between this instruction and sexual orientation. We were satisfied that it was consistent with the School's exercise of their duty of care towards each of the members of staff.

Pre-dismissal victimisation detriments

222 There were a number of allegations of victimisation due to protected acts relating to sexual orientation. Thus, the relevant protected acts were said to have been that:

222.1 On 4 October 2015 the Claimant sent an email to Janet Shipp asking for a meeting to resolve issues between them. This was said to constitute a protected act, on the basis that Janet Shipp believed that the Claimant was about to complain about discrimination by Janet Shipp against the Claimant because of her sexual orientation (Issue 9.1 (Item 55)); and

222.2 On 10 October 2015 the Claimant submitted a grievance alleging discrimination by Janet Shipp against the Claimant because of sexual orientation (Issue 9.2 (Item 56)). The Respondents accepted that this was a protected act under the 2010 Act.

223 The Tribunal found that the 4 October 2015 email did not constitute a protected act. There was no reference to sexual orientation or any protected characteristics in this email. Ms Shipp accepted that she anticipated a complaint that the subject of the matter was about their work relationship and their interaction in terms of their respective responsibilities. There was no obvious or indeed implied connection to any issue relating to sexual orientation.

224 The Tribunal also considered that the documentary evidence of Ms Shipp's response to the email was consistent with her believing that the Claimant's concerns apart from being expressly stated to have been work related, were indeed about work. This was reflected by the steps that she proposed should be taken such as having a meeting and with Mr Woodcock present. This was set out in the email Ms Shipp sent to Dr Haynes shortly afterwards seeking her advice.

225 The Tribunal also considered that it was unlikely that if Ms Shipp believed she was being or was about to be accused of a matter under the Equality Act, she would have proceeded with an APR meeting as normal and with the other meetings. It was clear that once she became aware of the nature of the Claimant's concerns subsequently she reacted appropriately.

226 The Tribunal concluded therefore that the email of 4 October 2015 relied on by the Claimant to Janet Shipp did not constitute a protected act under the Equality Act 2010.

227 The Respondents conceded that the grievance constituted a protected act and the Tribunal found it to be so on the basis of the reference in it to one of the protected characteristics. Thus, the Tribunal assessed the detriments which were said to have been acts of victimisation in the light of the one protected act that was found i.e. the grievance dated 10 October 2015.

228 The first of the victimisation detriment complaints was Issue 11.1 (Item 59) said to have occurred on 4 October 2015. The Tribunal considered that this was truly a reference to events on 6 October 2015. The allegation was that Janet Shipp punished the Claimant following her request for a meeting by:

228.1 reducing the Claimant's responsibilities; and

228.2 informing the Claimant that there would be no discussion of her complaints.

229 The Tribunal has already made findings about the meeting that was held between Ms Shipp and the Claimant on 6 October 2015. Corroboration of this comes from the contemporaneous note by Ms Patricia Johnson, the PA to Dr Haynes. However, this cannot be an act of victimisation in any event as it pre-dates the only matter which the Tribunal has found to be a protected act namely the grievance submitted on 10 October 2015.

230 Further, having regard to the other findings of the Tribunal the Tribunal found that this matter would have been out of time in any event.

231 The next victimisation detriment issue was Issue 11.3 (Item 61). This was also said to relate to events on 4 October 2015. The matters complained of were that:

231.1 the Claimant was called to a meeting with Caroline Haynes, without being informed that Janet Shipp would be present;

231.2 that Caroline Haynes was aggressive to the Claimant;

231.3 that Caroline Haynes forced the Claimant to discuss aspects of her complaint in front of Janet Shipp;

231.4 that Caroline Haynes stated that the Claimant's complaint must be in accordance with the grievance policy (which the Claimant asserted was an implied subtle threat).

232 The Tribunal found that these matters could not relate to any meeting on 4 October 2015 because the facts did not support such a meeting having taken place then. It appeared that this complaint related to a meeting on 7 October 2015. However, as the only protected act that the Tribunal found occurred on 10 October 2015, these complaints of victimisation could not succeed as such.

233 The next issue said to be a victimisation detriment was set out in Issue 11.4 (Item 62). This alleged that on 4 October 2015 Caroline Haynes instructed the Claimant not to talk to members of the faculty who she falsely said had complained about the Claimant.

234 The Tribunal found that there were indeed two members of the faculty who had complained about the Claimant so the basis for the instruction was not false. The Claimant identified as part of her allegation that she was referring to Rebekah Kelly and Lindsey Wood. However, although the Claimant set this out as having occurred on 4 October 2015, we found that it did not happen then.

235 The first documentary record of the instruction having been given was a reference to it having been clarified with the Claimant by Dr Haynes in an email dated 17 October 2015 (p284) between Caroline Haynes and Dan Woodcock. This records that the instruction was not that she should not speak to the two members of staff at all but that she must not do so unaccompanied.

236 Finally, the Tribunal also made findings elsewhere in these reasons about the appropriateness and the inevitability of the Fifth Respondent taking action along these

lines to protect the parties involved. This was against the background of the School having received evidence that the Claimant had shouted at and intimidated two more junior members of her department.

237 This allegation was not well founded because it was clear that the action was taken by reason of the Claimant's alleged unacceptable conduct that related to her treatment of two junior members of staff. Indeed, by then she had given the Fifth Respondent an account which substantiated some of the allegation. The instruction was unlikely to have been given by reason of the Claimant having made claims of discrimination. There was no evidence to support such an inference.

238 Further, the difficulty between the two members of staff and the Claimant had taken place prior to the protected act having occurred and there was no difference in terms of the way the School dealt with it before and after the grievance of 10 October 2015. This was another reason for concluding that the protected act did not cause the instruction in any way.

239 The next allegation of victimisation detriment was in Issue 11.5 (Item 63). By this the Claimant alleged that on 15 October 2015 in the course of a telephone call between Dr Haynes and the Claimant at 2:10pm Dr Haynes reprimanded the Claimant for carrying out a learning walk.

240 The Claimant accepted in cross-examination that she had been instructed to limit her contact with Lindsey Wood and Rebekah Kelly. That instruction had been recently given and had not been varied or removed by 15 October 2015. The Tribunal refers to the findings on this issue set out elsewhere and in particular the quotations from Ms Wood's evidence to the Disciplinary Investigation Panel about feeling that she was "*between a rock and a hard place*". The Tribunal found that Ms Wood was clearly anxious about the Claimant joining a forthcoming revision class on 26 November. She therefore wrote to Ms Shipp on 15 October 2015 about this (p283A).

241 The Claimant did not dispute that she had carried out a learning walk with Lindsey Wood. It was difficult to establish if the Claimant also carried out one in relation to Rebekah Kelly. She denied having done so. It mattered not however because as a result of the Claimant carrying out a learning walk with Lindsey Wood she was in a room as a more senior member of staff with the person who she was accused at that point of having intimidated and being aggressive to, without there being another member of staff present also, in breach of the instruction. The Tribunal considered that it was quite appropriate that in those circumstances Caroline Haynes should have reminded the Claimant of the instruction and to the extent that she reprimanded her, the Tribunal considered that this was also appropriate. Importantly however, the Tribunal found no connection whatsoever between this and the Claimant having done the protected act.

242 The next issue alleging victimisation was 11.8 (Item 66). By this, the Claimant alleged that on 8 December 2015 Gail Lewis provided an outcome report (p357) which:

242.1 failed to reference the complaint that Janet Shipp had said "*we know you are gay you don't have to shove it in our face*".

243 Gail Lewis was the investigating officer into the disciplinary allegations arising from the Claimant's interaction with Ms Wood and Ms Kelly on 28 and 29 September 2015, (along with the investigation into the Claimant's October 2015 grievance). As set out elsewhere, Ms Shipp disputed having made this comment. This was put to her by Mrs Lewis in the interview on 12 November 2015 (p322) and she indicated that she could not recall in all the years that Ms Caris-Hamer had been there, having a conversation about her or anybody else's sexuality, nor would she. Mr Harris attached considerable significance to the exact wording used by Ms Shipp and submitted that this did not suggest that she was denying having made the comment. The Tribunal noted that Ms Lewis put the allegation to Ms Shipp about something she was supposed to have said a year previously. There was no corroboration of this comment having been made or more recent complaint about it. When talking to Mr Saunders about adverse comments or attitudes towards herself as a gay person or towards homosexuality in May/June 2015 the Claimant did not identify Janet Shipp as the author or source of any such matters. Nor indeed had this been raised in the complaint to Chris Collins.

