# EMPLOYMENT TRIBUNALS

***Claimant*** **AAA**

***Respondent*** **BBB**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

HELD AT NORTH SHIELDS ON 4-8 November 2019

EMPLOYMENT JUDGE GARNON MEMBERS Ms. R. Bell and Ms. J. Maughan

*Appearances*
For the Claimant Mr. S. J. Mallett of Counsel
For the Respondent Mr. R. Stubbs of Counsel

**JUDGMENT**

**The unanimous judgment of the tribunal is**

**1. The claimant was at all material times a disabled person, but the respondent did not know, nor could it reasonably have been expected to know, she was, so the claim of discrimination under s15 Equality Act 2010 (EqA) is not well founded and is dismissed.**

**2. The dismissal was substantively and procedurally unfair, so the claim of unfair dismissal is well founded. We find no grounds for reducing any compensation under the Polkey principle or on the basis the employee caused or contributed to her dismissal by her own culpable and blameworthy conduct. Remedy, which may include an order for reinstatement or re-engagement, will be decided on a date to be fixed .**

**REASONS** ( bold print is our emphasis and italics are quotations)

1.1. The claim is of unfair dismissal under the Employment Rights Act 1996 (ERA) and disability discrimination under s15 EqA only. The respondent is the Governing Body of a voluntary aided primary school ("the school"). It is not local authority maintained but has an arrangement with the County Council ("the council") to provide HR and other advice. The claimant was its Deputy Headteacher. Orders have been made under Rule 50 for the anonymisation of all documents available to the public and, as the events occurred in a small community, caution is needed to prevent readers working out who the people involved are.

1.2. The claimant was born in late 1980 and worked at the school from 1 September 2013 until her dismissal without notice on 28 June 2018. Allowing for Early Conciliation, her claim has

been presented in time in respect of her dismissal. The respondent does not concede she was, at any material time, disabled.

1.3. In the unfair dismissal claim, the issues are
1.3.1. What were the facts known to, or beliefs held by, the employer which constituted the reason, or if more than one the principal reason, for dismissal?
1.3.2. Were they, as the respondent alleges, related to the employee's conduct?
1.3.3. Having regard to that reason, did the employer act reasonably in all the circumstances:
(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal?
1.3.4 If it acted unfairly procedurally, what are the chances it could still fairly have dismissed the employee if a fair procedure had been followed?
1.3.5. If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct?

1.4. If the EqA claim, the issues are

1.4.1. Does the claimant have a mental impairment which, but for measures taken, would have a substantial long term adverse effect on her ability to carry out normal day to day activities; and, if such effect at times ceases,is it likely to recur? If so, she is a disabled person.
1.4.2. Did the respondent know, or ought it to have known, she had the disability?
1.4.3. Dismissal being unfavourable treatment, was it, at least in part, because of something arising in consequence of the claimant's disability ?
1.4.4. Was she treated unfavourably in the following ways
(a) Failing to adequately support her in the workplace from July 2017 until dismissal;
(b) Suspending her on medical grounds and without any adequate explanation on 11 January 2018;
(c) Suspending her pending a disciplinary investigation on 5 February 2018;
(d) Failing to follow medical advice she was fit for work and not a safeguarding risk;
(e) Failing to make any adequate enquiries into whether her condition amounted to a disability prior to the decision to dismiss;
(f) Subjecting her to a disciplinary investigation;
(g) Failing to conclude her appeal within a reasonable timescale;
(h) Failing to uphold her appeal.
1.4.5. Was that treatment because of something arising in consequence of her disability?
1.4.6. If so, can the respondent show such treatment, and/or dismissal, was a proportionate means of meeting a legitimate aim?
1.4.7. Are any of the detriment claims out of time and, if so, would it be just and equitable to extend time?

## 2. Findings of Fact

2.1. We heard the claimant and read the statement of her witness **Ms L,** formerly Chair of Governors, who could not attend. For the respondent we heard its Headteacher **( "the Head"); Teacher A**, member of Senior Leadership Team (SLT) ; the Investigatory Officer **("IO")** a School Improvement Leader for the council; one of the three members of the Disciplinary

Panel **("the DO"),** a Governor of the school ; the Chair of the three member Appeal Panel **("the AO")** .Save for the AO , all are female.

2.2. Other people involved include
2.2.1. a Teaching Assistant **(the "TA")** who was interviewed in the investigation and was a witness at the appeal,
2.2.2. a Supply Teacher interviewed in the investigation ( **"the Supply"),**
2.2.3. **Teacher B** at the school
2.2.4. an Assistant Director of Education interviewed in investigation **("the Assistant Director")**
2.2.5. A clergyman at the local church **(" the Reverend")**
2.2.6. **the Caretaker** at the school interviewed in investigation
2.2.7. the Chair of the Disciplinary Panel, governor at another school **("the DP Chair"),**
2.2.8. **Dr D**, an Occupational Health (OH) Physician,
2.2.9. **the Head of OH** ,
2.2.10. **Dr P** a Clinical Psychologist
2.2.11. **Dr V** a Consultant Psychiatrist,
2.2.12. the Local Authority Designated Safeguarding Officer **("the LADO"),**
2.2.13. three HR Advisors for the Council **("HR")** who do not need to be separately identified
All the above are female save for the Reverend, Caretaker, Dr P and Dr V.
2.2.14. two Trade Union Representatives **("TU Rep")** of the claimant, a female at the Disciplinary Hearing and a male at the Appeal.

