Case Number: 3201173/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Ejvet**

Respondent: **Genesis Education Trust**

Heard at: **East London Hearing Centre**

On: **Monday – Thursday 8 – 11 and Monday 15 April and Monday 20 – Friday 24 May (Friday 24 May Tribunal only), Thursday – Friday 20 – 21 June 2019**

Before: **Employment Judge Prichard**

Members: **Mrs S Boot**
Mrs BK Saund

Representation

Claimant: Mr C Milsom, counsel instructed by Foot Anstey LLP solicitors, Exeter

Respondent: Mr F Evans, counsel instructed by Mr M Springer LB Waltham Forest Legal Services

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the claimant's complaint of unfair dismissal fails and is dismissed.

Her complaints of disability discrimination s. 20 and 15 of the Equality Act 2010 fail and are dismissed.

Her complaints of public interest disclosure under s.47B and 103A of the Employment Rights Act 1996 fail and are dismissed.

REASONS

1 The claimant, Ruth Ejvet, is an experienced teacher. At the time of this hearing she is aged 58. She has spent 30 years in education, and 20 of those as a head-teacher, 10 of those at St Margaret's Primary School in London Borough of Barking and Dagenham.

2 These tribunal proceedings arise from the conversion of St Margaret's from a stand-alone Church of England Primary School to part of a multi academy trust - Genesis Education Trust, the present respondent. The merger and creation of the Trust occurred on 1 April 2017. The other schools within the Trust are St Mary's and St Saviour's Primary Schools, Church of England Primary Schools both in the London Borough of Waltham Forest. This is a multi-academy Trust. Prior to the Trust, St Marys and St Saviours were federated schools. They were teaching schools able to provide support to other primary schools in Waltham Forest or other London Boroughs.

3 The merger, as we have been told, was a bitterly unhappy experience, not only for the claimant, but for several other members of the St Margaret's staff and the governing body, some of whom have been witnesses for the claimant at this tribunal hearing. The witnesses for the claimant at this tribunal hearing were Anita Fenn, David Hodge, Marcia Simon, the former finance officer, and Fiona Sapiano, former school teacher.

4 The claimant's dismissal arose from the school's awarding a £145,000 building contract to Elite Building and Maintenance Limited, a building company owned and run by the claimant's husband, Nish Ejvet and her brother-in-law Fez Ejvet. Following an audit published shortly after the merger, the respondent was surprised and alarmed to discover that this substantial building contract had apparently been awarded without the normal tendering processes being followed.

5 As this contract had been awarded prior to 1 April 2017 this had to be judged against the standards of the Scheme for Financial Regulation of London Borough of Barking and Dagenham. The financial regulation applicable to academies is, in fact, much stricter than local authority regimes.

6 This and other concerns which had come to light formed the basis for the claimant's summary dismissal by the respondent on12 January 2018. Prior to that she had been suspended with effect from 5 September 2017, although she was actually off sick from 6 July 2017 continuously for 6 months until her dismissal. The Med 3 sick certificates recorded her diagnosis as being "work-related stress and anxiety", "depression and work-related stress", and "stress at work".

7 There were two audits which we have been shown. The first was carried out by Strictly Education Limited. They visited on 6 July and their report was published on 24 July. The trust-approved Haslers auditors' report was published later following a visit on 13 July. It is not clear when it was published but the parties agree that Strictly Education was the first audit report to be published. It is noted that the start of the claimant's sickness absence coincides with the publication of the audit reports.

8 The approval of Haslers to be the Trust auditors was agreed. This was agreed between Beverley Hall, the respondent's Chief Executive Officer, and the claimant, along with Elaine James, Laura Ambrose, and Timothy Edwards, all 3 from Haslers. This occurred at a site meeting at St Margaret's on 2 March 2017 shortly before the merger.

9 Work-related stress is the disability relied on in these tribunal proceedings. It has been conceded to be a disability under s.6 at the material time by the respondent's solicitor - a concession which counsel later stated he could not resile from. He hinted he would not have made the same concession. We shall accept the concession for the purposes of this hearing and this judgment. The claimant had been prescribed a modest dose of Duloxetine antidepressant, and had a course of counselling as treatment for her depression.

10 We were shown the Strictly Education audit report, but it is not necessary for us to quote that for this judgment. It did express serious misgivings over the Elite transaction.

11 The Elite Building issue was dealt with at page 11 of the Haslers audit report which stated as follows:

> "The connection between Elite and Mrs Ejvet means that going forward, the "at cost" principle would have come into play and therefore the Trust would not be able to use Elite as we cannot see that Elite would ever be in a position to work without profit.
>
> The building committee of St Margaret's on 25 February 2016 said that they would not obtain additional quotes for the building work due to the supplier providing a good quality service and having been good value for money in the past (it is not known whether in the past such work went through a robust tendering process and that value for money can be proven).
>
> A quote for phase 3 was obtained dated 3 March 2017 and the quote was agreed by the St Margaret's board. A letter approving the quote on behalf of the governors was sent to Elite by the Chair of Governors dated 7 March. This means that the contract is pre-transitioning.
>
> Owing to the size of the transaction and the connection with Mrs Ejvet to the building company the intended work should have gone through a robust approval and tendering process. This was not something we could test due to a lack of documentation available. It could be argued that although the contract is pre-transitional it is still commitment for academy funds as there was a request for an immediate invoice from the building company in question of two thirds of the work amounting to £97,000 excluding VAT.
>
> From an outside view this could be seen as deliberately rushing through the process in order to circumnavigate the rules that the academy must abide by. There appears to be no other reason noted in the minutes as to why it was essential for the work to be classed as work in progress. The main concern is how this transaction could be viewed by the general public as it relates to the use of taxpayers' funds.
>
> The Academies Financial Handbook defines contentious transactions as those which might give rise to criticism of the Trust by parliament, the public, and the media. Contentious transactions must always be referred to ESFA [Education Skills and Funding Agency] for explicit prior authorisation … this issue needs further consideration and we make our recommendations below."

12 Recommendations included obtaining all evidence about the transaction, taking legal advice from the Trust solicitors, and referring the matter to ESFA using the ESFA enquiry form. We note that no recommendation was made for disciplinary process

against the claimant. However, evidence was later gathered in the context of a disciplinary investigation of the claimant's actions, when she was on paid disciplinary suspension.

13 Why this had never come to light before the audits is a matter of speculation for us. We saw quite a sketchy due diligence record, which was produced later during the course of the hearing. Some individuals from St Margaret's went to perform due diligence on St Mary's and St Saviour's schools. Kerry Munden the Assistant Head Teacher from St Mary's and St Saviour's went to carry out due diligence at St Margaret's. Under this heading there is an entry "Phase 3 of building works tendered and Elaine to review". The outcome was noted as "To be updated". The entry was no use at all. It was worse than useless because it used the word "tendered", on the assumption that these works had been tendered when they had not been.

14 The Haslers report was mainly focused on financial management. Strictly Education reported more broadly on educational matters. They audited payroll and personnel as well. They proceeded by sampling employees and reported nothing untoward. Later on, in the school's disciplinary investigation it was alleged that there were breaches of the "Safer Recruitment" policy. On the register of business interests, it was recorded that 2 people - Paul Powell and the claimant – had not disclosed all business interests.

15 Following the Hasler's report, Elaine James started to make enquiries. She was the Chief Operations Officer (COO) at the point of the creation of the Trust. Having made initial enquiries into the allegation that there had been no tendering for a £145,000 contract for building she was informed by the claimant as follows:

> "Following dialogue with Tim Elburn and Brian Lester [from the diocese of Chelmsford] over several years the governors have adopted the option of preferred builder status which requires going out to tender for one in three projects. These decisions have been taken at meetings without me [the claimant] being present and I am not a member of the premises committee"

16 Ms James was extremely surprised to hear this and therefore wrote to Brian Lester at the diocese asking him if this was the case, and whether it was something which had his approval. He responded on 12 July:

> "I am surprised by the idea that governors would adopt a preferred builder at the suggestion of either Tim or myself. I first became aware of the use of the preferred builder at St Margaret's in 2009 … and have been encouraging them to make sure they use a proper procedure for appointing the contract and strongly advising them to use a consultant to oversee that process since then. I have also on more than one occasion asked for documentation to show that some formal process has been followed."

He then discussed his experience at St Margaret's school including work going to Elite.

17 It has been a strong theme of the claimant's explanation and defence that the use of her husband's building company had diocese approval and that that made this transaction legitimate. This concern of Elaine James comes from the Strictly Education audit which was published 25 June 2017. This was some time before the Haslers report which we cannot date precisely. It had stated:

> "There were concerns that a significant contract sum of over £145,000 was awarded without going through an open tender process as required. We also noted the governing body's letter on file awarding this contract was unsigned…. Similarly, because of the contractor involved, we requested to verify the school's documents declaring pecuniary and business interests as well as review relevant signed governing body's minutes but these were unavailable at the time of this visit due to limited access to the Governors' secured cabinet."