244 The Tribunal had to decide these conflicts on the balance of probabilities. There was no corroboration of this allegation and it was raised against Ms Shipp somewhat belatedly on the Claimant's own account.

245 The Tribunal also reminded itself that this allegation was about Gail Lewis having failed to reference in the outcome report the allegation that Janet Shipp made the comment alleged. The complaint was not even that Mrs Lewis failed to uphold the allegation. The alleged comment featured in the notes of the investigation meeting but was not in the outcome report. The outcome report was a single page letter of some four paragraphs and Ms Lewis did not go into any detail about any of the allegations in it. The Tribunal therefore considered that the complaint was misconceived. It was in any event not surprising given the evidence about it that the allegation against Ms Shipp was not upheld by Mrs Lewis.

The disciplinary process and dismissal

246 There were complaints about the disciplinary process and the dismissal brought under various legal heads. As the findings of fact necessarily overlapped, these are largely dealt with together below.

247 The dismissal took effect on 19 February 2017 however the Claimant was informed of the termination of her employment by a letter dated 25 November 2016 (p696 – 699) from Ms C Kerr. The disciplinary hearing was held on 18 November 2016.

248 There were a number of allegations of victimisation due to protected acts relating to sexual orientation. Thus, the relevant protected acts were said to have been that

248.1 On 4 October 2015 the Claimant sent an email to Janet Shipp asking for a meeting to resolve issues between the Claimant and Janet Shipp, on the basis that Janet Shipp believed that the Claimant was about to complain about discrimination by Janet Shipp against the Claimant because of her sexual orientation (Issue 9.1 (Item 55)); and

248.2 On 10 October 2015 the Claimant submitted a grievance alleging discrimination by Janet Shipp against the Claimant because of sexual orientation (Issue 9.2 (Item 56)). The Respondents accepted that this was a protected act under the 2010 Act.

249 The Tribunal found above in the context of the earlier victimisation complaints, that the 4 October 2015 email did not constitute a protected act. There was no reference to sexual orientation or any protected characteristics in this email. Ms Shipp accepted that she anticipated a complaint that the subject of the matter was about their work relationship and their interaction in terms of their respective responsibilities. There was no obvious or indeed implied connection to any issue relating to sexual orientation.

250 The Tribunal also considered that the documentary evidence of Ms Shipp's response to the email was consistent with her believing that the Claimant's concerns apart from being expressly stated to have been work related, were indeed about work. This was reflected by the steps that she proposed should be taken such as having a meeting and with Mr Woodcock present. This was set out in the email Ms Shipp sent to Dr Haynes shortly afterwards seeking her advice.

251 The Tribunal also considered that it was unlikely that if Ms Shipp believed she was being or was about to be accused of a matter under the Equality Act, she would have proceeded with an APR meeting as normal and with the other meetings. It was clear that once she became aware of the nature of the Claimant's concerns subsequently she reacted appropriately.

252 The Tribunal concluded therefore that the email of 4 October 2015 relied on by the Claimant to Janet Shipp did not constitute a protected act under the Equality Act 2010.

253 The Respondent conceded that the grievance constituted a protected act and the Tribunal found it to be so on the basis of the reference in it to one of the protected characteristics. Thus, only the grievance on 10 October was relevant in considering the detriments complained of.

254 The first of the victimisation allegations which also occurred in the timeframe of the incident which led to the disciplinary and dismissal action was Issue 11.15 (Item 73). By this, the Claimant alleged that on 6 July 2016 Caroline Haynes reprimanded her for answering a safeguarding question incorrectly at Felixstowe/contacting the Head of Felixstowe without the Claimant's permission.

255 It was not in dispute that the Claimant had discussed the interview at Felixstowe Academy beforehand and that Dr Haynes had told her that she would need to inform that school about the live written warning issued in January/February 2016.

256 Dr Haynes' evidence was that it was the Head of the Felixstowe Academy who contacted her, after the Claimant's interview for a job at that school, to express his concern about the answers given by the Claimant to questions about safeguarding. Felixstowe Academy was in the same group of schools as the Fifth Respondent.

257 The Claimant herself described at paragraphs 1 – 8 of her witness statement that the day of the interview went badly, that she did not enjoy the lesson she had to teach and that she "*knew that* [she] *had not explained properly* [her] *answer to the safeguarding question during the interview*". Indeed, she confirmed in her witness statement that she emailed Mr Woodcock the next day to state that the interview did not go well.

258 The Tribunal considered that it was not surprising against that background that as Dr Haynes described, the Head of Felixstowe had been in contact with her ([R11] para 27) because he was concerned about the Claimant's response to the safeguarding questions and thought that it was appropriate for Dr Haynes to have a word with the Claimant about this.

259 The Claimant also acknowledged in her oral evidence that her answers in the interview on the safeguarding issues were "*not up to standard*".

260 As the only relevant contemporaneous documentary evidence was the note made of the Claimant's interview with Dr Haynes on 6 July 2016 (p466), the Tribunal considered that the Respondents' account of the reason for the discussion with the Claimant about her interview and about the background to it, was credible. Further, when the meeting commenced Dr Haynes explained to the Claimant the reason for it.

261 The Tribunal also considered that the way in which the matter was approached by Dr Haynes as recorded in the notes of that meeting was appropriate. She discussed the Claimant's Felixstowe Academy interview and asked her to describe things which had gone well as well as things which she thought she could have dealt with better. Once again, these notes of the interview record the Claimant accepting readily that she had not dealt with the safeguarding issues appropriately. Her answers led Dr Haynes to ask her if she knew what the safeguarding protocols at the School were. She referred to the Claimant having had training. The Claimant's reply was that at the Felixstowe interview she had "*walked out crying, I was gutted*".

262 The Tribunal also accepted that the Claimant was not reprimanded by Dr Haynes. She had simply taken steps to discuss with the Claimant whether she had the appropriate knowledge about safeguarding. Her answers to Dr Haynes in part reassured Dr Haynes because the Claimant clearly acknowledged that she had not explained the protocols properly. In the meeting with Dr Haynes the Claimant asserted that she did indeed know who to go to but that she had not given that answer to the Head at Felixstowe.

263 The Tribunal considered that it was absolutely clear, not least from the Claimant's admitted evidence, that the only reason why she was asked about her interview at the Felixstowe Academy and about her answers to the safeguarding questions was because these were a very important aspect of the Claimant's role and the Claimant had admittedly given poor answers about this at the interview. The Tribunal also found that this incident confirmed that this School viewed safeguarding issues very seriously as indeed did the other school in the group.

264 This complaint was therefore not well founded.

265 The next complaint was Issue 11.16 (Item 74) whereby the Claimant alleged as

a victimisation detriment that on 6 July 2016 the school used part of the discussion in 'the meeting' about a departmental meal with students to concoct a further disciplinary charge against the Claimant.

266 The matters alleged were not substantiated. The departmental meal had taken place on 24 June 2016. It was apparent from the contemporaneous documentary evidence that it was a parent of a student who had made a complaint, and multiple accounts of the Claimant and Mr Barrett's drinking with students and apparently less than professional behaviour had come to the attention of the School. In those circumstances it was wholly appropriate for Dr Haynes to have had a conversation about this with the Claimant during the meeting. To that extent therefore, the suggestion that the charges arising from the meal were "concocted" against the Claimant was completely misplaced.

267 By 6 July 2016 Dr Haynes had some awareness of matters having gone wrong at the departmental meal. This led to her asking the Claimant some questions about it during the course of the meeting on 6 July 2016 (pp469 onwards).

268 The issue had come to Dr Haynes' attention because following the departmental meal Dr Denise Jackson believed that the Claimant had had inappropriate conversations with the students at the meal about Dr Jackson. She had therefore reported this matter to two other senior members of the School. Dr Jackson was a member of staff in the Claimant's department but there was some tension between herself and the Claimant. Dr Jackson sent an email on 29 June 2016 to Tim Paternoster and James Saunders reporting that two Year 13 sociology students had independently told her on that day that the Sociology Year 13 group had gone on a meal out with the Claimant on the previous Friday and that the Claimant was "*most – to use one of the student's words – unprofessional as she spent the night along with some of the students 'slagging me off' and talking about their exam papers and how rubbish I am*" (p583). Mr Saunders forwarded the email to Caroline Haynes on 6 July 2016 at 19:57.

269 By then, the Claimant had also reported to Dr Haynes that she believed that other colleagues had been having inappropriate and potentially undermining conversations with students about her position in the department, especially vis a vis Dr Jackson's.