2.3. The claimant was born in Manchester in 1980. Her brother was born in 1984. Her mother was a primary school teacher. Her father died suddenly in March 1985 aged 36. She describes herself as a "*Daddy's Girl*" and was traumatised. In August 1985 the family relocated to the North East moving in with her maternal grandparents. She was miserable at school. The family never talked about her father and there were no photographs of him in the house.

2.4. At middle school aged 9-13 she had some happy times, took dance lessons and played four musical instruments. She had an unhappy time at High School where was considered a "geek". She moved schools after her GCSE's acquiring three A levels.

2.5. She wanted to be a primary school teacher like her mother from the age of 6. She went to University, graduated with a 2:1 honours degree and completed teacher training, qualifying in June 2003. She secured her first teaching position at a Primary School in North Shields. She moved to a School in Newcastle in September 2006**.** She began her first maternity leave in May 2009. In 2011, she was seconded as Acting Deputy Head to another School nearby. She returned as a Key Stage 1 Leader in January 2012. She lived with her family in a small town about 10 miles north of Newcastle where the school is, and was a member of a local Church.

2.6. She has self-harmed on and off since her father died. It started when she scraped her head off a gravel pavement and felt a sensation of relief. She describes the physical pain releasing her emotional pain as being like the physical pain pulling it out with a piece of string. She has never used 'conventional' stress relievers like smoking and alcohol, or taken drugs. She quotes the NHS website, "*Self harm is when somebody intentionally damages or injures their body, usually as a way of coping with, or expressing, overwhelming emotional distress.*"

and parts of the Mental Health Foundation booklet "*The Truth about Self Harm*" which fit the facts of this case very well:

*It is habit-forming, and some people believe you can become physically addicted to self-harm. There is evidence to show that chemicals, called 'endogenous opioids' are released when the body is injured in any way. They are pleasurable and can make you less sensitive to pain. .. Often it is the way of coping or distracting yourself that is habit-forming. In other words, young people get used to it, and come to rely on it.*

*To harm other people is understandable in our culture but to willingly harm yourself is thought of as perverted.*

*Young people who self-harm usually feel very guilty and ashamed of what they do, and do not want to talk about it. The stigma associated with self-harm is unhelpful, and stops people getting the support and information they need to find better and more helpful ways of coping.*

*But one of the biggest fears young people told us about, and the biggest obstacle to getting help, was the fear that self-harm, the only coping strategy that had been keeping them going, might be taken away from them. They also said that they thought they could cope on their own, or that they were planning to sort things out and didn't need any help.*

*Many young people were worried about what others would think of them, when they found out they were hurting themselves intentionally. They were also worried that they would not be taken seriously. Many feared that no one would understand why they had done it, or would be able to help them. Girls were particularly sensitive about being labelled or dismissed as being an 'attention seeker' or 'stupid' if they asked for help.*

*Many young people …were worried that if they were open about their self-harm, this could affect their choices for the future: they were worried they wouldn't be able to work in professions such as teaching, nursing, or childcare because of perceptions that people who self-harm are 'dangerous' and should not be allowed to work with children.*

2.7. The claimant has used several ways of self-harming as an adult: pulling her hair, burning herself with an iron, cutting herself with a razor blade, and sometimes hitting herself with one of her husband's hammers. She self-harms at home in secret, would go to bed at 10:30 pm wake up "*with her thoughts all over the place*", get up at 3 am and harm herself. This enabled her to face the day ahead. She would pick at scabs and apply antibacterial gel to the wound. Even her family were unaware of her self-harming. Her husband knew she had to some extent, in the past but was unable to understand this and showed no empathy. She told him the bare minimum so he unaware of her continued use of, or extent of, self-harm.

2.8. The higher up the career ladder she went, the more she was not coping with her personal life. She says she was like a split personality, more than confident in work, but unable to " *go to the Co-op for a pint of milk*". She 'acted' the role of a capable, strong person at school when in her personal life feeling she inadequate and having feelings of self-loathing.

2.9. Some governors at the school encouraged her to apply for the post of Deputy Head. She visited the school but did not warm to the Head whom she found stand-offish and unemotional.

She discussed the visit at length with her mother and husband and decided to apply. The Head took the decision to appoint her and she started on 1 September 2013.

2.10. The first part of her statement, about her relationships with the Head and other staff, is of limited relevance. We need not decide the many conflicts of fact, but accept the claimant's perceptions are genuine. Within a month, the Head made her feel unwanted there, saying she had concerns the claimant would go to church and divulge to governors things they did not need to know. Ms L was Vice Chair of Governors at the claimant's appointment (appointed Chair soon after). The DO, who then became Vice Chair, got along well with the claimant.

2.11. The school had been graded 'Outstanding' by OFSTED until in June 2013, it was downgraded to 'Requires Improvement'. Some staff refused to accept what had been found was correct. The claimant identified flaws and had many ideas for improvements but was met with the phrase, "*That's not the School's Way*!". Teacher B was on the SLT and a long-standing member of staff, who had applied unsuccessfully for the Deputy Head post. She made life difficult for the claimant. When the claimant voiced concerns to the Head, she was told, "*Suck it up Buttercup*." The Head denies this, saying it is not language she would use, but we find it is not a phrase the claimant would invent.

2.12. In **April 2014** the claimant went to her GP who prescribed the antidepressant Mirtazapine. After a few days she stopped taking it, as it was making her impatient with her children. She did not return to the GP. Mr Stubbs rightly points to her medical records which show hardly any visits to her GP. We find she must, at this time, have felt she had a problem.