(This was a reference to governors' minutes being kept within a cupboard within another cupboard).

18 What had raised specific alarm with the respondent, as well as the lack of tender, was the fact that 2/3 of the value of the whole contract was paid in advance. This was not normal. We have since seen a copy of the Elite estimate for the works. It was dated 3 March 2017, the day after the meeting with Haslers on 2 March to approve them as the auditors for the Trust. That quote was sent to other governors by Anita Fenn then the Chair of the Local Governing Body (LGB) of St Margaret's. The pre-Trust primary addressee was Tracy Harris who was the St Margaret's governors' secretary / administrator stating:

> "Tracy
>
> Here are all the documents relating to the 2017 building works can you keep them safe as I am sure Brian Lester will require sight of them.
>
> Marcia [the governing body's Finance Officer] – you should receive an invoice from Elite in the next couple of days. This needs paying immediately as it has to clear St Margaret's bank by 1 April.

She seems to have bcc'd Daniella Jung the previous School Business Manager.

19 This was of significance. Anita Fenn has been a witness for the claimant at this tribunal hearing and has been, and always was, extremely supportive of the claimant throughout this whole process. She was a member of the controversial buildings sub-committee of the St Margaret's governing body. She is minuted as taking part in the decision to award Elite the £145,000 building contract.

20 As was pointed out in closing submissions, the claimant and Ms Fenn maintain that nothing wrong or irregular was done here. It therefore seems inconsistent that Ms Fenn later terminated Elite from the building contract as at 14 July 2017, and declined to pay any of the balance of the contract price. (This was shortly after Elaine James' email exchange with Brian Lester at the diocese.) Ms Fenn's main contact at Elite building was Tim Edwards (no connection to Tim Edwards the Haslers auditor). She stated:

> "Dear Tim, on behalf of the governing body I wrote to you offering you contract for the building works at St Margaret's this summer. At the time of making this offer St Margaret's had yet to academise and the governors were legally entitled to offer you that contract. However, since becoming an academy, we have to adhere to different financial regulations and therefore regret to inform you we can no longer honour that contract.
>
> We have paid your company a part payment of £97,000 as work had started and if acceptable to you we would like work done that completes phase 3 of the original project such as lighting and decoration of years 5 & 6 etc. … I must stress that the work now requiring completion must come in under £97,000 as I cannot guarantee further payment. If it is not possible for all these jobs to be

> completed within this budget then the governors will need to prioritise the areas of immediate need."

21 Not surprisingly, Tim Edwards was upset by this and replied:

> "Dear Anita, we were disappointed to receive your email … we are surprised that the new Academy would not recognise an existing commitment made in good faith."

He complained of the amount of forward preparation, booking labour, and bespoke materials. However, he stated:

> "All this said, we are unlikely to pursue legal recourse for compensation resulting from the revoking of the contract and late notice"

Given the relationship, that was not surprising.

22 The tribunal remained puzzled by this. We were informed by Elaine James, who was a witness here, that if there had not been this problem over the appointment of Elite, then subsequently discovered problems with defects to the building work carried out by Elite Building, would have had to be rectified at academy expense, if Elite did not rectify them itself free of charge, (which is what rectification normally means). It was part of an existing contract entered into before academisation, notwithstanding that a new contract could not have been made with that firm, given that it was what Haslers referred to as a "contentious contract to be carried out at cost".

23 Following Haslers' recommendation, the board obtained advice from Winkworth Sherwood, their solicitors. The advice was included in the bundle of documents for the tribunal. Their letter was dated 14 August 2017 and sent to Beverley Hall the CEO of the respondent. It mentions the obligations of the Trust under the *Public Contracts Regulations 2015*. The Regulations state that "Any contract which has been unlawfully procured may be challenged and set aside". We have been informed that such contracts can be challenged, and regularly are, typically by disgruntled would-be contractors. The whole field is also governed by EU Regulation.

24 Winkworth Sherwood recommended, as far as relevant here:

> (1) That the respondent should investigate to see whether "an unauthorised benefit" has been received by a Trustee connected to the company it states:
>
> (2) A further investigation should be carried out to establish
>
> (a) Whether the headteacher of St Margaret's has followed the appropriate procedures as part of her role and responsibilities as leading a school.
>
> (b) Whether there has been a wider leadership failure at the school (enquiries should be made as to what disclosures were made and how these were recorded); and
>
> (c) Whether the local governing body of St Margaret's properly followed its own process and policies for contracting with Elite.

….

(5) The local governing body of St Margaret's Church of England Primary School should be reclassified as a "Supported Academy" meaning some governance responsibility has been retained by the Trust board while the investigations are carried out.

25 St Margaret's did become a "Supported Academy", and not just in relation to financial governance. That was one of six resolutions that was determined by the Trust's board at the start of the next academic year on Tuesday 5 September, as described below.

26 There was a general meeting of the Genesis Trust Board on 5 September 2017. At this time, Anita Fenn was the Chair of the Genesis Trust. She had produced a written response to the Haslers' report, dated 1 September which she presented to the meeting. Mr Graham Moss the previous Vice-chair had discovered that appointments to the GET board ran for an academic year, and not a calendar year. Therefore, elections to the board had to be done at this meeting. At this meeting Anita Fenn did not stand for re-appointment. Therefore, Graham Moss became the Chair of the Board. The Vice-chair became Reverend Canon Ademola, who was also the Chair of Finance for the board. As will later appear, he chaired the panel who decided that the claimant should be summarily dismissed. He was a witness before this tribunal, as was Mr Moss.

27 Six resolutions were made at the end of this meeting. Resolution 1 was the Director appointments, as described. Resolution 2 was that there be a full investigation into the key issues in the Haslers audit (Anita Fenn abstained on that). Resolution 3 was an investigation specifically into the claimant surrounding the Elite contract, and that the claimant be suspended pending the investigation in order to protect the integrity of the investigation (again Anita Fenn abstained). Resolution 4 was that a named person from St Mary's teaching school provide appropriate leadership in improving standards. Resolution 5 was that the Local Governing Body of St Margaret's be reclassified as a Supported Academy. Resolution 6 concerned the Scheme of Delegation.

28 It is worth describing how the relationship between the school and Elite arose in the first place. We saw a set of minutes of the Finance / Premises Committee 19 May 2015 there was a project for works that could cost £120,000. Minutes record that the builders asked to submit tenders the previous year would be approached to submit tenders again that year. In this case there was an architect, Paul Shackleton. The claimant was not a member of that sub-committee, deliberately.

29 This was minuted later at a meeting of the General Governing Body on Friday 26 June 2015. This was a general governors' meeting not a sub-committee. Significantly the claimant was not present, intentionally, having declared an interest because of Elite, as building projects were on the agenda. Four companies were named: (1) Firth Brothers (2) Kirkman and Jourdain Limited (3) Elite Building and Maintenance Limited and (4) Denbar Property Maintenance Limited. It was minuted that two of the companies Elite and Denbar were were shown the same plans. Jackie Rayner, (a teaching assistant, and a member the building sub-committee) was present at each appointment, with Elite, and with Denbar. Firth Brothers declined to submit a tender, Kirkman & Jourdain apparently dropped out. That left only Denbar and Elite. Denbar quoted £87,200, and Elite £81,742.

30 The minute read:

> "It was noted that the tender from Elite was more detailed and thoroughly listed. Denbar had not listed individual items and had excluded floor finishings, fire, and alarm provision, and security of the site. Elite offered these provisions within the price. It was noted that Elite needed a 5 % allowance for unforeseen costs…. A new Governor not familiar with either of companies favoured Elite. Longer standing governors recognised that Elite had been used by the school many times in the past and always delivered to a high standard which had also been recognised by the Diocese. The governors acknowledged the high standard of work completed within the deadline of last year's project "Kids Kitchen" which had been praised by external bodies such as "Healthy Schools".

The upshot of the meeting was a unanimous acceptance of the Elite tender.

31 The next meeting of the full governing body was in the next academic year, 6 October 2015. The claimant was present at that meeting. There is an entry in those minutes under the heading:

> "UPDATE ON THE SUMMER BUILDING WORKS AND PLANS FOR THE FUTURE
>
> The report has been sent to governors by the Architects. The Chair [Anita Fenn] proposed Elite builders for the next three years. Governors discussed and agreed to the open, transparent, accountable and credible. Governors were not in agreement to use Elite and decided to go to tender".