270 The Claimant wrote to Dr Haynes on 4 July 2016 at 10:28. She referred to the Sixth Form prom which was a different event from the departmental meal, which had taken place on the preceding Friday night (p463). She then reported to Dr Haynes that it had come to her attention that Dr Jackson was, and she stated that she was quoting from the students' exact words, "*bragging that she is now head of social science, that she had demanded to have her own classroom and her own budgets to make changes to the classroom or she had threatened that she would resign*".

271 The Claimant sent a further email to Dr Haynes on 4 July 2016 at 13:45 in which she gave Dr Haynes more detail of the reasons for her concerns (p465).

272 The Tribunal also quoted from this contemporaneous correspondence to capture a flavour of some of the difficult relationships which the School was having to manage as between the different members of staff.

273 The Tribunal also noted that when Dr Haynes asked the Claimant about the departmental meal at the meeting on 6 July, the Claimant gave Dr Haynes answers about the consumption of alcohol which the Tribunal considered reasonably justified concern on the part of Dr Haynes. This led in due course to further investigation.

274 The predominant issue however that initially emerged from the conversation between Dr Haynes and the Claimant about the departmental meal on 6 July 2016 was a concern about whether the Claimant had had inappropriate conversations with students about a colleague.

275 The concerns raised about the conduct of Mr Barrett were not as extensive as those raised about the Claimant because there was no issue as far as Mr Barrett was concerned of inappropriate conversations criticising a colleague, and he was also not a Head of Department. Despite those differences in their circumstances, he was subjected to the same disciplinary investigation in terms of the departmental meal as the Claimant was.

276 It was also not in dispute that a preliminary investigation into what had happened at the departmental meal was conducted by a member of staff (MLE) at the request of Dr Haynes (pp590 and following).

277 However, the Tribunal considered that this complaint was not well founded because it was clear beyond peradventure that the reason for the action the Respondents took was because of the allegations and cross allegations about the Claimant's conduct and that of Mr Barrett. The complaint under Issue 11.16 was therefore not well founded.

278 Issue 11.17 (Item 75) was that the Claimant was victimised on the same date (6 July 2016) in that Caroline Haynes informed her that a restructure of middle management would take place, which the Claimant took as a threat.

279 Mr Michael Muldoon (the Fourth Respondent) was to be the new Principal of the School starting in September 2016, as an internal promotion. He was looking at implementing a restructure based on value for money and accountability of middle leadership. It was not Dr Haynes' initiative.

280 There was also a record of Dr Haynes trying to explain to the Claimant something about the process during the meeting of 6 July 2016. At page 467 of the bundle there is a note of Dr Haynes raising the issue of the organisation of the teaching of Sociology and asking the Claimant whether she now understood why Sociology had been taken away from Social Sciences so that they could address any misunderstanding. The Tribunal considered that these notes of the discussion gave the clear impression that Dr Haynes was attempting to reassure the Claimant. She also referred to the fact that Mr Muldoon as Principal would consider the whole structure and that he would consult on it. There was no evidence that this was intended to be issued as a threat. It was also clear as is apparent from the allegation that the Claimant was told that it was a restructure affecting all of middle management. It could not reasonably have been understood by the Claimant at the time as being directed at her alone.

281 Later in the meeting of 6 July 2016, Dr Haynes returned to the issue of the

restructure and was noted as stating clearly to the Claimant that she was Curriculum Leader of Social Sciences, that Dr Jackson was teaching Sociology and that she would take all the Sociology and be responsible for it. The notes of the meeting indicate that the Claimant appeared to be reassured by this answer and stated that she was now clear and she needed clarification of the Curriculum Leader "*bit*". Dr Haynes reassured the Claimant again that nobody had taken her title (p471).

282 In all the circumstances the Tribunal considered that the Claimant had not established the primary facts that there was any threat or intention to threaten her. Indeed, the way in which the issue was put did not suggest that this was the intention of the Respondents but rather that the Claimant took it as such. The Tribunal considered that Issue 11.17 was not well founded in the circumstances.

283 There were also various whistle blowing allegations in this timeframe: Issue 28.1(Item 152); Issue 28.5 (Item 156), Issue 28.6 (Item 157), Issue 28.8 (Item 159) and Issue 28.9 (Item 160). These alleged that as a result of having made whistle blowing disclosures as specified in the list of issues (Issues 27 - 28 (Item 150)), on four dates, namely 6 July, 16 July, 17 October and 11 November 2016, the Claimant was subjected to the following detriments:

283.1 That Caroline Haynes told her that she would face disciplinary proceedings and could have been suspended on 15 July 2016 (Issue 28.1(a)); and

283.2 On the same date instructing the Claimant not to talk to anyone about the issue and that a note would be made by the First Respondent, Dr Haynes of anything she discussed (Issue 28.1(b)).

283.3 That on 15 September 2016 Caroline Haynes appointed herself as investigator (Issue 28.5(a)); and

283.4 That further changes were made to the allegations during the disciplinary investigations which, the Claimant contended contained no factual evidence and were based upon Dr Haynes' meeting and information provided by Janet Shipp (pp483 at 488) (Issue 28.5(b)).

283.5 That on 14 October 2016 Michael Muldoon warned Lyndsey Wood against making a statement in support of the Claimant (Issue 28.6 (Item 157)).

283.6 That in November 2016 Caroline Haynes refused the Claimant's postponement of the hearing Issue 28.8 (Item 159). As set out above these facts have already been considered as a victimisation complaint and a sexual orientation harassment complaint.

283.7 Finally, by Issue 28.9 (Item 160), that Connie Kerr:

283.7.1 refused to postpone the disciplinary hearing;

283.7.2 considered the Claimant's disciplinary and grievance together;

283.7.3 dismissed the Claimant;

283.7.4 held the disciplinary in the Claimant's absence; and

283.7.5 did not consider any evidence in support of the Claimant.

284 The whistleblowing disclosure which was relied on by the Claimant as set out in the table of issues at Issue 27 (Item 150(f)) was as follows "*…the Claimant told the Fifth Respondent's Executive Principal, Caroline Haynes (the First Respondent), that there were annual departmental meals with sixth form students at which alcohol was consumed by staff and students and that some of those members of staff were members of senior management and that this raised safeguarding issues*".

285 Even by the end of the case, the Claimant had not properly set out all the elements that she relied on to establish each occasion on which she said that she made that disclosure. In her oral evidence in cross-examination, this (Item 150, Issue 27) was put to her towards the end of her evidence and she confirmed that her whistle blowing disclosures were that she had raised other people were having meals with students. Thus, although she provided dates of the alleged disclosures to the Tribunal at the beginning of the hearing, she did not clearly identify in each case what specific factual matters were said to have amounted to the disclosures that were being relied on.

286 The 6 July 2016 disclosure, the first one relied upon, was treated during the hearing as appears to have been the reference to the Claimant saying during her meeting with Dr Haynes on 6 July 2016, "*other departments do it*" i.e. have departmental meals (p471).

287 The Tribunal considered that when the Claimant simply made the assertion on 6 July that other departments also "did it", this was insufficient to amount to a disclosure of information which otherwise met the definition of a protected qualified disclosure.

288 The second date given by the Claimant as being a disclosure date was 16 July 2016. No relevant events in this case happened on 16 July. It was the Saturday after the Claimant had had a distressing time at work on Friday 15 July and had left work early. There was a further occasion in the meeting with Dr Haynes on 15 September 2016 at which the Claimant (p487) again asserted that other departments drank alcohol when they were out and that staff were drinking it at the Year 13 prom. This may have been a typing error and that the Claimant meant to refer to 15 September 2016 rather than 16 July 2016. Unfortunately, this detail was not clarified during the hearing or in submissions and as set out above the Claimant did not actually rely on the conversation with Dr Haynes on 15 September 2016.

289 In all the circumstances we could not find on the balance of probabilities that the Claimant had made a disclosure of information on 16 July 2016 as alleged.

290 The third date for the disclosure given by the Claimant was 17 October 2016. The only matter that we had evidence about on that date was the Claimant's attendance at an occupational health assessment (pp555 – 557). There was nothing in the notes of the meeting to suggest that the Claimant had made a protected disclosure

about other people having similar experiences with their students. This appeared to be yet another matter sadly where the Claimant had failed to accurately identify the evidence that she relied on. Her witness statement mentioned the occupational health meeting taking place on 17 October and the suggested adjustments, but nothing else (para 261).