2.13. **Early in the academic year 2014-2015,** she was asked to do a lesson observation with the Head in Teacher B's class. They agreed the grading was 'Requires Improvement'. The Head later said Teacher B had argued the grading so she had agreed to change it. Following this, the claimant was not given any opportunity to observe any other lessons, apart from when Ofsted visited. She was told by the Head her judgments were too harsh. When Ofsted visited in June 2015, she was given only positive feedback about her observation techniques.

2.14. In her previous schools the claimant never had any informal or formal disciplinary processes. **On 12 January 2015**, the Head issued her a verbal warning about the relationship between her and Teacher B, who was also warned . The claimant felt she was being held solely responsible for anything going badly. The Head said, as Deputy Head, the claimant should be held accountable. **Shortly after** when talking to Ms L, the claimant says " *As we were talking, I was absentmindedly rubbing my arm. My sweatshirt sleeve rode up to reveal cuts on my left arm. Ms L knew instantly what they were. She asked if I was okay and I said, "Yes. It's just how I deal with things.* ***Things are tough at the moment****."*. She adds Ms L in her work *" has a sound understanding of mental health issues. She didn't overreact or question any further, simply asked that I was careful and looked after myself*". Ms L was a Sunday School Teacher at the Church the claimant and her children attended. Her statement says she did not think this was a safeguarding issue so she did not break the claimant's confidentiality when the Head approached her at some point in 2015 saying she thought the claimant was self-harming. The Head denied approaching Ms L in 2015 but when talking later about seeing old scars she described as "*straight white lines*" on the claimant , the phrase "*two years earlier*" slipped out, which she hastily corrected by saying she meant two years

before this hearing. Coupled with her statement saying her first "***firm*** *knowledge*" of the claimant self harming came in 2017, we believe she had suspicions in 2015.

2.15. On 26 February 2015 the claimant was informed the Head was going to look at formal capability procedures mainly about her needing to 'make friends' with Year 2 staff. The claimant sought advice from her Union. When the Head became aware, she said many of the issues she believed to have existed, did not. The Head admitted that on at least one occasion in the past, she could not recall when, she had encouraged the claimant to be more sociable outside work with other staff and governors.

2.16. Following the Ofsted inspection **in June 2015**, the inspectors told the Head, while the claimant was present, she needed to share the practice of her good teachers with the rest of the staff. The claimant was awarded an outstanding grade for one of her lessons and praised by the Chief Inspector for a comment a child had passed about her teaching. Some staff asked the Head who was deemed to be outstanding. She told them she did not know.

2.17. **In the Spring term of 2016**, tensions between the claimant on the one hand and the Head and Teacher B on the other, continued but there were no memorable events for about a year after that. The claimant's only sickness absence was in December 2016 due to a "*bug*".

2.18. The preceding paragraphs show some correlation between times of increased stress for the claimant and her self harming. It matters not whether the claimant was objectively justified in feeling unappreciated, undervalued and unfairly treated. We do not think the Head is an uncaring person, but she is not emotionally demonstrative. At one point the claimant said all she wanted was for the Head to put a comforting hand on her shoulder.

2.19. **In May 2017** the Head accused the claimant of (a) inappropriate behaviour in a staff meeting led by Teacher B who said the claimant had rolled her eyes (b) an inappropriate email to a colleague in another school (c) sharing documents provided by another school on the school's 'Staff Share' thereby breaching copyright. The Head kept a handwritten notebook at the time which shows a discussion with HR on **16 May** that a warning letter be issued.

2.20. In the same month, probably on **17 May,** two pupils asked Teacher A about marks they had seen on the claimant's arms. Teacher A and another teacher told the Head who says she was concerned about the claimant's welfare, but also that pupils aged 8 had raised this. The Head's notebook shows she discussed this on 17 May with the lady who later was the DP Chair, who, as a council employee, gave advice to the school. She advised the Head **to get signed statements f**rom the two teachers, **which we cannot see she did**, refer the claimant to OH and hold back the warning letter until she had the OH advice. This advice must have conveyed to the Head the importance of accurate, detailed, contemporaneous records of events, but neither she nor others kept any, then or in future. An entry for 14 July is on the same page of the notebook following immediately the entry for 22 May and that page in our bundle finishes mid-sentence. Teacher A accepted in oral evidence that at some time she had seen marks and asked the claimant, "*Is that what I think it is*?" Her response was, "*Well, what do you think it is*?". Teacher A said she does not recall any more was said. We find the claimant's version more likely that Teacher A specifically asked if she had done it to herself and she admitted she had. Teacher A was sympathetic. The claimant felt she could talk to her from then.

2.21. The claimant says **around this time** , the Head said to her, "*You've got cuts all over your arms; I think you've been self-harming"*. The claimant said the cuts she was discussing, were from gardening which she still says was the truth. She did not reveal self-harming. The Head's notebook shows this was probably on **Monday 22 May** when the claimant asked for the warning letter she had been told she would receive. The referral to OH **on 26 May 2017** (page 199) said the claimant **was** self-harming and the Head had asked her "last term" if she had considered counselling, The referral was made on the day school broke up for half term and the Head says "last term" meant the half-term which had just ended. She did not mention the gardening explanation. Her notebook contains no further entries until July.