32 We were shown a procurement and tendering policy. It states its date to be "Summer 2015". The author of the policy was the claimant herself. The policy had been approved by the Premises Committee. Under that policy all works above £50,000 had to be subject to four tenders and added "…the value of single items or groups of items, which must not be disaggregated artificially." The procedure was:

> "All purchases with a value greater than £50,000 must be put out to formal tender the following procedures must be followed in such circumstances:
>
> > (1) A specification will be prepared and authorised by the Chair of the relevant committee and head teacher and sent to at least three suppliers. It is anticipated that for any major building works of the value greater than £5,000 the services of an architect would be engaged to deal with the handling of specifications and suitability to tender…. For purchases exceeding £50,000, providing the expenditure has been budgeted for, a decision will be recommended by the Finance and Premises Committee. The decision will need to be ratified by the full Governing body".

33 As we appreciated during this hearing, it is almost impossible to have such a tendering process without paying an architect. It is clear from the minutes of the governors meeting that the building contractors themselves had stipulated the specifications. An architect/project manager was really essential to this process without which it is extremely hard to make valid comparisons between tenders and to be fully independent. We note that no one on the board or the building sub-committee had any construction qualification or even significant experience. Without judging this pre-Academy process against the Academy's standards, it was clear to the tribunal that the school had not actually followed its own current policy, authored by the claimant.

34 We spent some time debating during this hearing what happens if tenders are

invited and the majority of the invitees drop out of the tendering process and only 1 or 2 remain. The respondent, notably Mr Moss, who had a better grasp of these processes than any of the respondents' witnesses, or the claimant, stated that the duty on the school was to go and get more tenders if they could not get enough in the first round. It is not easy, as an additional pressure on these tenders is that schools wish to have major works done during the summer school closure. If the tendering process runs up to the end of the summer term, options are limited if the works are to complete by the end of the summer closure.

35 The next minutes we were shown were of the meeting of the Building Committee of St Margaret's 25 February 2016. The three committee members were Anita Fenn, Jackie Rayner, and Luke Mitsi. Sandra Moey, St Margaret's Head of School, was also present. The following was minuted:

> "Governors were told that Elite Buildings and Maintenance were commissioned last year to complete an extension for the ground floor of the premises and the school has been highly satisfied with the result.
>
> It was explained that Elite Building and Maintenance had provided a good quality result and their services were of value for money for the school.
>
> Governors heard that other building suppliers could be approached for quotes; however, governors unwaveringly voted in favour (on behalf of the Full Governing Body) of approaching Elite … to quote and complete the additional phases of the development due to the quality of their work and the value for money for the school. It was also agreed that governors would favour Elite Building and Maintenance to quote for a third phase to the Foundation Stage 1 area."

36 They met again on 23 May 2016 the Committee then consisted of Anita Fenn as Chair, Jackie Rayner, and David Hodge. Mr Hodge was also a witness for the claimant at our hearing. He was the former Vice Chair of the St Margaret's Local Governing Body. He was replacing Luke Mitsi who had left the Building Committee. Mr Nish Ejvet was present representing Elite. It was minuted:

> "Meeting was attended by Ruth Ejvet, Head Teacher (at beginning of the meeting) and Nish Ejvet of Elite to outline the building plans…… Mrs Ejvet left the meeting for the project to be discussed in greater detail … Nish Ejvet explained there would be a floor put above the new area with half being open plan to create an area that could be used when temperatures permitted use. In addition to 3 home bases there will be another room created for multi-purpose function, such as computers, library, personal study area, withdrawal / behaviour room. They did a site inspection. At that stage Ruth Ejvet left the meeting."

It is minuted that

> "Mr Hodge stated that … a quote has been given and funding is available, and therefore based on previous work carried out he thought the proposal was acceptable and fair… the costs of the project £200,000 will be net of VAT with a £30,000 contingency."
>
> The school has a sufficient carried forward of over £400,000 and funds had been put aside for this project … Ms Fenn will write to Elite to confirm the work can proceed."

There was no tendering whatsoever on this occasion.

37 That was in 2016. But the more controversial meeting of the Sub-Committee was on 3 March 2017. Present were Anita Fenn, Jackie Rayner who was Health and Safety Governor as well as being a TA, the claimant, her husband Nish, and her brother-in-law Fez Ejvet, and Sue Newman (salaried Family Liaison Officer and manager of the projected Genesis Extended Education (GEE) initiative (which consisted of a project to take children at an even younger age than Nursery level). A nursery was to provide baby provision for one to two-year olds. We were told that this has not happened since.

38 At that meeting the minutes record:

> "AF explained that governors had already agreed that Elite would be carrying out the building work for the development of the 30 hours Foundation Stage 1 provision from 17 September. However, due to the implementation of the Genesis Trust from 1 April it was essential that the building work was approved and started prior to that date so that it can be classed as "work in progress".
>
> … AF met with Elite separately to consider the finance implications of the work and it was agreed that 2/3 of the quote would be paid by 1 April 2017 so this work is badged as being part of St Margaret's and not Genesis Education Trust."

39 It seems that the committee had not focused on what would actually happen after 1 April 2017 when the school transitioned immediately to become part of the respondent Education Trust. Ms Fenn stated after the meeting on 6 March:

> "The quote was received following the meeting and reviewed by AF and JR. This was accepted by JR and AF and Elite were told to proceed with the work. AF to instruct Elite to invoice for the initial stage payment so that this could be cleared [sic] before the 1 April 2017."

40 It seems to be an indication Ms Fenn was not confident in her assumption that Genesis would honour this "work in progress" contract. Otherwise why did she want to ensure that this abnormally large advance payment actually cleared by 1 April?

41 As Mr Moss put it in compelling evidence to the tribunal, the Building Subcommittee was effectively *ad hoc*. It had been set up by the St Margaret's LGB to consider work undertaken but it did not have delegated powers regarding the works to be undertaken. It had no proper basis to consider the works and the tendering of the contract, and no delegated power to award a contract, but in fact did so. That is what was controversial about the building committee.

42 Anita Fenn who had chaired that committee was highly supportive of the claimant throughout, including when the claimant had become unwell after the audit reports. Ms Fenn appointed herself as the sole conduit for all communication to and from the claimant. The claimant was not to be troubled by other people who might exacerbate her condition of stress.

43 The other point Mr Moss made in evidence to the tribunal, which seems to be a valid point, is that this device of the claimant leaving the committee meeting at a time when a decision is made to award a contract represented an abdication of her lead responsibility for the school. The claimant put it forward as the reason that she had done nothing wrong. Mr Moss totally disagreed with her analysis. The committee lacked the delegated powers. The reality was, he stated, that the process was steered by the

claimant notwithstanding she chose to leave meetings at certain of the most critical times. By the time it reached that stage, the decision was a done deal. That was a well-observed and accurate statement to this tribunal panel. This seemed to the tribunal to be what it appeared to be - poor governance, and lack of independence.

44 A disciplinary investigation took place and it was carried out by Beverley Hall with the assistance of an HR Manager, Carlene Reid who was the Trust's HR Lead. The latter had previously been employed by Waltham Forest to provide HR support to schools. Of course, the claimant's school was in Barking and Dagenham. Ms Hall published an investigation report in December which was sent to the claimant under the cover of a letter dated 6 December inviting her to a disciplinary hearing on 20 December at St Mary's School, Walthamstow.

45 The allegations were set out under unhelpfully vague headings:

(1) Serious breaches and financial management of St Margaret's School.

(2) Serious breaches in the tendering process leading to pecuniary interest.

(3) Misleading the governing body of St Margaret's by informing them of incorrect instructions in the name of Genesis Education Trust.

(4) Serious failure to adhere to safer recruitment practices; and

(5) Serious failure to follow due diligence when transferring to Genesis Education Trust.

46 There were some 15 appendices to the investigation. The entire report and the appendices ran to 289 pages, the report itself being 18 pages. It was a thorough piece of work.

47 The claimant's suspension letter dated 7 September was there. By a letter of 26 September 2017, the claimant was invited to an investigation meeting to find out the circumstances around these 5 portfolio charges to listen to the claimant's account of what had happened. By a letter of 17 October the claimant was invited specifically to a meeting at Walthamstow Town Hall, but it never went ahead. The claimant chose to respond in writing.

48 The two audit reports were appended to the disciplinary investigation report, and a large amount of the pack was 83 pages of the minutes of St Margaret's School LGB. One of the appendices was the Barking and Dagenham Scheme for financing schools dated 18 April 2013. The claimant's conduct around the contract needed to be judged according to those LBBD standards and not the new and tighter Academy standards. The Scheme for Financing Schools runs to 56 pages. There were some 10 invoices from Elite from over the years running from July 2010 to 9 March 2017.

49 The tribunal could not help noticing that for the first six years the Elite was not VAT registered. They registered for VAT in July 2016 and one can understand why. They exceeded the compulsory registration threshold in one invoice in July 2016. The bill was £96,387.50 plus VAT so the total turnover of Elite was clearly low for the first six years of

their relationship with the school.

50 That invoice in July 2016 describes itself as being for "Phase 2 development of building project". The controversial final advance bill of £97,000 in 2017 was for what was called "Phase 3". This was another way in which the claimant put her argument against the need to run a tender. She saw it a continuation of earlier phases of building work.