291 We did not find therefore that any disclosure of information had been made on this date, as alleged by the Claimant.

292 During the course of the hearing the Claimant appeared to wish to enlarge this case to include as a disclosure the fact that she had delivered an envelope (C1, p191) on 19 September 2016 to Jan Shipp. On that page there was a photocopy of the envelope which contained some documents which were delivered to Ms Shipp. However, the documents were delivered anonymously. At p496A – G were further documents which were said to support the picture of other staff having done what the Claimant was accused of, with no adverse consequences for them. The covering note was in the following terms:

> "*Dear Jan and Gavin,*
>
> *I am contacting you as safeguarding related staffs. I am obliged to refer the enclosed items discovered which breach TTC rules relating to Face book.*
>
> *The following pages are evidence of departments who have live Face book groups for their department (both past and present); you will see that Gavin Byford is neither a member nor admin for any of them. I am sure that this is an oversight by experienced teachers/middle managers.*
>
> *It may be of use to have up-to-date training on this issue as it seems that many departments are not fully aware of the rules related to Face book groups.*
>
> *Yours sincerely*"

293 The letter was not signed, and did not state who it had come from. There was no reference in the Claimant's witness statement to having delivered these documents.

294 The copy of the letter in the Tribunal bundle had the receipt date in manuscript in Ms Shipp's handwriting. She had also endorsed that this was to be addressed on 25 November and that Gavin Byford was to see the four departments to be added with admin rights – a reference to regularising the position in terms of compliance with the social media policy.

295 The documents delivered to the Fifth Respondent about other people who had also participated in meals with Sixth Formers were clearly relevant as evidence of the context to be taken into account in relation to determining the gravity or otherwise of the Claimant's disciplinary offences and were relevant in terms of the Claimant's argument about the proportionality of the penalty imposed.

296 In his written closing submission Mr Harris did not deal with each of the dates of the alleged disclosures and how each met the statutory definition. He dealt with the

disclosures globally and then dealt with the detriments that he said had been caused by these. In all the circumstances, it did not appear to the Tribunal that the Claimant had adequately set out to the Respondents that she would be relying on the delivery of these documents as a protected disclosure by the start of the case.

297 The fourth date relied on by the Claimant as a further date on which the disclosure was made was 11 November 2016. At page 129DI paragraph 235 (Amended/particularised claim), she referred to the particulars of her grievance which she provided on 11 November 2016. At para 231 the Claimant again reiterated that the disclosure was that she had revealed that the allegations of impropriety regarding the sixth form meal and social media breaches reflected "*common practice across the school*".

298 Further, at paragraph 235 the Claimant specifically indicated that she made a disclosure in her grievance letter (pp658 – 682).

299 In the grievance document the Claimant used sub-headings ostensibly to identify the content of the paragraphs under those sub headings. The Tribunal was taken to paragraph 76 on page 673 which contained a statement "*I raise these breaches as disclosures qualifying for protection under Section 43B(1)(b)(d) of the ERA 1996. I expect these disclosures to be taken seriously and formally investigated independently of my grievance*". That paragraph was at the end of a section of the grievance which started some two pages earlier (p670) under the sub heading "unlawful discrimination on protected grounds of sexual orientation".

300 In his closing submissions at paragraph 123, Mr Harris stated "during cross-examination Dr Haynes conceded that the Claimant did disclose information. This information detailed the ongoing alleged breaches of the school teachers in terms of Face book and social events where alcohol was available".

301 In accordance with the principles on this issue in decided cases which bind this Tribunal, we found that when the Claimant repeated this assertion in the grievance of 11 November 2016 and gave some details, this amounted to the giving or disclosure of information which tended to show that a person was failing or likely to fail to comply with legal obligation, or that the health and safety of students were being placed at risk.

302 The Claimant also needed to establish that she held the reasonable belief that the disclosure tended to show that a person was failing or likely to fail to comply with a legal obligation and/or that the health and safety of the students was at risk, in order to meet the statutory definition.

303 The Claimant had not conducted full investigations into the circumstances of the other events. When the matters were raised by the Claimant, the School investigated them. They found that they were departmental meals conducted broadly within the School's protocols. On the evidence available, the Tribunal had no proper basis for rejecting the School's findings. The Claimant merely asserted, with very little by way of concrete evidence, that this was not the case.

304 The Claimant's description of the party in her grievance particulars (pp673-674, paragraphs 77, 84) was in a section headed "Unlawful discrimination on protected grounds of sex". She expressly criticised the disciplinary action being taken against

her and made reference to criticism about the consumption of alcohol. She alleged that this was direct sex discrimination. However, at paragraph 111 on page 681 in the grievance, the Claimant stated that when she was confronted by Dr Haynes with allegations of impropriety regarding the 6th form meal and social media breaches, she chose to reveal that this was common practice across the school. This is set out at paragraphs 111-116. In this grievance she relied on the presentation of the list of departments which had also organised a leavers' meal.

305 The Tribunal considered that this evidence lent considerable weight to Mr Panesar's submission that the Claimant cannot have had the belief that the incidents that she relied on and raised with the School, of other staff having arranged social events for students at which alcohol was consumed and also having used social media in similar circumstances, raised safeguarding issues because it was a fundamental and persistent part of the Claimant's case sustained throughout that she did not accept that her own admitted behaviour on 24 June 2016 raised safeguarding issues, or constituted conduct which warranted disciplinary investigation.

306 The Tribunal agreed with Mr Panesar's contention that, for example, the Claimant had been "repeatedly vociferous that a much more significant incident did not raise safeguarding issues" (p82 of R18).

307 The Tribunal considered that in all the circumstances the Claimant had failed to establish an important element of the whistle-blowing complaint which was that the employee was providing information which in their reasonable belief, tended to show that a person was failing or likely to fail to comply with a legal obligation, or which placed the health and safety of the students at risk. That adverse conclusion delivered a fatal blow to the whistle blowing complaint.

308 Issue 28.1 (Item 152) alleged whistleblowing detriments in two respects arising from the conversation with Caroline Haynes on 15 July 2016. The Tribunal has set out elsewhere in these reasons the nature of the communication between Caroline Haynes, the Claimant and Brian Barrett in the meeting of 15 July. The Tribunal considered that the Fifth Respondent acted properly by putting the Claimant on notice of the possibility of a disciplinary process. The Tribunal considered that the Fifth Respondent could have suspended her in the circumstances given the nature of the allegations, and that Dr Haynes acted responsibly and in a proportionate manner by not taking that action given the imminent summer holidays. Instead she took the step of instructing the Claimant not to speak to students.

309 Finally, the Tribunal considered that where there was a prospect of disciplinary action, it was normal for an employer to request that the matter not be discussed with other employees.

310 The Tribunal did not consider that there was any prospect of our finding that these steps taken by Dr Haynes on 15 July were connected in any way with the disclosures relied upon. They were self-evidently done in respect of the concerns that the School had about the conduct of the Claimant. Further, as set out above Mr Barrett was also questioned about his conduct at the same time in the same meeting. No-one suggested that he had not made a protected qualifying (whistle blowing) disclosure before that date.

311 In all the circumstances, the Tribunal concluded that both parts of the complaint in Issue 28.1 were not well founded.

312 The next victimisation complaint was Issue 11.19 (Item 77) about events on Monday 18 July 2016. There were two parts to this issue. First the Claimant alleged that the School failed to have a return to work meeting/assess the Claimant's health Issue 11.19(a)); and that Janet Shipp made no contact with the Claimant about cover (Issue 11.19(b)).

313 The Tribunal considered that the complaint about a return to work meeting and an assessment of the Claimant's health was misconceived as the Claimant had not been absent on sick leave. She was treated as being on compassionate leave. This was confirmed in paragraph 11 of Mr Muldoon's statement.

314 The background to this complaint was an incident which had occurred on Friday 15 July 2016 in which the Claimant had become rather distressed during the course of the working day. She had left the School premises, someone had called her wife who had subsequently accompanied the Claimant home.

315 The Claimant was distressed after a meeting that had taken place with Dr Haynes also on 15 July. Effectively Dr Haynes had told the Claimant that she was conducting a fact-finding mission (p475) in relation to the Social Science (departmental) meal with Year 13. She asked the Claimant further questions mainly related to the consumption of alcohol and also about which members of staff were present. Mr Barrett was also present at the meeting and was also questioned by Dr Haynes. At the end of the meeting which lasted some 10 minutes according to the notes, Dr Haynes told both members of staff that she had serious concerns about unprofessional conduct and drinking in front of students particularly when it had been raised as a concern to her. She stated: "*I cannot ignore it*". She then told both staff members that she was instructing them not to discuss the conversation with any staff or students as this was a confidential procedure. She warned them that if they discussed this, they put themselves at risk of a disciplinary process. She stated that she needed to take advice and she suggested that they did also. She thanked them for their candid response and hoped that it helped to develop trust. She asked them to appreciate that there were concerns as they had acknowledged and that this matter would be picked up after the summer holidays. The Claimant then reacted as referred to above by exhibiting considerable distress and her wife was called and eventually accompanied her home. No sick note or certification was presented by the Claimant. Indeed, she returned to School on Monday 18 July as normal. She had left the environs of the School at some point shortly before 2pm on the Friday.