2.22. The claimant told her TA she was being referred to OH. The TA said she had known from very early on the claimant self harmed but assumed it was her way of coping when times were hard. Although the TA encouraged her to seek help, she understood why she found it difficult. The TA worked closely with the claimant daily, had full access to her classroom, regularly looked for resources in her cupboard and found nothing of concern. The TA said so in her interview with the IO, which was not included in the pack for the disciplinary hearing. The TA also said so during the appeal.

2.23. OH contacted the claimant **on 30 May 2017** to make an appointment **for 7 June**. The claimant told Dr D who asked about self-harming, she had done it in the past, but stopped about 12 years ago. She says "*I was utterly ashamed of my self-harming and embarrassed by it. Also, at this point, I was not ready to accept and face up to my problems. In retrospect, I can see that people were trying to help. At the time I could not accept it and was fearful of it and the potential consequences it could have for my children, marriage, family and career*."

2.24. Dr D provided her advice by letter dated 7 June 2017 (page 203) which includes

"*She was referred here as a result of a colleague suggesting that she had self-harmed";*
*"I spoke to her at length about her psychological wellbeing, both in recent months but also over her life. I certainly have no overt concerns about her mental health";*
*"I believe there were **some scratches** to her right wrist shortly after the meeting, as she had spent some of the weekend gardening. There was also **a small burn to her right wrist** from the oven and I am certain this is not from any incident of self-harm";*
*"She has no further past medical history which is of any concern to me today. She is on no medication";*
*"I am happy for her to remain at work. I do not feel that any restrictions or adjustments are required in the workplace";*
*"I have no concerns about any long term implications therefore. At the moment, no additional help or support is recommended*".
The Head was surprised to see the "gardening" explanation was accepted by a medical professional, but did not feel she could go against the doctor. 22 days had elapsed between the marks being seen and the doctor examining the claimant.

2.25. The claimant sent an email to the Head on **Friday 14 July 2017,** about difficulties with Teacher B. The Head says she rarely emails but spoke with the claimant. Her notebook shows she took advice from HR including offering mediation or a grievance route. The claimant said she would wait until September and see if mediation was required.

2.26. By now the claimant had severe anxiety and felt unhappy at work. We accept her evidence that over this time her mental health suffered, she was regularly upset at home and afraid to go to work. **During the Autumn term 2017 things got worse. She was very anxious about going to work each day and began to self-harm at home more regularly in order to cope with leaving the house in the morning.**

2.27. On **17 November 2017** the claimant says she was self-harming at home in the early hours of the morning using a **razor blade** and was disturbed by her 4 year-old daughter. She hid the blade in her mobile phone case and forgot to retrieve it when getting the family ready for work and school that morning. By lunchtime she had forgotten it was there and slid her debit card into her phone case to buy lunch. When she returned and removed the debit card, remembered the blade and it was gone. She asked Teacher A to help her search the classroom. They did not find any blade and were satisfied it had not fallen out in the school. The claimant found the blade, in February 2018, in the driver's seat door pocket of her car into which she had probably put her phone case in the morning. By then, she was suspended and not allowed any contact anyone from school so could not tell Teacher A. **All this is denied by Teacher A** who says her Google calendar shows it was impossible for her to have searched the claimant's classroom that day because she was with other people. She only produced it during our hearing despite having known from the time witness statements were exchanged the claimant was going to make this allegation of an event on 17 November, which both recall was Children in Need day. The Google calendar shows only what she was meant to be doing. In the witness statements and document bundle we have not found any reason why the claimant would have **volunteered to anybody** having brought, albeit unintentionally, a **razor** blade into the school. That she did so, convinced us it happened as and when she says.

2.28. On **11 December 2017 at about 3.30 pm,** the claimant attended a SLT meeting at school wearing a long sleeve top. She normally dresses in black. Present were the Head , Teacher A, the Assistant Director, Ms L and the Reverend. On the **palm side of both wrists** the claimant had what she describes as *scratches* done that morning, before she left the house. She later rubbed antibacterial gel into them which made them look sore. In their witness statements the Head calls them '*fresh 'lacerations'* on her *arms*. Teacher A says the cuts were "*fresh and bleeding"* on her *forearms.* The claimant says she has no scarring from these marks which indicates 'laceration' is an exaggeration. The Head took **immediate** advice from HR which was to refer to OH again. If the wounds were as she described, they would be seen on a physical examination, **if one was done quickly**.

2.29. The claimant was at the School Christmas performance on **12 December 2017, wearing a black long sleeved top chosen to hide her wrists.** Throughout she was at the back of the hall which was in darkness. Parents were looking towards the lit up stage. The only people in the hall who knew about marks on her wrists were the Head and Teacher A. It is the respondent's case an anonymous referral was made by a parent to the LADO in early January. The claimant believes this could only have come from the Head or Teacher A. It would be surprising if a parent, who knew nothing about the claimant being suspected of self harming but who was close enough to see marks, would not have asked her how she had come by them, or then waited 3 weeks to contact the LADO.

2.30. The Head made the referral to OH dated **14 December 2017** (pages 208-211). Under the heading "*If your request is urgent please state the reasons here*:" the Head refers to "*cut marks on the **inside** of both her wrists. The marks look very fresh and I am concerned that this is taking place **in school hours**".* Later on the page she says "*She has told me she does not want to attend counselling and I wonder what else is available to help with strategies so she can cope and stop self harming*". The claimant was told she needed to attend OH whether she wanted to or not. She became afraid and anxious feeling OH was being used as a punishment, rather than a supportive measure. In manuscript on the first page of the referral someone has written "*20/12/17.Appt at 11.00am with* (the Head of OH)" . It was again with Dr. D.