51 Having debated this at some length of this hearing the tribunal do not consider, from what we have been told, that the phases were inextricably linked. They seem to have been artificially aggregated. There is no reason why another contractor could not have carried the next "phase".

52 Mr Nish Ejvet was a card holder of the school Costco card which was used for food and drink and personal groceries, for reasons we neither asked nor were told about. There were also home phone bills addressed to St Margaret's primary school at the Ejvet's home address (then). They must have moved there sometime early 2016 because, at the time he was given his address as being 2 Warren Field CM16 7BA. (That address was on a vehicle hire invoice). We did not investigate why the Costco card was needed, or the phone bills during the course of this tribunal hearing. It was not central to the issues.

53 The appendices included two pay rises, one in December 2010 where the claimant had requested her salary scale be amended from 24 - 25 and backdated 3 months to the 1 September 2010 and the second dated 22 November 2010 and that was signed by the claimant herself as the beneficiary of the pay rise. That looked odd to the tribunal, as it did to the respondent. The second one showed an uplift of 12.5% basic salary dated 22 November 2016 but that had been signed by Anita Fenn as the Chair of the Governors, which was the normal way of doing it. We also saw an email dated 14 December 2016 relating to the claimant's pay request confirming that the 12.5% could not be awarded as spine points above her group range salary. It could only be awarded as a discretionary bonus. This limit applied because of the size of the school (the numbers), this school being Group size 3.

54 Appendix 14 to the report was long string of emails where it was clear that so far from supporting the school in getting untendered work Mr Lester was striking a strong note of caution. This is of relevance because the claimant was, and is, invoking the apparent approval of Brian Lester. The above-quoted exchange of emails between Mrs Hall and Brian Lester show that he was surprised to have been taken to have apparently approved such an unorthodox process. These emails dating from November 2016 through to January 2017 were pre-transition, and showed that Mr Lester was expressing misgivings and advising caution even then. 1 November 2016, e.g.:

> "There is continuing concern over the process for appointing Elite without any form of external comparison. I believe this will cause problems in the future once you convert to an academy. I strongly advise the school to discuss the situation with the auditors, once they had been appointed, to clarify what they will find acceptable practice for employing Elite".

55 It was clear that Mr Lester did not know the detail of what academisation would mean but already then in November 2016 he was calling for caution. He seemed not to have appreciated that it was not only the future that was a problem but the present pre-

transition present too, as it was then.

56 Appendix 15 consisted of witness statements. First, there was one from Elaine James who was also a witness before us. She was the Chief Operations Officer for the Trust. Prior to this she was the School Business Manager at the two federated Waltham Forest Schools. She described the appointment of the auditors.

57 There was then a statement from Heather Fleetwood who is the HR Manager with the Trust having previously worked for HR in the two federated Waltham Forest schools. She stated that a full audit was undertaken at St Margaret's on 11 September and revealed that there was no Single Central Record detailing all staff and covering statutory requirements. There was no personnel matrix record. She says recruitment procedures were not followed according to Safer Recruitment guidelines. Staff files were missing documents like references, contracts, interview notes, and applications forms. There was no central training record, no record of staff signing induction forms to say they had read the Keeping Children Safe in Education guidance, and no record of annual safeguarding declaration forms being completed to ensure staff were aware of what designated safeguarding needs were.

58 They also found there were breaches of recruitment practice. Apparently, it found two cleaners not having the proper identity and being able to establish their right to remain in the UK. They had therefore to be suspended until their immigration status was confirmed. There were discrepancies between contracted hours whilst they should have been 32.5 according to the Burgundy Book.

59 More worryingly she stated:

> "The file for the Executive Head was empty when first checked and then, days into the audit, pieces of paper started to materialise on the file. This file was in the main empty with no references application forms, qualifications, interview notes and no contract. It is found that variations forms had been submitted to payroll dating pay increases to payroll that had been signed off by the Executive Head herself when the change was in relation to her own pay. That was 2010."

60 There was a statement from Sandra Moey, St Margaret's Head of School concerning the appointment of the Ejvets' daughter, Amy Ejvet. Carlene Reid who was assisting the investigation and the HR Adviser for Waltham Forest stated that, because some members of staff were unhappy that Amy Ejvet had been appointed without interview. Ms Moey stated she had been asked to carry out a backdated interview after the event of recruitment.

61 Patricia Coady who had been acting Deputy Head of St Margaret's gave an account in another email stating she had been asked to email to let Beverley Hall know the events surrounding the interview of Amy Ejvet:

> "I was called down to the office and directed to interview Amy with Sandra. Sandra had the paperwork and I saw it once we went into the room. I noticed that the date was incorrect on the paperwork and I highlighted to Sandra that it was incorrect. It was my understanding that on the date that the interview should have happened for whatever reason both Amy and Abbie Khan were unable to attend for interview. They were both in school on this afternoon to meet their new classes. I carried out the interview with Sandra. I signed and dated the end of the interview. Previously staff

> had questioned the appointments and it was addressed in leadership meeting by Ruth that these were good teachers and the school needed teachers to be employed for September."

The Disciplinary Hearing

62 That, then, is a rough survey of the allegations and the evidence the claimant had to face. The claimant was due to attend a disciplinary hearing in January. Originally the claimant had been invited to a disciplinary hearing on 20 December by letter of 13 December. Her solicitors, Foot Anstey, Plymouth, applied to vacate that date. In fact, there had been Occupational Health report for the claimant dated 15 December 2017. Doctor Kapoor stated:

> "In my opinion presently, Mrs Ejvet is not fit to return to work however, as regards her fitness to attend a meeting, she is likely to be able to attend a meeting provided it is held sometime in the first week of January".

This had been suggested because, by this time, the claimant would have had further sessions of counselling and would be more composed. The respondent followed that recommendation which is why the hearing was then rescheduled for 12 January at 10.15.

63 Half an hour before the meeting the claimant had emailed a large written response to the investigation report, pasting parts of the report, and then giving comments and evidence that she would like the panel to consider. It was unhelpful to send it so late, out of the blue. It was obvious, from looking at the closely typed 28-page response, that this was not a response that had been compiled overnight. It is quite clear that the claimant expected the school to do a great deal of investigation work into her defence. The tribunal presumes that she expected the entire process to halt and for weeks if not months, for time to be spent further investigating, not the respondent's case, but the claimant's defence.

64 The panel adjourned for 45 minutes to go over her written submission. The panel was Canon Ade Ademola, Heather Boardman, Paul Powell. Terri Patterson was advising the panel. The GET case was put by Ms Hall, with Carlene Reid advising her. There was one management witness. That was Elaine James.

65 One of the matters we had to consider at this hearing is whether that hearing should have gone ahead at all on 12 January. Canon Ademola did not help the respondent's case when he suggested to us there was no hurry. He seemed oddly out of touch, in this, and several other, respects. Every other witness here suggested that there was considerable amount of urgency. Parents were all asking what had happened to the Head Teacher. Rumours were abounding her having been dismissed. There was press interest. Apparently, Amy Ejvet had also put the whole affair onto a WhatsApp group, which appeared to be large and active.

66 David Huntingford, the new Executive Head, was new to the school and new to headship. There had been a need to recruit staff. Policies needed updating and they had a new governing body. The school had become seriously destabilised by this whole leadership crisis.

67 Furthermore, there was the complication of a curious civil race discrimination complaint made against the claimant. Apparently, the County Court Claim had been sent to the school during the summer closure and was not picked up. Therefore, there was a default judgment entered against the claimant and the school too. This was taking a lot of work to revoke.

68 The school had to know where they stood. The tribunal accepts there was a need for urgency. The panel ultimately upheld 3 out of 5 of those broad portfolio allegations:

(1) Financial management

(2) The tendering process (lack of)

(3) Failure to adhere to safer recruitment practice (Amy Ejvet, Abbie Khan)

What were not upheld was misleading the governing body by informing them of incorrect instructions in the name of Genesis Education Trust, and serious failure to follow due diligence when transferring to Genesis Education Trust. Nonetheless the sanction was summary dismissal.

69 The due diligence finding may well have been because responsibility for due diligence actually lay with Kerry Munden from St Mary's and St Saviours, and is commented on above. She never picked up the failure to tender for the sizeable Elite contract at all, and in fact she had assumed that it had been tendered by her comment quoted above.

70 The headline incidents were:

(1) The self-awarding of a pay rise in 2010, and a general conclusion that the operation and financial management which is the responsibility of the headteacher had not resulted in maximum benefit to children.

(2) The tendering process was seriously flawed, no independent advice and expertise was sought. It also mentioned concerns about the quality of the work undertaken.

(3) They were concerned about the recruitment of Amy Ejvet.

(4) They were particularly concerned about the lack of an up to date Single Central Record.