316 The Tribunal considered that in all the circumstances there was no reason to have held a return to work meeting. The Tribunal also took into account that the school term was nearly over, with the holiday due to start on either 19 or 20 July 2016 (p474). Further neither side referred the Tribunal to any relevant policy which suggested that in these circumstances the holding of a return to work meeting was to be expected.

317 The second part of Issue 11.19 was the complaint that Janet Shipp had made no contact about cover. Janet Shipp gave evidence that she was not responsible for arranging cover at this point. There was no evidence to contradict this. In those circumstances therefore, the Tribunal did not consider that there was any criticism to

be laid at her door in this respect. Nor, in any event, was there any evidence that cover needed to be arranged for the Claimant.

318 Issue 11.19(b) was therefore not well founded and was dismissed.

Issue 13.12 (Item 99)

319 In Issue 13.12 (Item 99), by way of a complaint of sexual orientation harassment, the Claimant alleged that in November 2016 Carolyn Haynes refused a postponement despite the Claimant's medical health to which Connie Kerr agreed. This is a complaint about the conduct of the disciplinary proceedings against the Claimant which ultimately led to her dismissal. The Tribunal relied on its findings above about the disability discrimination victimisation complaint about the same facts (Issue 11.23).

320 There was no evidence whatsoever that the refusal of the postponement was in anyway related to or caused by considerations of sexual orientation. The Tribunal has already referred above to the fact that the Fifth Respondent was in receipt of occupational health advice as to what steps were required in order to enable to Claimant to attend the disciplinary hearing and that the steps in the occupational health report were implemented. It was clear that the refusal of the postponement of the disciplinary hearing was because all the steps advised had been followed and to allow the hearing to take place within a reasonable time. Furthermore, such evidence as there was about the potential effects on the Claimant of a postponement indicated that it was in her best interests for the hearing to proceed. The Occupational Health Department had not advised the School that the Claimant was not fit to attend a disciplinary hearing.

321 The final victimisation allegation was Issue 11.23 (Item 81) whereby the Claimant complained that Caroline Haynes refused the postponement despite the Claimant's medical health, to which Connie Kerr agreed. As stated above the factual findings overlap with many already made in the context of other legal heads, such as Issue 13.12.

Issue 28.5 (Item 156)

322 This was a whistle blowing allegation. The disclosures which were relied on, which had taken place prior to the events complained of in this Issue, were said to have happened on 6 and 16 July 2016 (Item 150, Issue 27). Albeit that the Tribunal found that the protected qualifying disclosures relevant for this Issue had not been established, the Tribunal went on to make some findings about the detriments alleged to be whistle-blowing detriments.

323 The first assertion that Caroline Haynes appointed herself as investigator on 15 September 2016 was not established on the facts. As Executive Vice Principal, she became aware the previous term of matters which it was appropriate for her to have investigated. She was not however directly involved in the investigation or the subsequent disciplinary hearing and appeal.

324 Further, it was clear that Caroline Haynes was not appointed as investigator as a consequence of the Claimant's alleged disclosures.

325 In sub paragraph b of this issue the Claimant referred to further changes made

to the allegations during the disciplinary investigations. This appeared to be a reference by the Claimant to an accusation of bullying [C3 paragraph 146]. The Claimant complained during the hearing that Dr Haynes had described her previous disciplinary warning as relating to an allegation of "bullying" (p488). If that was what the Claimant was referring to, this was not an additional disciplinary allegation. It was simply a reference back to something the Claimant had accepted a warning in relation to and which was currently outstanding. The Claimant did not make it clear what additional matters she was complaining about in this sub paragraph.

326 If any changes were made during a disciplinary investigation to the allegations, the Tribunal did not consider that there was anything objectionable to that in principle. The purpose of an investigation was to consider what matters were worthy of further enquiry. This could mean that matters which had originally been the cause of concern were no longer pursued or that matters which had not previously been brought to the attention of the employer came to light, and then formed part of the subsequent formal disciplinary inquiry.

327 In relation to Issue 28.5 (b), therefore the primary facts were not established.

Issue 28.6 (Item 157)

328 The complaint was that Michael Muldoon warned Lindsey Ms Wood against making a statement in support of the Claimant. This issue similarly could not be considered as a whistle-blowing detriment because the Tribunal had not found that the Claimant made the relevant disclosure.

329 The Tribunal sets out our findings in any event in respect of this matter because they are in any event relevant in the context of consideration of the unfair dismissal complaint below: Issue 2.1.4. The Claimant's allegation (as set out at paragraph 166 of her witness statement), was that on 14 October 2016 Ms Wood had a Facebook discussion with the Claimant's wife and told her that Mr Muldoon had telephoned her at home and told her that the Fifth Respondent would make life difficult for her.

330 A considerable amount was made by the Claimant of the fact that the telephone bill which was produced by Mr Muldoon only contained records of some 8 or 9 telephone calls on what was thought to be the material day. The Tribunal considered that it was impossible for Mr Muldoon to try to prove a negative. He completely disputed that he had made the telephone call. What was more notable was that the Claimant did not produce any telephone records from the alleged recipient of the telephone call from Mr Muldoon which could have demonstrated that the call was received. It was also notable that the Claimant's wife, who was apparently the first recipient of this information, and who attended the trial of this matter throughout was not called to give evidence.

331 To the extent that the school attempted to produce evidence to establish the negative, the Tribunal considered that this was an attempt to assist the Tribunal, it was not that the burden lay on them.

332 Mr Muldoon's case on this was set out at paragraph 34 of his witness statement that at no point did he deter Lindsey Wood in any way from making a statement. His case was that Ms Wood was upset as she felt under pressure to make a statement for

the Claimant and Mr Muldoon told her that if she wanted to do so she should feel able to do so and would be given any support she needed by the College.

333 It only latterly became apparent where and how Mr Muldoon was alleged to have made the threat to Ms Wood. Ms Wood stated in evidence that she had received a call from an 01255 number in the evening. Mr Muldoon was clear about where he was in the nights up to and including 14 October 2016, namely that he was at home, where he was looking after his sons, save for on 13 October 2016 when he was at the school for an open day. This was credible evidence and the Tribunal was not presented with any evidence which undermined or contradicted it, so we accepted it as correct, on the balance of probabilities.

334 Mr Muldoon described that he had only one landline number at his home, which was a Sky telephone number. All of the calls from that number from 8 October up to and including 14 October had been obtained and checked against Lindsey Wood's telephone number. Furthermore, again as described by Mr Muldoon, a record of all of the outgoing calls from the school for 13 October 2016 had been obtained and put in evidence. Mr Muldoon was clear in re-examination, that he had requested records of all outgoing calls, that the school only had one telephone number and that all such calls were shown on the bill for that number. There was no evidence of any calls to Lindsey Wood's number on the evening of 13 October.

335 The Claimant asserted that Mr Muldoon may have made the call from another location or another number. However, the Tribunal took into account that she had not adduced any evidence to indicate that Mr Muldoon was anywhere else. No questions about this were put to the other two teachers from the School who gave evidence. The Claimant belatedly sought an order for the production of telephone records in the 2018 hearing, but the Tribunal declined to make that order at such a late stage, and on grounds of proportionality, no prior application having been made by the Claimant.

336 The Claimant alleged that she was aware of this matter on 14 October 2016, which was prior to her disciplinary hearing, dismissal and appeal hearing. In the days immediately following the alleged call and the months up to the date of her dismissal, the Claimant lodged multiple complaints and protests about a whole range of matters, yet she made no reference to this call in them. These included:

336.1 A three-page letter on 16.10.16 (pp550-552) indicating that a grievance would be lodged. This was two days after the Claimant was allegedly told about the call.