2.31. At the appointment, on **20 December 2017**, the claimant first told Dr D she did not need any help. Dr Dang pushed up her sleeve and asked about what the claimant says were **burn not cut** marks she saw. The claimant admitted self harming. Her statement says "*From this point I felt like I was waving a white 'surrender' flag. I was petrified about the potential ramifications, but I accepted that I had to be 100% honest about my condition. I remember sitting in the room, alone, sobbing. I was offered little sympathy from Dr D when she returned after speaking to a colleague about 'what they were going to do with me'. My worst fears unfolded, when Dr D informed me she would have to involve Children's Safeguarding Services as a child protection measure. I felt like my whole world was unravelling; I was distraught*"

2.32. **Teacher A** saw the claimant on **Friday 22 December 2017**, the last half day of term, visibly shaking and upset. OH were referring **her own children** to Social Services. She was concerned about this and her husband finding out about her self-harming if a letter were to be sent to her home. Teacher A told the Head (as documented in the timeline the Head provided during the investigation) who contacted HR for advice and was told Social Services would be in touch with the claimant soon. The Head says she spoke confidentially to Ms L at Church who agreed to keep an eye on the claimant. She tried to speak to the Head of OH too.

2.33. The report from Dr D, pages 212-213, states, "*We have referred the children to Children's Safeguarding Service, **although I do not feel the children are at immediate risk**"……. "With regards to her work, she completely denies any self-harm incidents within the School. She states that the job is everything that she is and that she functions completely within the workplace. After discussion with* the Head of OH*, we felt that from a psychological perspective, she would be better off in the workplace….She denied any suicide risk. We will review her in the New Year"* . **On receipt of this the Head would have known the claimant was likely to return to work**. Absent from Dr D's report are any physical examination findings of what marks she found and where or any opinion as to when any wounds on her wrists, inflicted only nine days earlier on the respondent's case, were likely to have been made. In all that followed, no-one from the respondent ever asked her for such findings.

2.34. Over the Christmas holidays Teacher A received text messages from the claimant, which she interprets as her saying she could not go without self-harming , there were ways of self-harming which would , not be detected (page 391, 399) and blaming the Head for the referral to OH (page 395). We went through the texts (which were messages on "What's App") with Teacher A. She had been asked to print them which she could only do by downloading them and converting to a Word document. They appeared in our bundle, and the one provided to the disciplinary and appeal panels, to be out of order and have gaps. Most did not show the date they were sent. It took our Employment Judge nearly half an hour to go through them with the

witness establishing when they had been sent and what certain names and abbreviations meant. Such an exercise, not undertaken by the IO, the disciplinary or appeal panels, showed the context in which they were sent, without which there was scope for misinterpretation. The claimant was very worried about Social Services involvement and trying to avoid them. It is entirely credible what she said, wrote and did at this time would be irrational.

2.35. The staff returned to work on Monday 8 January 2018. Teacher A had a conversation with the claimant and her statement includes

"15 *I still remember the words, "I **still never found that blade I lost**" and "you know I do it in school. They just don't know" and "I'm covered now in marks from head to toe". **She also referred to the fact the blade was in blu-tac.***

*17. I was however concerned about the Claimant's actions and the potential risk to children. I felt there was no alternative but to inform* (the Head , the Assistant Director and the LADO) *on 8 January 2018 about the text messages **and the potential risks to children**. My professional obligations dictated that I must take this difficult decision.*

*18. I was reluctant to disclose the text messages, as I felt a conflict between my friendship with the Claimant, the trust we had developed and, upon reflection, the seriousness of the information she had disclosed to me, together with my safeguarding responsibilities and the **potential risk** to children. I also felt concerned about how the Claimant would react to me disclosing these matters and text messages to a third party, which had been given to me in confidence.*

2.36. The first emboldened words above are what would be said to a person **who knew before** a blade had been lost. In her answers to the IO at page 337, Teacher A also says the claimant said she was contemplating suicide every day, but that is absent from her witness statement, and inconsistent with a text at page 402 where the claimant refers to Dr D as a "*nasty piece of work*" for even suggesting the claimant had contemplated suicide.

2.37. The parent who raised concerns with the LADO did so on 2 January 2018.The LADO telephoned the Head on **Monday 8 January 2018** requesting her to attend a joint strategy meeting on **Thursday 11 January 2018.** There was no immediate risk to children, as the claimant returned to training all day on 8 January 2018 and safeguarding training on 9 January 2018. **Teacher A first said she told the LADO on 8 January not only about the text messages but what the claimant had said about losing a blade, but not until 2 February was she a "whistleblower". When our Employment Judge asked her to explain, she said the LADO had said her identity need not be given to the claimant until she became a "whistleblower".** Teacher A's statement says of the two points she alleges the claimant confessed on 8 January (a) blade lost in school, (b) regularly self-harmed during the school working day, she " *was expecting the claimant to raise this herself once she had met with the LADO*". She adds "***By late January 2018**, it became clear that the Claimant wasn't going to disclose the lost blade or the fact she was self-harming in school, and there was also talk about the Claimant returning to school. **It was at this stage** I felt I had no alternative but to pass this important information* "onto the LADO. She changed her oral evidence to us back to this. We find she told the LADO well before 31 January, probably before 11 January. Teacher A's statement she did not tell him until late January is untrue.