71 We spent a lot of time discussing the latter - SCR - during this hearing. The root problem seems to have been that there was an audit by Heather Fleetwood, HR Manager. At the time the audit was carried out the School Head and the Deputy Head did not know where the single central record was. No-one there could show her where it was. If it had not been a Trust audit but instead had been an Ofsted inspection the school would probably been put into special measures, without more. The concerns about the lack of records on file were across the board.

72 Against that evidence on the Single Central Record, we were referred by the claimant to an email of 23 January 2018 from Phil Davies who was a contractor brought in

to help with the administration of the school following the departure of an unsuccessful school business manager, Daniella Jung. Mr Davies' email stated:

> "Dear Ruth,
>
> I am writing to confirm that I updated the school single central register in August 2017 with details relating to the September 2017 starters."

73 This was relied upon by the claimant to show that there was a Single Central Register. It existed. She said it was stored in one of the files of a previous administrator who has left. However, the problem was that on the day in question when Heather Fleetwood carried out the audit, the Deputy Head was asked and could not tell Ms Fleetwood where the single central register was. The tribunal can understand that was a serious problem when the Executive Head was absent on long-term sick leave.

74 The claimant had suggested that Ms Hall was not the right person to conduct the disciplinary investigation. The panel concluded that the school's own disciplinary policy states that the disciplinary investigation should be carried out by the line manager and that was Beverly Hall. We considered that there was no evidence of partiality on Ms Hall's part, after specifically challenging her in questioning.

75 The claimant was given 10 working days to appeal. She appealed on 23 January 2018, to Mr Moss. Graham Moss who is a Director of the Genesis Education Trust has a history of being a Director of Education at two local authorities and is also Chair of other academies. He is used to conducting disciplinary and grievance hearings.

76 Canon Ade Ademola did not have a very commanding grasp of what was going on here, as mentioned above. He had many responsibilities, too many responsibilities. He told the tribunal that there was no urgency, but there was palpably was. Beverly Hall was in a better position to know. When asked by the tribunal as to which he regarded as the most serious charge he responded that it was having Amy Ejvet in class who had not completed a DBS check. That conflicted with almost all the respondent's witnesses who all unsurprisingly considered most serious and obvious lack of judgment was the awarding of the building contract to Elite. Had he been the sole decision maker on the dismissal decision, we would have had more serious concerns about the respondent's defence.

77 The claimant's appeal letter made a variety of demands. It stated that the appeal should be heard by somebody other than Mr Moss as he had been involved in making decisions on her whistleblowing complaint and therefore should not hear the disciplinary appeal. Other Directors were involved in the original subject matter of some of the allegations. She requested that an appeal officer who had experience in financial procedures relating to Voluntary Aided Schools. She acknowledged that the primary reason for her dismissal related to the building contract.

78 She also made a demand for the appeal to be heard at neutral venue namely Roding Primary School. She stated that she would send in her detailed grounds of appeal on 30 January in one week's time together with evidence to back it up. She followed with another short letter on 30 January stating that she did not agree that it was appropriate for Mr Moss to hear her appeal, but that nonetheless she stated that, as she wished to

appeal, she would attend a hearing with Mr Moss.

79 The claimant took issue with the disciplinary charges against her:

(1) Procedural impropriety obvious flaws – [unspecified].

(2) Substantive unfairness "I do not believe the conclusion that wasreached could reasonably have arrived at on the basis of evidence before the panel."

(3) Detriment suffered by me as a whistleblower including my eventual dismissal.

(4) Discrimination and failure to make reasonable adjustments in connection with arising from my serious medical issues and disability. See attached correspondence from GP and Occupational Health referral documents (detailed particulars supporting each of the above will be set out at the appeal hearing for your consideration on 30 January).

She sent extra documents by email of that day, and also by post. These documents all found their way into a consolidated appeal bundle which ran to 2 lever arch files. The whole sequence is set out in our comprehensive tribunal hearing bundles - 6 lever arch files for this hearing. We are grateful to Mr Springer. It has been easier to follow than it might have been.

The Disciplinary Appeal

80 The appeal bundle ran to 51 appendices, including absolutely all correspondence suggested by the claimant or attached by claimant. It represented a lot of work. It was the claimant's contention that certain evidence was not put before the disciplinary panel because of procedural impropriety. Ultimately the appeal panel found no impropriety and, in any event, they apparently took everything that the claimant wished to be taken into account in the final appeal hearing.

81 The appeal hearing went ahead. The panel was Mr Moss and Mrs Patricia Stannard who was the governor of the Woodside Academy in Waltham Forest, and Jeanette Wallow, a Governor of Chingford, Church of England Primary. These were both Waltham Forest schools. The selection had been partly guided by the claimant's demand that there be somebody on the panel who had experience of finance in Voluntary Aided Schools.

82 They also selected a neutral venue so far as St Margaret's was concerned which is Waltham Forest Town Hall. Mr Moss said that the room they were in was smaller and hotter than they would have liked, so when the appeal hearing adjourned they reconvened it was changed to Gilwell Park Scouts Association headquarters.

83 Although the panel would not normally have considered fresh evidence on an appeal they decided to treat this appeal effectively as a rehearing of the remaining 3 allegations, not forgetting that 2 charges had not been upheld by the disciplinary panel who had had 5 charges before them.

84 The appeal took place over two days 23 February and 8 March. Mr Moss sent the

outcome letter on 13 March. It is a thorough letter which covered a lot of ground. The claimant attended the appeal hearing on both days and made a full presentation. Her presentation of her appeal points and evidence took all of the first day. The claimant was represented by Mr Brian Fox who was a Headteacher colleague of the claimant's who apparently took copious notes. The management case was presented by Canon Ademola who was supported by an HR Adviser. Jerry Kemblewood was there to support the panel from Waltham Forest Services.

85 The tribunal considered Mr Moss's outcome letter was thorough and commendable. It cited the 3 remaining allegations which were:

(1) breaches of financial management,

(2) breaches in the tendering process for Elite,

(3) failure to adhere to safer recruitment.

It provided much detail.

86 It rehearses, which we must accept as fact, that the claimant did not object to the venue for the hearing. Save for pieces of information she was awaiting from the Trust she had been able to present all the information she would have presented at the original disciplinary appeal.

87 She claimed that the investigation was biased. However, the panel considered there was no evidence of bias. Even if there were gaps in evidence presented by the investigating officer there was no tendentious approach, or any material difference to the outcome which is, after all, what they needed to cover.

88 Mr Moss also dealt with the issue of the competing disciplinary procedures and the argument as to which one was the correct one to use in the claimant's case. The claimant had stated that the London Borough of Barking and Dagenham disciplinary procedure was the correct policy for her as she had not been moved across to the National Society Grievance and Disciplinary Procedure adopted by the Governing Body. We heard much evidence which we need not waste time on.

89 The claimant could not get hold of her contract of employment because it had been retained by LBBD, for no particularly good reason. Despite repeated requests she simply could not get it. There was no earlier objection to the National Society procedures being adopted. The suggestion first arose on appeal. The panel ultimately failed to find any material discrepancy, for these purposes, between the two policies which would have dictated a different way of dealing with the disciplinary hearing. On our attempted analysis we cannot find anything cogent was put forward by or on behalf of the claimant to suggest that the difference could possibly materially have affected the outcome.

90 In any event we are hearing an unfair dismissal case together with discrimination and whistleblowing claims none of which would be affected by the particular choice of disciplinary procedure, see *Cabaj v City of Westminster Council* [1996] IRLR 399, EAT.

91 It is under such a variation to procedure that the respondent decided to treat an appeal hearing which would normally be a review into a rehearing. It serves, from an unfair dismissal point of view, to make this dismissal even fairer than it already has been.

92 The respondent considered the claimant's point about Elaine James and Heather Fleetwood being investigatory officers too much overlapping in the investigation and agreed with the claimant that it would have been better if there had been secondary delegated investigator. They confirmed that they had read the entire disciplinary panel bundle as well as all the new material now provided in the 2-lever arch file appeal bundle and they had given the claimant a day to present her case 23 February.

93 The claimant also stated she had suffered a detriment as a result of being a whistleblower, which we will come to in the whistleblowing section below. Mr Moss himself had dealt with the whistleblowing allegations. Indeed, it was confirmed that Canon Ademola had no knowledge of the whistleblowing complaints and confirmed that none of the other panel members had such knowledge when deciding to dismiss.

94 Mr Moss also dealt (which was necessary) with the position of Brian Lester of the Diocese board. He had been involved in the Governor's meeting on 2 July 2014 which was included in the appeal pack and of this Mr Moss says as follows:

> "However, the view of a school building officer working for the Diocese does not in itself give the governing body the power to disapply local and national procedures for conducting tenders for building contracts."

95 Generally, Mr Moss's approach was like this. The people who operated at the fringe of the school's governance could not absolve the claimant of what had happened over the lack of tender.

96 The panel agreed that elements of the disciplinary process could have been better. This tribunal has said as much above.