336.2 A 24-page grievance on 11.11.16 (pp658-682) complaining about a whole range of matters including breach of the implied term of trust and confidence (p658), detrimental treatment because of protected disclosures, sex discrimination, disability discrimination, sexual orientation discrimination, breaches of the Health and Safety at Work Regulations, the ACAS Code, and the Respondent's own disciplinary procedure. The grievance mentions Lindsey Wood specifically, first at paragraph 33 stating that the College fabricated a complaint by her against the Claimant (referring to the Rebekah Kelly matter). Ms Wood was referred to again at paragraph 72 (p672) in relation to the giving of lifts. Despite complaining of whistleblowing, making a whole host of

claims against numerous members of college staff, and mentioning Ms Wood specifically, there was no complaint whatsoever that Mr Muldoon had sought to prevent anyone from giving evidence on the Claimant's behalf.

336.3 At p682a, on 14.11.16 – an email protesting about the holding of the disciplinary before the grievance.

336.4 At pp683a-b, on 15.11.16 – a two-page complaint about the disciplinary hearing. There was no mention of the call/ alleged suppression of evidence.

336.5 At p703, on 5 December 2016, 35-page appeal was submitted, with no mention of Ms Wood or anyone else being prevented or deterred from supporting the Claimant.

337 The Claimant's disciplinary hearing took place on 18 November 2016 and she was given notice of dismissal on 25 November 2016. That dismissal took effect on 19 February 2017.

338 The first mention of the alleged threat to Lindsey Wood was in the Claimant's ET1 presented on 17 February 2017 at paragraph 113 (p35).

339 Further, the allegation made in the agreed list of issues was that (multiple) witnesses were warned against giving evidence. A witness of far more central relevance, namely Brian Barrett attended the second disciplinary and was encouraged to do so by the Fifth Respondent (p1055). There was no mention of employees being warned against making statements in his witness statement.

340 The Tribunal took into account that if it had been made, the threat was potentially a very serious matter for the Claimant. Furthermore, it was likely, given the background set out elsewhere of the interaction between the Claimant and Ms Wood at the end of September 2016, and the conversation about giving the Claimant lifts home, that Ms Wood was understandably reluctant to give a character reference for the person who bullied her, and used the untrue threat from Mr Muldoon as a means of escaping having to do so.

341 The Tribunal concluded on the balance of probabilities that Mr Muldoon did not make such a threat/call in all the circumstances as set out above. The main reasons for this finding were the late making of this allegation, the failure to have raised it when other matters were being complained about by the Claimant, the lack of any explanation for apparently failing to complain about this issue sooner, and the poor evidential basis for it.

342 The Tribunal was satisfied therefore that the Claimant had not established the primary facts on which the allegation relied, and this allegation was not well founded.

343 The only factual matter which the Tribunal considered might have been affected by the ***Efobi*** case law was in relation to the issue of Mr Muldoon's phone call. This was because this was a matter which was not really chronicled in any documents. However, the Tribunal considered that the Claimant fell very far short of the threshold

of proving that Mr Muldoon had made that phone call and that the Tribunal did not consider that it came within the category where it was finely balanced and could have led to a different result if the burden of proof was neutral. The detailed submissions of the Respondents which the Tribunal adopted in this respect, clearly demonstrated just how far short the Claimant fell of proving this allegation.

Issue 28.8 (Item 159)

344 This complaint reiterated the issue about Caroline Haynes refusing the Claimant a postponement of the hearing in November 2016. This has already been dealt with above in the context of the victimisation (Item 81) and sexual orientation harassment (Item 99) complaints. In addition to any points made above, the Tribunal also found that Dr Haynes was the investigating manager and did not have the authority to postpone the hearing. It was a matter ultimately for the panel.

345 The complaint at Issue 28.8 was therefore not well founded and was dismissed.

346 The related complaints at Issue 13.2 (Item 89) and Issue 13.12 (Item 99) were similarly not well founded

Issue 28.9 (Item 160)

347 These complaints were all directed against Ms Kerr (Third Respondent only). Issue 28.9(a) repeats the criticism made earlier about Connie Kerr refusing to postpone the disciplinary hearing. The Tribunal's findings about this are set out elsewhere in these reasons so are not repeated here.

348 Issue 28.9(b) complained about the chair of the panel, Connie Kerr dealing with the discipline and grievance together. Objection was taken to this by the Claimant in the postponement request.

349 The Tribunal could see no possible basis for finding a connection between the Claimant's alleged whistle-blowing which, in any event, the Tribunal found was not established and the decision to hear the disciplinary and grievance together. The relevant evidence about this was at page 682A and 683. The Tribunal considered that there were valid and appropriate grounds for the School to have taken the decision to deal with the two matters together.

350 The Tribunal adjourned consideration of Issue 28.9(c) about the dismissal to detailed consideration of the dismissal which was all dealt with together.

351 The Claimant complained at Issue 28.9(d) about Ms Kerr holding the disciplinary in her absence and not considering any evidence in support of the Claimant. The Tribunal was satisfied that matters were getting stale by then (p683C). The School offered the Claimant the opportunity to be involved in the hearing by telephone but this was not taken up by the Claimant. Further, on 18 November 2016, the Claimant just did not turn up. Further still, there was no occupational health advice to the effect that the Claimant was not fit to attend the disciplinary hearing at this stage. Subsequent occupational health advice confirmed that it was in the Claimant's best interests for the hearing to continue.

352 The Claimant did not provide any specifics about the complaint in the second Issue 28.9(d) about not considering any evidence in support of the Claimant. The Tribunal noted that she made this criticism about a hearing which she did not attend. Evidence was given on behalf of the Third Respondent that time was taken considering the allegations and the postponement request. This was corroborated by the notes and the detail in the dismissal letter (p687).

353 The Tribunal considered therefore that in relation to holding the disciplinary hearing, this was reasonably and appropriately explained by the Respondents and the Claimant had failed to establish that the Third Respondent (or anyone on the panel) failed to consider any evidence in support of the Claimant in any event.

The Dismissal

354 The complaints about the dismissal itself entailed consideration of Issues 13.13 (Item 100); (Direct Sexual Orientation Discrimination or sexual orientation harassment); and Issues 1 - 4 (Items 1 - 8) (Ordinary Unfair Dismissal under Section 98(4) of the Employment Rights Act 1996; and Issue 28.9(c) (Item 160(c)) (Whistle-blowing Dismissal).

Issue 13.13 (Item 100) & Issue 27 (Item 150)

355 Issue 13.13 (Item 100), alleged that the dismissal of the Claimant with notice was either harassment or direct sexual orientation discrimination.

356 In light of the Tribunal's findings and conclusions above, the allegation that the dismissal was a consequence of the Claimant having blown the whistle was not well founded and was dismissed.

357 The Tribunal considered the unfair dismissal complaint under section 98 of the 1996 Act – ordinary unfair dismissal. The fact that the Claimant was dismissed was not in dispute. The first issue for determination was what was the reason or principal reason for the dismissal and whether the Fifth Respondent had established that it was a potentially fair reason. They said it was a reason relating to the Claimant's conduct.

358 The Fifth Respondent's case was that the reason for dismissal was the Claimant's misconduct in:

358.1 Setting up a Facebook Page in breach of the Fifth Respondent's (AET's) procedures.

358.2 Attending a public house with students where alcohol was consumed and purchasing a round of alcoholic drinks for students.

359 The Fifth Respondent said that the 2 acts of misconduct both occurred during the unexpired term of a written warning for misconduct. The misconduct relied on was (a) the Claimant's conduct on 24 June 2016 (the pub visit), and (b) the Claimant's breach of the Fifth Respondent's social media policy in the run-up to the pub visit.

360 The Claimant was dismissed following a disciplinary meeting chaired by Connie Kerr and a subsequent appeal hearing chaired by Kathy Roebuck. Both gave evidence

in chief which clearly confirmed the two reasons relied on above.

361 There was only limited challenge to their evidence on behalf of the Claimant. In particular, there was no challenge to the evidence of Connie Kerr that the Claimant was dismissed by reason of conduct/ for the specific reasons of the events of the 24 June 2016 and breaches of the Social Medial Policy. Further, other than asserting that Kathy Roebuck had 'rubber stamped' the decision of the original disciplinary panel, there was no challenge to her evidence that the Claimant was dismissed for the same misconduct. In answer to the suggestion that the appeal panel had merely 'rubber stamped' the decision of the disciplinary panel, Kathy Roebuck was clear that the appeal panel was independent, had had no instruction and that their decision had been entirely their own.

362 Ms Kerr and Ms Roebuck were not involved in any of the events prior to the disciplinary and appeal processes. There was thus no evidence to contradict their case that they were independent, and made their respective for any other reason than the disciplinary matters themselves.