2.38. The Head made a handwritten note made at the time (page 218) of the meeting on 11 January. It is headed " *Disclosure to colleague* ***(from 8.1.18)"*** She says the texts show the claimant was seeking to conceal the extent of her self-harming; had found out about places on the body where doctors do not look; was "*telling them what they want to hear*"; contemplating not cooperating with Children's Services; and avoiding appointments. Despite having confessed self harming to Dr D, after 33 years of hiding it from everyone including her family , it is not likely she would suddenly become totally open with everyone, so what is in the texts is unsurprising . The note also includes " *cried on Mon and said* ***I have been self harming in school time***" and " ***only way to get through the day*** *and will never stop*". The Head can only have got this from Teacher A and it appears in her note of a meeting with the LADO on 11 January. This shows much of the respondent's witness' evidence that certain matters were first disclosed on 2 February is plainly untrue.

2.39. The claimant says she **only once** self-harmed during the working day and this was done at home, while building up the courage to contact Children's Services on **9 January 2018** . She had attended training with the Head that morning and told her she was going home for lunch. The Head agrees this and that she gave her additional time in the afternoon to do assessment work but denies knowing she was going home to make a call to Social Services. However, as page 218 shows, she saw the claimant visibly shaking during the training course. We accept Mr Stubbs submission Children's Services did not tell the claimant that day no further intervention was necessary, but the call went better than she had been fearing.

2.40. On **10 January 2018** the claimant was in school but not teaching her class as the Supply was present who asked if she had enjoyed her Christmas holiday. She replied she had not, confessed to having self harmed, outlined what had happened and said she was worried about what was going to happen. The Supply worked in the claimant's classroom every week with full access to drawers and cupboards. She states in her interview with the IO on 19 March 2018 she saw nothing untoward or felt the claimant was self harming at school and she noticed ***fresh, but not bleeding,*** marks on the claimant " *a while ago*" and we believe she meant in the afternoon on 10 January 2018 . The claimant also told her she had cut inside her mouth.

2.41. Teacher A claims that on 10 January 2018 she saw marks on the claimant's hand, which had not been there in the morning and therefore she must have cut herself in school. We accept these were the marks the claimant had made at home on the previous day, picked the scabs at school and then dabbed on anti-bacterial gel which would make them look red. Despite it now being open the claimant had self harmed, no-one asked her to agree these be photographed. Had she ever refused a request for photographs, a physical examination, or for doctors to disclose their findings, the inference could have been drawn she had something to hide. At the 11 January meeting, the Head, two HR advisors, the LADO and the Head of OH were present. No such requests were made.

2.42. The claimant would usually arrive at School at 7:45 am. Teacher A who worked in the classroom next to hers was always there before her. The caretaker was usually around when she arrived and her TA would arrive in the classroom at 8:15 am. She says there would be no opportunities during the day to self harm. We accept Mr Stubbs submission she could have gone to the toilet to do so, but we would have expected staff to be asked by the IO if they had noticed the claimant taking long toilet breaks, which none of them were.

2.43. At the strategy meeting 11 January 2018, it was decided the claimant should be medically suspended. The Head says one of the HR Advisors and/or the Head of OH would convey this decision when the claimant attended school at 11.30am. At the time it was not adequately explained. **At about noon**, the Head took the claimant out of her classroom to the office. An HR officer was sitting there. The claimant was informed they were taking her to the hospital to see OH. **This matches a text to Teacher A at page 410**. **This was the greatest opportunity for a medical opinion to be obtained on the age of cuts, inflicted on the claimant's case 48 hours earlier, but on Teacher A's evidence only 24 hours earlier. No such opinion was sought**.

2.44. The claimant learned of the anonymous referral to the LADO**.** A What's App to Teacher A at page 414-415 on 14 January says she would like to find out who made it, **but is sure it was a member of staff**. Of the texts to Teacher A the claimant says *"I regret sending these texts and involving others.* ***Many of the texts I could not recall sending, due to my anxiety and state of mental unwellness at the time, though I accept and apologise for sending them.*** *They were made to* Teacher A *because… she had contacts with social services and because I thought she was someone who I could trust and who understood my predicament. She had regular contact with Children's Services .., and I know from conversations we had, she sometimes ignored their letters and phone calls, and tried to avoid them. Naively, I thought she would be able to offer some advice on ways I could also avoid contact with them. The 'lies' I refer to within the messages are particularly in the context of my husband. However, much was made of the messages to construe them as me continuing not to be truthful about my condition. Individuals can be selective what they share with their families and I am no different*.

*Self-harming is a very misunderstood and taboo subject. It is extremely difficult to acknowledge. However, I did have a turn-around moment in January 2018, not long after I had made this comment to* Teacher A *that I could not go on denying the situation and that I needed help to overcome my mental health condition. I was honest and cooperative regardless of how enormously challenging that was for me at the time and I have continued to be so. However, the way I was treated by the School subsequently, is exactly what sufferers of self-harm fear and exactly why they feel ashamed and terrified to 'come out'.*

2.45. The claimant was assessed by Dr P, an OH Psychologist, on **15 January 2018.** His report, on the same day, states, "*Self-harm is a coping strategy often used to help manage emotional distress and it can be associated with a number of co-morbid mental health conditions such as depression and anxiety. ….Self-harm does not directly impact on an individual's physical and mental ability. Urges and cravings to self-harm can be strong, but some individuals will find that distracting activities such as work actually help curb the desire to self-harm.* ***The only identifiable concern there may be, is the risk of infection from the superficial cutting****. …… There is no compelling evidence to suggest (*the claimant) *is unable to discharge her duties….She does not attribute her self-harm behaviour to issues arising at work. … Given her role in School it would require a management decision as to whether there is any perceived impact on pupils who attend the school. Based on her typical self-harming pattern, which occurs at home and mainly on hidden areas of the body, I can only estimate the impact as* ***minimal****.".*