97 Of the timing of the disciplinary hearing, he stated:

> "There is always a balance to be found between the needs of the individual under investigation and the needs of the school and its reputation in the local community. You had been, by January 2018, been absent from the school for approximately 6 months and there was no agreed date when you would be fit to return to work."

They therefore did not uphold the claimant's allegation that the process was flawed. Then they moved to consider the 3 charges.

98 First, they considered the failure to adhere to safer recruitment practices. They focused on the apparent unavailability of the Single Central Register. Much confusing evidence was given particularly by the claimant on this matter. Graham Moss seemed to have it absolutely straight in his mind. They took account of the Phillip Davies email which was there in the appeal bundle to the effect that the SCR was updated in August, however that conflicted with the management record. He stated:

> "Should greater weight be given to statements from the Head of School and Assistant Head Teacher or 2 assistant teachers no longer employed at the school? Similarly, with the interim school business manager the fact that you state that the SCR existed is not sufficient evidence stated in the quote "however at no time did you inform the investigating officer that it existed as an electronic record on the school business manager's computer (Karen Bennett)" nor did you seek a copy of that file as part of the additional evidence that you requested. We are also mindful that senior staff at the school were unable to locate it. Ofsted expect simple spreadsheet to be immediately provided and will use it to investigate the completeness of the records of the individual staff… Our unanimous view is therefore to uphold the original decision of the disciplinary panel as the balance of evidence indicates that a SCR did not exist in the format required by Ofsted. In common with the original panel we are minded of the very serious potential implications for the school due to this failure"

99 There were allegations of serious breaches and financial management of the school and they focused on the most serious of these which considerably clarified the case. The earlier part of the process had possibly become over complex and unwieldy because of preponderance of less serious allegations mixed in with the overriding lack of building contract tendering allegation.

100 However, there was an earlier allegation which was not really highlighted in our account of the disciplinary hearing. There was a serious breach of financial management relating to the setting of an inaccurate school budget for 2017/2018. The error had been the omission of 6 teachers from the budget which amounted to a substantial annual impact on the budget. It therefore meant that the governing body did not have any meaningful involvement in the setting of the school budget 2017/2018 and minutes of the meeting held on 21 March did not even state the copies of the budget were available to the governing body then. The fact that the claimant said that David Hodge signed these minutes off as an accurate record was not to the point. Mr Moss stated:

> "We are minded that as headteacher you are lead paid professional at St Margaret's and it is therefore your professional responsibility in accordance with the professional standards to ensure due process and financial propriety."

101 This is the theme which finds further expression when Mr Moss came to consider the tendering and the extent to which the claimant could dissociate herself from that process. He mentions that the claimant had suggested that the Hasler's report into St Mary's School had identified serious financial mismanagement in respect of a private nursery linked with St Mary's School. Mr Moss pointed out, and we have now read the report, that this is not what the report said and therefore this was not a fair comparison to raise.

102 The panel then moved to the tendering process leading to a pecuniary interest. They said as follows:

> "Whilst all the allegations made against you was serious in our view this was the most serious allegation"

103 That has been the view of the tribunal panel. There was nothing marginal about it. The panel are not impressed by the fact that the governors were aware of the link between the claimant and Elite Building and that it had been reported in the register of interests. It would have been remarkable and shocking if it had not been reported there. It was in plain view. It was too large a fact to be easily disguised from the board or any

member of the school. The fact that there was nothing covert about it did not legitimise it. Mr Moss mentioned the obvious fact that the Ejvets, as a family, benefitted from the award of such a contract

> "As a panel we are unable to understand why the school did not follow the procedures laid down by the LBBD and the DfE on tendering contracts. We were also of the view that as an individual you did not recognise that external perception might question the continuing award of a sizeable building contract to a small firm partly owned by a family member and the panel states "it is the unanimous view of the appeal panel that your approach in taking a backseat role that mounted to a fundamental failure to carry out the lead professional role in providing advice and then guidance to the governing body on the award building contracts. Consequently, members of the Governing Body took decisions and undertook actions which they did not have delegated powers to undertake."

104 They then turned their attention to the controversial Building Committee and they said:

> "The setting up of the Building Committee was an *ad hoc* decision raised under AOB and taken at the meeting of the full governing body on 9 February 2016. There is no evidence that any written documentation such as terms of reference and delegated powers were presented to governors and that such powers were invested in the committee. Nor were they presented to committee when it met for the first time on 25 February 2016. You were not present at that meeting and were represented by your Head of School."

105 Reading the minutes that he is referring to from 9 February 2016 under paragraph 50:

> "ANY OTHER URGENT ITEMS;
>
> The Governors were informed [sic] that a Building Committee is to be established volunteers were requested as the building works scheduled for the school for this summer the Chair is to email the governors with more information. Mrs Jackie Rayner volunteered to join the committee."

106 It is correct that on 25 February Sandra Moey, the Deputy Headteacher attended the building committee meeting, the panel was Anita Fenn, Jackie Rayner and Luke Mitsi subsequently, after Luke Mitsi resigned, David Hodge sat on the same committee.

107 Mr Moss continued about the Building Committee meeting on 25 February:

> "At that meeting the three governors present took a decision not to go out and seek tenders from 3 companies but to designate Elite Building and Maintenance as the preferred building suppliers and seek a tender from them alone. This was later reported back to the full governing body which had been implemented.
>
> This action conflicted with the decision taken by the full governing body at its meeting of 6 October to go out to tender. To quote from the minutes of 6 October "Governors were not in agreement to use Elite and decided to go out to tender". This decision could only be altered by the full governing body and not by a committee without delegated powers. In response to being questioned about these minutes you commented that minutes are words written on a piece of paper by a non-professional clerk and that the investigating officer should have interviewed the governing body for an interpretation of the process and that headteacher was not accountable if a governing body wanted to make a decision. We simply do not accept this view of the role about the headteacher in respect of the relationship with the governing body."

108 This passage confirms what has been the experience of this tribunal of the scheme of the claimant's defence and justification to the allegations the constant plea for deeper investigation. If one thinks about it in a practical way, investigating Board members about a meeting almost 2 years ago would be unlikely to produce any reliable evidence to add to the picture one can read in the minutes. The plea for more investigation seemed an empty plea for yet another layer of process which would yield little or nothing of substance. This was work which realistically, psychologically, would have yielded next to no substance, but much delay.

109 Mr Moss continued:

> "There are significant deficiencies in the tendering process. Firstly, the building committee did not have any delegated powers and secondly it is not possible to award preferred building supplier status to a company for un-costed [tribunal emphasis] building work, and thereby intentionally avoiding a robust tendering process. You should have intervened at this stage. As Executive Headteacher with experience of previous awarding of contracts you knew that this was not in accordance with the LBBD Scheme for Financing Schools. Nor did it follow the clear advice and guidance set out in the DFE "Buying for Schools" documentation. This was high value contract where there should have been a written specification and an invitation to tender from at least three companies."

110 A significant fact is that Mr Moss might not have realised is that the St Margaret's Procurement and Tendering policy was authored in summer 2015 by the claimant herself. The tribunal found that ironic because this process was in clear breach of that policy. The tribunal has already appreciated that one has to have a costing and a specification in order to conduct a fair competitive tendering process against common set criteria, rather than leaving it to the individual contractors to suggest the spec and the costs. He mentioned that 2/3 of the contract price of £145,000 was paid in advance - £97,000. He commented:

> "Minutes show that the decision making was driven by the time factor of conversion to academy status rather than ensuring value for money in the use of public funds. As Executive Headteacher you chose not to be involved even at this stage as you had declared pecuniary interest. You therefore had at least 3 opportunities when you could and should have intervened to stop the process and ensure that the correct procedures were followed. The school had no means of knowing whether this quote from Elite Building and Maintenance Services offered value for money for such a large contract. This was a serious breach in financial management of the school by yourself which amounts to gross misconduct … Our unanimous view is that we uphold the original decision of the disciplinary panel."

111 The tribunal cannot fault that reasoning on all of the evidence we have reviewed over this long hearing. Much of the claimant's evidence and argument, by contrast, has been confused, speculative, equivocal, vague, and more often just an invitation to go away and do a lot more reading with little prospect of getting much more insight or focus on the essential issues. Proportionality would indicate that this tribunal has spent a fair amount of time considering this case, and so did the respondent.

Other matters

112 We should mention a point that Mr Moss handled well, and fairly. Subsequently to the investigation starting it transpired that there were serious defects with the work Elite had done (alluded to above, in connection with Beverley Hall). We were referred to an

email from Elaine James to Beverley Hall 6 February. They had consultants come to visit, to inspect the works, the list of defects was extensive. We have since been told that the building was deemed uninhabitable that the school had to rent space in other schools. There is a very substantial claim now being made by the school against Elite Building. The size of the claim is £132,000 of which £99,000 relates to building rectification and the remainder to the costs of relocating classes to other schools, surveyors' fees, and a project manager. We were informed that the Diocese paid some £117,000 towards this on the basis that if the school recovered anything from the legal proceedings against Elite, they should reimburse the Diocese for this.