363 The Tribunal considered what other evidence there was that tended to show that the dismissal was because of the Fifth Respondent's genuine belief in the Claimant's misconduct.

364 The first of these was the extant written warning issued on 4 February 2016 and to be kept on the Claimant's record for 12 months (p444). As set out elsewhere in these reasons, the warning was issued with the Claimant's agreement and was imposed because of the Claimant having acted in an "*insulting, intimidating, aggressive way towards two colleagues during the autumn term*". The letter recording the written warning stated that *"any further misconduct could lead to further disciplinary action being taken against you which, if substantiated could result in dismissal.* The Claimant signed the letter at the time (p445).

365 It was necessary to consider whether the Fifth Respondent had reasonable grounds on which to have reached the view that the Claimant was guilty of the misconduct alleged. The Tribunal found that the Fifth Respondent reasonably found that the Claimant bought alcoholic shots for students on 24 June 2016. Brian Barrett was interviewed on 10 October 2016. Notes of the interview were in the hearing bundle (p534). In that interview he stated:

> *"When students said they were going to come we chose the purple dog as they have bouncers. So we thought it would be safer.* ***We sat down, EHa bought a round of shots. I contributed money to a round later on.*** *I went to the bar and bought a round, from then on I bought my own 2 Jagermeister and 2 goat shed ale."*

366 Mr Barrett was the only other teacher at the event. There was no reason put forward by the Claimant as to why his account should not be relied upon by his employers.

367 Despite having bought alcohol for students, the Claimant twice denied buying drinks for students at all. When Caroline Haynes interviewed the Claimant on 15 September 2016 (p483) and questioned her about buying drinks, the following

exchange took place (p486). [The Claimant's answers are indented in the text below]:

- *Where was the meal?*
  - *Zizzi's*
- *Then you went on to this pub?*
  - *Yes*
- *I assume these drinks in the jam jars are cocktails?*
  - *Yes*
- *Who were buying the drinks?*
  - *They were bought in rounds, I didn't buy any.*
- *Did BBa buy a round?*
  - *I went to the bar at the beginning I bought myself a drink*

368 The Claimant was asked again about buying drinks (p493). She initially denied buying drinks for the students once again. Then, when questioned again, she admitted that she had done so in the following exchange. (The Claimant's answers are indented.)

- *Did you pay at the pub for any drinks for students?*
  - *No*
- *Are you sure?*
  - *Right at the beginning I bought a round of shots*
- *For everybody?*
  - *Yes*
- *A shot measure*
  - *Apple flavoured, Jagermeister, they are watered-down*
- *Are they alcoholic?*
  - *Yes*
- *What shot?*
  - *I cannot remember they gave a selection I picked the sweetest one*

369 Mr Barrett was junior to the Claimant and reported directly to her. The Claimant was his Curriculum Lead. He was interviewed on 15 July 2016 (p475). In that interview Mr Barrett admitted that he had drunk too much, in the following exchange:

- *How many students?*
  - *At the meal, 8*
- *Was everyone drinking alcohol? Did anyone become the worse for wear?*
  - *At the meal, yes. I did*

- *At the meal or later?*
  - *At the meal*

370 In the same interview, Mr Barrett (although he disputed the accuracy of this note at the Tribunal hearing), was noted as stating that both he and the Claimant had had too much to drink in front of the students, in the following exchange (p475):

- *You went to the Purple Dog, how long were you there?*
  - *2½ to 3 hours*

- *During that time did yourself or EHa have too much to drink in front of the students?*
  - *Yes, but we were professional in front of the students*

371 When he was asked if the Claimant had had too much to drink, Mr Barrett's answers were somewhat evasive. He responded by saying that the Claimant was fine the day after and that he could not be expected to answer a question as to whether she appeared drunk as it was subjective. The exchange was recorded (p476) as follows:

- *Had she had too much drink?*
  - *The day after she said she was fine, it was her diabetes, she said she had been sick.*

- *Was she behaving in public, in front of the students, as if she was drunk?*
  - *How subjective is that? What do you expect me to say?*

- *Just the truth with no embellishments*
  - *Just what I saw, she said she was sitting down, she was jovial, joking, talking, not slurring her words.*

372 In addition, the Fifth Respondent had other evidence from the initial report about her conduct from the mother of a student, and the information gleaned from the students' statements given to the member of staff who Dr Haynes had asked to make preliminary investigations.

373 Thus, Student A, who was present at the dinner at Zizzi's and the Purple Dog pub, reported to her mother (p572) that '*the teachers were really drunk Ms Caris-Hamer was crazy drunk, it was embarrassing'.* Student D, Ms Renee Kennedy Edwards (who was called as a witness on behalf of the Claimant) when asked on 12 July, reported (p593) inter alia, that:

- At the Purple Dog, two students '*quite drunk, nice drunk though'.*

- At the Purple Dog *'that's where everyone got drunk'*

374 At the Tribunal hearing, Ms Kennedy Edwards attempted to suggest that the record of her interview had been altered. However, it had not been suggested at the disciplinary or appeal hearings that the students' accounts of the evening had been altered, even though reference was made to these accounts during both appeal hearings.

375 Thus, at the time of making their decision, the Fifth Respondent had no reason to believe or suspect that the students' accounts had been altered or were unreliable. Further, there was no credible evidence that this student's account was altered.

376 There were then additional matters arising from the evidence reviewed by the Fifth Respondent which tended to suggest to the Fifth Respondent that the Claimant was guilty of the misconduct alleged; and that it was within the band of reasonable responses for the Fifth Respondent to find that this was the case:

376.1 The Claimant and Mr Barrett did not monitor the students' drinking. Despite being with the students for over 4 hours during which the students were bought alcohol by the teachers, and bought and consumed it themselves, the Claimant did not monitor their drinking. In her (lengthy) grievance prior to the disciplinary hearing, the Clamant stated (p674 at paragraph 80) "*During the evening alcohol was consumed but as the students were all 18 we did not monitor their consumption..'.* The Claimant's case was that they made sure no students were drunk in their presence, but that statement was plainly contradicted by the accounts of the students, which the Fifth Respondent was entitled to accept.

376.2 The Claimant knew that it was neither permitted nor appropriate for her to leave a member of staff alone with students at a social event. At her interview on 15 September 2016 (p485) the Claimant accepted that it was not appropriate to have left a member of staff alone with students at a social event, stating '*Yes I would not want that. [Blank] wanted one but I said no, someone else has to be there, be all together so we can keep an eye on them'*.

376.3 The Claimant left Brian Barrett alone in the pub with students. At (p490) the Claimant accepted she had (a) left Brian Barrett alone in the pub with students and (b) not advised him to go home when she left. She said she had not done this because Mr Barrett knew her views on the subject.

376.4 Brian Barrett accepted that he had drunk too much. In his interview on 10 October 2016 (p534 at p537), Brian Barrett acknowledged that he had previously stated that he had drunk too much in the presence of the students. He confirmed that he was not seeking to resile from that account.

376.5 Mr Barrett accepted that his behaviour on that night was unprofessional and raised safeguarding concerns. He signed a written warning on 17 October 2016, by which he also acknowledged this.

376.6 The Claimant accepted that she was a 'responsible adult' in relation to the students on 24 June 2016. At the Claimant's interview on 15 September 2016 (p494) she accepted that the students would still have regarded her as a professional responsible adult in that setting.

377 In relation to whether the Claimant had acted in breach of Social Media Policy, it was not in dispute that:

377.1 The Claimant created a closed Facebook site, of which she was the sole administrator.

377.2 The Fifth Respondent's Social Medial policy (p205) provided in the section entitled 'Specific Advice for organizing social networking activities at Tendring Technology College', that the Assistant Principal for ICT (Gavin Byford at that time) should have access to any social media activity site, for the teacher's protection (p207).

377.3 The policy further provided (p207), that staff should discuss the purpose of the social networking activity and what they were trying to achieve, with the Assistant Principal for ICT, before starting the activity.

377.4 The Claimant neither discussed the site in advance with Gavin Byford, nor did she grant him access to it until after 24 June, when instructed to do so by Caroline Haynes.

378 Further, the Claimant accepted when interviewed on 15 September 2016 (p483) that:

378.1 She had considered whether to add Gavin Byford as an administrator but had not done so.

378.2 It was an oversight on her part not to have added Mr Byford.

378.3 She had not spoken to Mr Byford (p484) and that omission was also an oversight on her part.

378.4 She realised in hindsight that she should have asked before setting up the site, and she apologized profusely for not having done that (p486).