2.46. The Head quotes from the report:- *"I am unable to be definitive if there is an underlying health condition such as depression and anxiety, as (*the claimant) *does not describe herself in these terms. Her scores on the Clinical Outcome Routine Evaluation, which measures general psychological wellbeing, indicate she is in the mild range." … "I was not able to identify any adjustments or restrictions from a psychological point of view",* and says she did not consider the claimant to be a disabled person at this stage. The Head of OH wrote on 19 January 2018, following receipt of Dr P's report, the claimant was potentially fit to return to work. The Head says she was working towards getting her back following a risk assessment and case assessment meeting with her where any remaining concerns could be discussed and addressed. This meeting was arranged for 31 January 2018 and she wrote to the claimant on 26 January 2018 to invite her to attend.

2.47. The claimant attended on **31 January 2018** with the LADO, the Head, the Head of OH and HR. They discussed the nature of her self- harming and that she did it at times of anxiety in the early hours of the morning. She was asked if she had ever self-harmed at school and replied she had not, because once she was out of the house, she adopted her 'professional, capable persona" and did not need to. At least some of those present knew this did not match what Teacher A had told them **but said nothing.** The notes of the meeting were not supplied to the claimant at the time. She contacted the IO on a number of occasions asking for them.

2.48. The claimant denies ever telling Teacher A she had hidden blades in blu-tac; self-harmed at school; contemplated suicide daily or was covered in marks from head to toe. On **2 February 2018,** the Head told staff the claimant would be returning to work. Teacher A says she "whistleblew" to the LADO **that day**. The Head says *This was alarming news, conflicting with the Claimant's version of events and called into question whether or not it was appropriate for her to return to work at this stage, until further investigation had taken place. This view was shared by the Council HR team and the LADO (see page 258, where I refer to "2 February 2019 - 4pm HR called to say this turn of events changed everything and rang H&S").*

2.49. On **3 February 2018** the claimant's classroom was searched by the Head and caretaker. A Stanley knife blade was found attached to the magnetic strip of an identity badge of a teacher who had left the school and given it to the claimant with the words " something to remember me by". When we asked the Head, she confirmed it was found **in a box** on the second shelf of the cupboard. Two craft knives were found at the back of her desk drawer with a spare blade. Also in the box was a shard of what was first called glass but which the Head said in oral evidence was sharp hard plastic. The claimant was suspended by letter dated **5 February 2018** pending investigation into misconduct allegations. Between the first and the second search the decision was taken by a health and safety officer to bolt and secure the cupboard in her classroom, to ensure there could be no access to her items.

2.50. A further search on **13 February** using a metal detector, obviously meant to find anything hidden in blu-tac, found only a piece of glass which looks like the base of a broken jar, wrapped in a cloth, near the box where the Stanley blade was found .This shows either the first search was not thorough, or the glass had been put there since. The Head **was told by somebody to collect lumps of blu-tac, and did so**. The claimant's TU rep had asked if he or the claimant could be present at this search. They were told that was unnecessary as an independent officer would conduct it. The Head conducted it alone. She says the location in

which these items were found was suspicious **as if hidden from view** but then says they were potentially accessible by pupils aged 7-8 years which suggests they were not well "hidden". She says it is highly unusual for such items to be in a classroom "*They are not used by children and we do not provide these items to any teachers as part of their normal duties.* The claimant has never suggested the items were used by children, but by her as she, like many teachers, makes display items from corrugated cardboard, (photographs of which she presented at her appeal) and use Stanley or craft knives to cut it. We accept that is common practice in many schools, as a document produced by Mr Mallett showed. The respondent accepts most primary school teachers use blu-tac.

2.51. The claimant has alleged items were "planted". The Head says this is pure speculation, she did not and cannot think of anyone who would. We agree it is unlikely anyone would "plant" these items but it illustrates how a person can become paranoid when faced with concealment of information. Teacher A described the glass in her investigation interview on 7 March 2018 as *'doesn't look like glass that has been smashed by accident"*. We agree that is a meaningless observation. The claimant asked how she knew about this glass but never received any answers which made her suspicious, distressed and anxious.

2.52. The claimant does not need to allege "planting". Before us, and earlier, she freely accepted the craft knives and blades were her own and she used them. The Stanley blade was in a box of "*miscellaneous stuff'* accumulated over her teaching career. Years ago, at another school, she used a Stanley knife for craft work. When she changed the blade she put the old one into the box until she could dispose of it safely and accepts she had overlooked it. It may well have stuck to the magnet on the name tag. When the claimant collected her belongings from the school in September after her dismissal she found one of her craft knives was where she had left it, in a mug in the cupboard. The school had by then introduced a policy about storage of sharps, which the Head had said were never used, so why have a policy?. No-one ever checked if the Stanley blade was "used", or still sharp as new.