113 The reason why we mentioned this now is just for completeness. Canon Ademola was rightly criticised in cross-examination and also criticised by Mr Moss for including in his dismissal letter the fact that the work was defective. That was not what the claimant was dismissed for, not in any way. She was dismissed for awarding the contract in the first place.

114 While it may be newsworthy from a press point of view it is not a factor that we have had to consider in any way. Mr Moss was right to distance himself from the issue. He said:

> "We also reached the view that a judgment on the quality of work undertaken by Elite was not an issue in the investigation and should not have been referred to during the disciplinary hearing or indeed the letter subsequently sent to you. We agree with your presentation on this matter."

i.e. they agreed with the claimant.

115 We need to deal with other matters of less relevance, as we spent some time on these. When the investigation started, Beverley Hall informed the claimant that the matter would be reported to the police, and it was. Ms Hall delegated the police report to Elaine James to deal with the reporting, on the online form. Elaine James therefore became the liaison contact with the police, whilst Ms Hall liaised with the claimant. Subsequently there was contact from the police to Elaine James saying the matter was not going to be taken any further. Elaine James did nothing about that and took no further action. She should have told Ms Hall at once. Ms Hall would have told the claimant. The claimant has stated that the reference to the fact being reported to the police was one of the main causes of deterioration in her mental state and had brought about this apparently enduring depressive episode.

116 Elaine James at this tribunal hearing made an open and profuse apology for her omission in not ensuring that this clearly welcome news reached the claimant. The claimant was never interviewed in connection with a criminal investigation. The police simply did not pursue it. Ms James accepts total responsibility for this failure.

117 The further aggravation of the police report was it reported the total sum concerned was nearly half a million pounds £498,000. This is the sum total of every single Elite invoice to St Margaret's. They are all in the tribunal bundle from 2010 onwards. Aggregating them in this way implies that all the contracts awarded were as culpable as the last, which is not so. They were invoices of varying sizes over a 7-year period. The circumstances differed.

Whistleblowing - Protected Disclosures

118 The first alleged whistleblowing complaint protected disclosure was dated 20 November 2017 sent by the claimant from home was sent to the Education Skills and Funding Agency (ESFA), to LBBD, to the Genesis Trust, to the Diocese, to Ofsted, and the Department for Education (DfE). It alleges breaches of legal obligations and good practice by the Genesis Education Trust in particular by the CEO, Beverly Hall, and the COO, Elaine James. We remind ourselves how they came to the positions they hold. Ms Hall had been the Executive Headteacher of the two LBWF federated schools, St Mary's and St Saviour's both of which had high Ofsted ratings. Elaine James had been the only Business Manager, effectively a bursar at both schools and the only one with the necessary business skills to become the COO. There was no-one in a comparable role in St Margaret's at the time.

119 As it turned out, the Genesis Trust at the time had no whistleblowing policy. That was because this was during the early grace period where new multi-academy trusts are given a period to introduce harmonised policies across the academy as Mr Mr Moss later pointed out in a 17-page letter to ESFA. The claimant alleged that Ms Hall and Ms James' appointments had failed to follow any due process. That was not the way Mr Moss saw it. She alleged she had been suspended as a Trust Director, which was factually wrong. She was suspended as an employee i.e. as Executive Head Teacher. She was never suspended as a Director although she did not attend board meetings at the time, because she was off sick.

120 She mentioned what became a familiar cry at this tribunal hearing about suspension being a neutral act, something which the claimant and her representative vehemently disagree with. It has not been necessary for us to make a decision on that. For what it is worth we consider that, in a disciplinary context, disciplinary suspension is a neutral act. They are reading too much into it from certain quite extreme reported cases (e.g. the *Gogay v Herts CC* case) where suspension was found to be a breach of the implied term of mutual trust and confidence. In our view that did not apply here.

121 In her whistleblowing complaint, the claimant also raises the point about confidential minutes. It is a fact, we now know, (and it took some time to come out at our hearing), that the minutes of the Governors meeting on 5 September 2017 at which the claimant was suspended were confidential and remain confidential and will never be published on the school's website, because it was confidential and personal to the claimant and her position at the school. For the claimant's sake, for the sake of the investigation, and for the school's sake, the Governors did not want the public to be able to know that the claimant was subject to a disciplinary suspension.

122 There were complaints about governance, management, finance, curriculum, and health and safety. The claimant's summary at the end of the letter was:

> "This whistleblowing is an action that has required careful thought and as a founder member/creator of the Trust it is difficult to see what started as an amazing vision of partnership and collaboration being eroded into what appears to be an extremely hostile takeover resulting issues of employment law, governance, management, finance and curriculum".

123 Mr Moss dealt with it and he replied by a letter dated 17 December 2017 following

further exchanges with the claimant. The claimant never went to talk to Mr Moss about it because she said she was too unwell so he said he would investigate it as best he could in her absence. He stated:

> "Much of your letter relates not to your whistleblowing complaint but to the disciplinary procedure which the Trust has commenced in respect of your role as Executive Headteacher at St Margaret's. I believe that you are conflating two separate processes. I would urge you to put your concerns relating to the disciplinary procedure to the investigation officer who is Beverley Hall…. There is no requirement for the outcome of the whistleblowing complaint to be completed prior to any disciplinary hearing… they are entirely separated processes. They run to their own timetable."

124 The claimant followed up with a second whistleblowing complaint dated 8 January 2018 addressed only to Mr Moss. It starts:

> "Please find attached the second stage of my whistleblowing complaint which includes new and significant ongoing concerns …. asset stripping of schools and evidence of a hostile takeover …. ….This is NOT what God intended [repeated several times throughout] ….The school's Christian ethos is now "mocked" by my colleagues and the witness regarding the treatment of staff at St Margaret's does not honour God."

125 Anita Fenn independently sent a whistleblowing letter as well so Mr Moss had to deal with all 3 at once. Anita Fenn's had the same profile and the same addressees as the claimant's first complaint. Latterly at the hearing we were given a copy of his closely typed 17-page letter to ESFA, dated 23/02/2018 dealing point by point with evidence and responses to the claimant's 19 calls for evidence and 25 responses to make to allegations. It was extremely detailed.

126 We realise from this correspondence how close the relationship between Anita Fenn and the claimant was. In his letter to ESFA Mr Moss describes Anita Fenn's resignation from the board and stated:

> "Anita Fenn in her resignation letter stated that she was resigning in order to provide support for Ruth Ejvet. Anita Fenn also stated in her reasons for resignation was that she wanted to achieve a work-life balance and mentioned no concerns regarding GET directors. I responded to those complaints on 18 January 2018 and attached copies of those letters in the bundle of documents I am sending to you."

127 His letter to ESFA deals very openly terms about his concerns for St Margaret's. Notably, the school had not had an Ofsted inspection since 2013 and therefore were due for one anytime. He was concerned that due to recent deterioration in performance that they would fail very badly. That is why the school, and the governing body, had "Supported Status" as decided at the 5 September confidential meeting of the full governing body.

128 Subsequently he sent outcome letters to the claimant on both her whistleblowing complaints. Both these were dated 19 January 2018. His conclusion to the claimant's first whistleblowing complaint was:

> "Your concerns are not supported by the evidence that is available to me. The Trust exists for the benefit of all 3 schools within the Trust and as a Board of Directors we have a duty to ensure a quality of opportunity for all children across the 3 schools. At this moment in time as a board we have serious concerns about the financial management and standards at St Margaret's which we are addressing. We are confident that actions we have put in place since September will enable in

> the near future the original partnership working that formed the basis of St Margaret's, St Mary's and St Saviour's taking that decision to form a multi academy Trust. this is not an extremely hostile takeover since the decisions were taken by the Board of Directors which has representatives from all three schools.

129 He responded to the claimant's second 8 January letter and reassured her that the appointment of an interim headteacher to St Margaret's was to stabilise the school in her absence and: -

> "No judgment was made about whether or not you would be returning."

We heard evidence that the appointment of Mr Huntingford is a fixed term interim appointment.

130 At times we did give serious consideration as to whether Mr Moss had been motivated by the fact that the claimant was a whistleblower because there can be no doubt it entailed a lot of work for him to contain the potential damage these communications could have caused in ESFA, LBBD, the Diocese, and Ofsted. Mr Moss's letters dismissing the claimant's concerns were 5 pages long and closely typed. They were very detailed.

131 For instance, he mentioned the problem about the school having left 6 teachers off the budget had equated to a discrepancy of £197,000. This was a large amount in school budget particular in a school with only a 2-form intake. St Mary's and St Saviour's were considerably larger.

Submissions and conclusions

132 We consider that we have found the facts we need to find in order to address the submissions in this case. Those submissions focused primarily on whether there was an unfair dismissal.