379 Further, the Fifth Respondent's social media policy provided under the list of 'don'ts' (p208) that staff should not upload content on social media that reflects badly on the member of staff or the academy at which they work, or AET. The definition of such content included: *Negative content - Any content that could potentially reflect badly on the academy* (p209).

379.1 It was not in dispute that the Claimant posted a picture on Facebook at (p602) after 24 June which showed the Claimant and Mr Barrett with alcoholic drinks with students, at the Purple dog pub.

380 Further, the Fifth Respondent's social media policy provided under the list of 'don'ts' (p208) that staff should not upload content on social media that reflects badly on the member of staff or the academy at which they work, or AET. The definition of such content included: *Negative content - Any content that could potentially reflect badly on the academy* (p209).

381 Although the Claimant asserted in the Tribunal Hearing that she was unclear about the relevant policies, it was not in dispute that the Claimant had (a) previously set up sites in accordance with the Fifth Respondent's policy, and (b) considered adding

Mr Byford in this case, but chosen not to do so. Furthermore, all of the Fifth Respondent's policies (including the social media policy) were available on the Fifth Respondent's Comms Portal (as described in the re-examination of Caroline Haynes), a site which was available to all curriculum leads. This was not the virtual learning site which the Claimant asserted she had difficulty in accessing.

382 In light of the above findings, the Tribunal was satisfied that the reason that the Claimant was dismissed was because the Fifth Respondent believed that she was guilty of the disciplinary charges brought.

383 Further, they had reasonable grounds for believing that:

In relation to the events of 24 June

383.1 She had bought alcohol for students.

383.2 She had been aware that her junior colleague had bought a separate round of alcohol for students.

383.3 She had had alcoholic drinks with students both at a restaurant and later at a pub over a period of 4 hours.

383.4 The Claimant did not monitor the students' drinking.

383.5 The Claimant twice denied buying alcohol for students before admitting to having done so.

383.6 The Claimant knew she was a responsible adult for the students.

383.7 Mr Barrett had drunk to excess in her presence.

383.8 Nevertheless, the Claimant left the students in the company of Mr Barrett who had (in her presence) drunk to excess.

And that this conduct amounted to misconduct.

384 In relation to the alleged breach of the social media policy, the Fifth Respondent had reasonable grounds for believing:

384.1 The Claimant had previously set up pages complying with the Fifth Respondent's social media policy, including notifying Gavin Byford.

384.2 The Claimant set up a closed Facebook page of which she was the administrator.

384.3 The Claimant did not consult or include Gavin Byford on the Facebook page, nor did she include him on the site until after the index events.

384.4 The Claimant posted images of herself and Mr Barrett (who by that point had on his own admission drunk to excess) drinking alcohol with students on that page.

384.5 The Claimant accepted that she had breached the social media policy to the extent that she felt the need to apologise profusely.

384.6 The above behaviour amounted to clear, further, misconduct.

385 The next question was whether the College had carried out a reasonable investigation?

386 Almost the entirety of the matters for which the Claimant was dismissed were admitted by her prior to her dismissal, as listed above. The Fifth Respondent followed a disciplinary process which complied with the ACAS Code on disciplinary procedures.

387 In all the circumstances the Fifth Respondent's belief in the matters for which the Claimant was dismissed was plainly reasonable, and based on a reasonable investigation in light of their admission by the Claimant. As such the investigation by the Fifth Respondent was within the band of reasonable responses in the circumstances.

388 Reasons for dismissal which are related to the employee's conduct are potentially fair under section 98 of the Employment Rights Act 1996. We found that the Claimant was dismissed for a reason relating to her conduct, namely that the Fifth Respondent believed that she was guilty of the disciplinary charges in relation to her conduct on 24 June 2016 and her breach of the Respondent's social media policy, at a time when she had a current written warning. Such a reason is potentially fair under section 98 of the 1996 Act. The next issue was whether the College had acted fairly in dismissing the Claimant for that reason?

389 The Tribunal accepted that the dismissal fell within the range of reasonable responses for an employer for the following reasons:

389.1 At the date of the misconduct, the Claimant was the subject of a written warning for serious misconduct (intimidating, aggressive and insulting behaviour) which had been accepted by her.

389.2 The Claimant had committed further serious misconduct in the respects found as above; and, in contrast to Mr Barrett, had shown very little remorse or contrition in relation to her actions on 24 June, or acknowledgment that her actions constituted misconduct.

389.3 The Claimant had committed further misconduct in breach of the Fifth Respondent's social media policy, as stated above.

390 The Claimant cited other alleged instances of colleagues failing to comply with the social media policy and/or the rules about social interaction with students and argued that the dismissal was unfair by reason of inconsistency. The Tribunal rejected the Claimant's contention that her actions and omissions were no different from that of many other members of staff, for the reasons set out below. The contention that her treatment was inconsistent with that of other colleagues did not meet the criteria specified in case law. It was held in the case of ***Hadjioannou v Coral Casinos Ltd***

[1981] IRLR 352 that to render a dismissal unfair by reason of inconsistency, the circumstances of the conduct that is compared must be truly parallel.

391 In relation to the Facebook entries, only some of these in the Tribunal's bundle were before the disciplinary panel. The Tribunal took that into consideration when deciding what evidence was before the disciplinary panel and therefore whether the dismissal could be justified in the light of the evidence that they were asked to consider. Further the Claimant did not provide any sort of detailed commentary to put the Facebook entries which she submitted to the disciplinary panel in context. We accepted Dr Haynes' evidence about the enquiries that the school made about the other sites which did not have Mr Byford as administrator on them and about the 3 occasions the Claimant described other staff going out for meals with their students. We were satisfied that the situations as described by Dr Haynes and her evidence indicated that the circumstances were different.

392 The Claimant also argued that the dismissal was unfair for a number of other reasons.

393 The Claimant submitted some photographs to the appeal panel. There was no evidence before the panel or indeed this Tribunal about the dates on which the photographs were taken. The Tribunal accepted the evidence from the Respondent's witnesses that some or most of the staff pictured had already left the school before the relevant time frame. We did not have evidence of the applicable social media policy at the time of the photographs. Nor was there any evidence about context placed with these photographs. We noted in this context also that the College had asked Mr Byford to re-train/remind the staff about the social media policy**.** We noted however, that the Claimant had also accepted during her interview with Dr Haynes on 6 July 2016, that she had been trained on the social media policy which the Tribunal and more importantly, the disciplinary panel was aware was applicable.

394 With regard to the events of the 24 June 2016, all of the comparator cases cited by the Claimant were investigated by Caroline Haynes. We accepted her evidence on this issue as credible. In none of the instances cited by the Claimant at the time of her dismissal were staff shown to have purchased alcohol for students, drunk themselves to excess and then left students in a pub in the care of a sole member of staff who had drunk to excess. Furthermore, there were no other instances of students or their parents complaining about the levels of alcohol drunk by the members of staff and students present, as had occurred in relation to the outing on 24 June 2016.

395 In relation to social media policy breaches, whilst some other members of staff had not put Mr Byford as administrator of their site, the content of those sites was educational. The Claimant's site was of a social nature, and subsequently displayed inappropriate material in the form of the photo.

396 Thus, none of the examples cited by the Claimant amounted to truly parallel circumstances such that they rendered the Claimant's dismissal unfair. They fell very far short of that threshold.

397 Further, in none of the example cases cited was there the combination of an extant written warning, misconduct in relation to a social event, and further, breaches of

the social media policy. All three of those applied to the Claimant and in no cited comparator case.

398 In relation to the fairness of the dismissal, the Claimant complained about the integrity of the students' notes which emerged from the investigation carried out by Mel Lester, who had been asked by Dr Haynes to conduct a preliminary enquiry into the nature of the complaints and reports about impropriety in relation to the departmental meal ([R11 para 28]). The Tribunal took this point on board but considered that the most damning evidence about the disciplinary charges came from the Claimant's own mouth during the meetings with Dr Haynes on 6 July and 15 September. Further damning evidence about the episode also came from Mr Barrett when he was spoken to in July 2016.

399 The Claimant also contended that there were no blood alcohol documents produced. The Tribunal did not consider that this was relevant or determinative. As far as the unfair dismissal claim was concerned, the College was to be treated like an ordinary employer not like a police or prosecuting authority. They were entitled to have regard to relevant evidence from whatever sources as long as it was cogent evidence.

400 The unfair dismissal complaint was not well founded and was dismissed.

Employment Judge Hyde

31 July 2018