Unfair Dismissal

133 It is beyond any doubt or dispute that the claimant was dismissed for reasons related to her conduct under s 98(2) of the Employment Rights Act 1996, as opposed to any of the other potentially fair reasons there.

134 As may already be clear from our recitation of the facts, the respondent's handling of the claimant's dismissal and the sanction of dismissal itself comes nowhere near to being outside the range of reasonable responses mandated by section 98(4) of the Employment Rights Act 1996, and the case law. The matter has caused reputational damage. In the tribunal bundle we saw adverse reports in the press. The school and the parents were acutely aware of this. The threat to the reputation of the school was not merely theoretical.

135 Like Mr Moss, in particular, we consider that the award of the building contract to Elite without a tender was obviously wrong and in breach of generally accepted and internationally well-known competitive tendering requirements for public authorities. It was

taxpayers' money.

136 The claimant herself was in breach of her duties as Executive Head. She attempted, in the disciplinary proceedings and in these tribunal proceedings, to exonerate herself by saying she absented herself from the decision-making parts of the Building Subcommittee meetings was to no avail. She had abdicated from the responsibilities of her role. She knew exactly what was going on, and we find as a fact that she had a guiding hand in it. When the evidence is properly analysed, this was a nugatory defence. The claimant had a role, as the professional lead of the school, not to let that happen on her watch.

137 There was circumstantial evidence that Elite Building benefitted very substantially with St Margaret's. For a long period, they were not even VAT registered until 2016 when one single St Margaret's invoice put them over the threshold for compulsory registration.

138 We found there was nothing unreasonable about suspending the claimant it is a standard process. It was a neutral act in a disciplinary context. It was not a breach of the implied term of mutual trust and confidence. Loyalties amongst staff and Governors became strongly divided within the school. Anita Fenn, the previous chair of Governors, was the main example. Anita Fenn was present on most of the days of this tribunal hearing.

139 The tribunal found nothing unfair with the respondent asking potential witnesses if they wished to be interviewed in connection with this.

140 We found nothing wrong with the venue for the disciplinary hearing in Waltham Forest. The claimant's school had been in Barking and Dagenham. All hearing venues were in Waltham Forest.

141 We found nothing in the point about the wrong policy being used, as stated above. In any event, we are bound by s 98(4) which gives primacy to reasonableness over policies (*Cabaj v Westminster City Council* [1994] IRLR, 530, EAT).

142 We cannot see why or how the ACAS Code of Practice was not followed. No one managed to explain this to the tribunal.

143 The criticism of the respondent's "failing to consider evidence" was over-general to the point of meaningless. It was impossible to analyse and often a plea to the respondent, and then this tribunal, to do more reading and more research so we could conscientiously say that we had done a fair investigation. This tribunal has now spent more than a proportionate time on this. There was no substance in this point. It was an empty plea for more process.

144 The dismissal could not be deferred. Then there was eminently fair appeal before a panel which was highly independent.

145 Having analysed the whistleblowing complaints and the disciplinary appeal process we cannot say in any way that Mr Moss's status, as the person who delivered the

outcome to the claimant's whistleblowing complaints, disqualified him from hearing the claimant's disciplinary appeal. He rightly pointed out that a lot of the substance of the 20 November whistleblowing complaint actually concerned the disciplinary process anyway rather than the whistleblowing. He then directed that so much of it that did refer to the disciplinary process was to be referred to Beverly Hall because otherwise they were separated processes which had their own timetable.

Whistleblowing - Protected Disclosures

146 The tribunal panel had serious concerns about the claimant's meeting the "reasonable belief" and "public interest" requirements under s 43B(1) of the Employment Rights Act 1996, in raising these alleged protected disclosures when she did, having read Mr Moss's detailed, comprehensive, and convincing rebuttal of the points she raised. On one view they could be seen as a counter-offensive diversionary tactic to serve just her own purposes, and not in the public interest.

147 However, the tribunal panel is prepared, for the sake of argument, to agree that the letter of 20 November 2018 was a protected whistleblowing complaint, i.e. a protected disclosure relating to breaches of legal duty under s 43B(1)(b). We cannot find that it played any causative role whatsoever in accelerating the disciplinary hearing on the school's part. Although this ran counter to the claimant's need for delay because of her depression and anxiety. As Mr Moss stated, a balance had to be struck between the parties. The dismissal took place on 16 January 2018, 3 months after the suspension, and the appeal was refused after another two months on 13 March 2018. That was hardly unseemly haste.

Disability Discrimination s15 Equality Act 2010

148 As stated above the status of the claimant as a person with a disability of depression and anxiety has been conceded by the respondent. The respondent obviously had constructive knowledge and actual knowledge of her disability as it was on all on her Med 3 certificates. The tribunal does not now wish to go behind that concession.

149 Our main point, again, is causation we have not found under the Equality Act s.15 that the respondent discriminated against the claimant because of something arising from her disability i.e. her absence and continuing sickness. The respondent did as much as they reasonably could to accommodate the claimant. They actually followed an Occupational Health recommendation not to hold a hearing before the first week in January from Dr Kapoor as stated above. The fact that the claimant did not attend was a matter for her. The respondent felt that they could not decently postpone it again.

150 On the facts, judging from the minutes, we cannot see that a requested break on the second day of the appeal hearing was refused at all or that the claimant was at any particular disadvantage. In fact, Mr Moss stated several times that the claimant appeared to be able, alert, and not unduly disadvantaged in her presentation of her appeal. He made his decision on the actual substance of what she was saying.

151 We cannot see that there was any failure to hold the disciplinary hearing or either of the appeal hearings at a neutral venue. Nor can the tribunal see how the respondent

had misinterpreted the letter from Dr Kapoor dated 12 January. The claimant's actual dismissal was nothing whatsoever to do with her absence from work. It was because the Trust, justifiably, had lost all trust and confidence in the claimant. That is the essence of gross misconduct. That is what happened in this case. How could they continue to employ and Executive Headteacher who had shown such a fundamental lack of judgment?

152 By this reasoning under s 15 of the Equality Act 2010, we do not need to reach a determination on whether the respondent had legitimate aims, or if they used proportionate means of achieving them. If we had needed to, there is no doubt we would have held for the respondent. There was an immediate need to stabilise this school which was in crisis and suffering from alarming reputational damage. Generally, the school was at risk of being put into Special Measures by Ofsted.

153 We mention the fact that there had been an obvious failure in the due diligence process. That has been alluded to above, but that is what it is. The fact was this was quickly discovered by the auditors of the Trust once the Trust had been constituted and once the two sets of auditors had been appointed. It was suggested at one stage the academisation might have been called off by St Mary's and St Saviours if they had known about this.

Reasonable Adjustments

154 The claimant also makes s. 20 complaints of failures to make reasonable adjustments. The first reasonable adjustment she claims is making sure she was provided the opportunity to put her case in person. The tribunal considers it was not reasonable for the respondent to wait for her to attend, when no return to work date was in prospect, and when Occupational Health had said she should be fit for a hearing by then after her course of counselling.

155 Nor can we say that the respondent's failing to conduct an investigatory interview with the claimant amounted to a failure to make reasonable adjustments. Beverly Hall tried hard to meet with the claimant, and the claimant would not agree because of her anxiety. They had to press ahead because reputational damage was already happening. The destabilisation of a whole school is no small concern. Speculation among all the children and parents was rife.

156 As stated above, the criticism over venues has been made repeatedly under different sections of the Equality Act 2010. The claims that are made as s.20 reasonable adjustments are more or less the same as those made in the s.15 claims. We cannot see how the claimant can argue she was put at a disadvantage for s.20. She was not a known figure in the London Borough of Waltham Forest.

157 Again, the suspension of the claimant was something that had to be done. The respondent could hardly be accused of failing to make a reasonable adjustment thereby. The respondent was not obliged to refrain from suspending the claimant her because she suffered with anxiety. In any event, it is academic in the sense that the claimant was unfit for work and was not coming into the school at all anyway. Although we appreciate that the suspension put extra requirements on her, as for instance, not contacting members of

the school, in order to preserve the integrity of the investigation. This was not beyond the normal incidence of a disciplinary suspension. We cannot see how it could raise a *prima facie* case of disability discrimination in this case.

158 The suspension complaint was not merely an empty apprehension on the respondent's part. Heather Fleetwood stated that the Headteacher's file had been empty when first inspected and material had been put on it when next viewed. How that happened, no-one knows. That is precisely the sort of the sort of reason that somebody might consider suspending an employee pending disciplinary investigation. Suspension is an insurance, and not an accusation of wrongdoing. The school was not stating that the claimant would somehow subvert the investigation. It would also be better for the claimant herself, to be able to say that she had had no opportunity of interfering with the investigation, as she was suspended.

159 For all these reasons all the claimant's complaints are dismissed.

Employment Judge Prichard

Date: 19 August 2019