2.53. The claimant is adamant she has only ever cut herself with **clean razor blades** to prevent infection, said by Dr P in his report to be the greatest risk**.** Our Employment Judge said razor blades, which she described as rectangular with holes in the middle, are rarely used these days by men for shaving as they have been replaced by multi blade cartridges . **She immediately said she used to buy from ASDA, which is not the sort of detail a witness is likely to make up on the spot.** She maintained Stanley or craft blades were never brought into school for the purposes of, or actually used for self-harming. As for the broken glass, she took over the classroom from somebody else and other teachers and TA's still used it . She never used glass in her classroom but plastic or wood items, including a vase containing flowers she had on a bookcase. She would not cut herself with broken glass for hygiene reasons. The larger piece of glass was found in cloth, as it would be if someone had broken a jar and wanted to make it safe by wrapping it. It is unsafe to rely solely on the body language or demeanour of a witness to assess truthfulness, but the claimant when talking of the allegation she cut herself with items stored so unhygienically showed revulsion at the thought.

2.54. The Head produces a "consideration of suspension – decision record" at page 253 and says her hands were tied ,because an **allegation** had been made the claimant had lost a blade in school and was **self-harming in school time**, but she was not accepting she had.

Because blades knives and glass items had been found in her classroom, there was suspicion she was not being honest. The Head says at paragraph 49.5 of her statement "*Alternatives to suspension were considered, however,* ***my view and the view of the local authority designated safeguarding officer*** *was the Claimant posed* ***a potential risk*** *to children and should not be allowed to return to work. If we did not suspend and if anything had of happened to a child under our care, knowing what we knew, then serious questions would have been asked of why suspension was not considered to protect the children*". **This attitude permeates everything which follows.**

2.55. It was clearly right to suspend. At a meeting on 14 March 2018 Dr D noted anxiety around the disciplinary process was causing the claimant the most stress. On **22 March 2018** the decision to suspend was reviewed and it was concluded it was appropriate for suspension to continue whilst the investigation did. We agree, but the investigation needed to be handled competently and progress rapidly for everyone's sake.

2.56. The IO was technically appointed by the DO as the "Nominated Officer" ( it is not clear exactly when) but the investigation brief she was given was prepared by HR. **The IO is a Council employee but not in HR, and had never done an investigation anything like this before**. She was asked to investigate three allegations (1) the claimant had brought sharps onto the school premises, with the intention of self-harming (2) had self-harmed on school premises during the school day; (3) had not given a truthful account to the Head, the LADO, OH and HR. The IO says the investigation report was entirely her own work. The brief suggested individuals who should be interviewed. She also interviewed the caretaker who was not listed. The following interviews took place all in 2018

| | | |
|---|---|---|
| Teacher A | 7 March | page 336. |
| The Head, | 9 March | page 332 |
| The Supply | 19 March | page 339. |
| The TA | 19 March | page 520A |
| The Caretaker | 27 March | page 341. |
| The Claimant, | 17 April | page 343 to 362 (final version at page 362ff). |
| The Assistant Director | 4 May | page 367. |
| The Head, second interview | 23 May | page 371 |
| The LADO | 24 May | page 369. |

The IO says "*there was not the resource to provide a note taker*", so she took her own notes, which were then typed up. Only at the claimant's interview, where she had her TU rep, was a note taker present.

2.57. The IO says the minutes of her interview of Teacher A are "*a summary and are not verbatim, but are accurate to be best of my recollection*". It lasted 1 hour 10 minutes and results in a mere 1½ pages. First, she says two children came to see her in **June** 2017 having seen marks on the claimant, when we know it was in **May**. She says since then matters have become "***progressively*** *worse over the last 6 to 9 months*" but was totally unable to answer when we asked how she can use the word "progressively" when, on her own account, she was aware of nothing between May and 11 December 2017. In answer to the IO she said the wounds she saw on that day were on the claimant's forearms, but we know they were on the

inside of her wrists. The claimant accepts on this and other occasions there were marks/wounds to be seen, the point is that **if people who saw them cannot accurately describe where on her body they were, it is unlikely their inexpert opinion of how recently they had been inflicted would be reliable.**

2.58. On page 336, Teacher A says when she received a text on Saturday 23 December she "*informed* the Head *of the incident*". Talking of the texts received over Christmas, she says on page 337 she "*felt I had to reply but I* ***always*** *informed* the Head". Despite this wording, her evidence and that of the Head, was she did not tell the Head of the texts as they were arriving, but only in the first week of January 2018.

2.59. Teacher A's account has people present at the SLT meeting whom other people do not mention and to none of whom the IO Spoke. As for the texts referring to the claimant inflicting wounds on parts of her body which doctors do not look at , she confirmed the claimant had **looked into doing** this rather than **had done** it. Halfway down the page she gives the account of what she says the claimant told her on 8 January which the IO has put in quotations

" *Thinks daily about killing herself"*

*"You know I do it in school. They just don't know, I still never found that blade I lost"*

*" I'm covered now in marks from head to toe*"

She alleges the claimant was struggling to eat because she was cutting inside her mouth and then says "*I reported this all to* the Head" which we find she did at the time, but no doctor was asked to do a physical examination to find if she was *covered now in marks from head to toe* .

2.60. Teacher A then described the glass found on the second search at which she was not present and which on the third day of our hearing, the Head denied ever showing to her A. She makes allegations of marks on 10 January which she saw at 1pm as "*straight cuts across her left palm they looked like new marks* " having said "*there were no marks on her hands in the morning*". If that was the case the wounds the claimant inflicted on 9 January had disappeared. She gives an account of a complaint from a parent about the claimant being abusive "*early on 27 January*". Page 231 shows the complaint was made on 25 January.

2.61. All in all there is a lack of times or places when she alleges the claimant said these things, or detail of exactly what she said. Time and again before us, Teacher A said she could not remember detail from over two years earlier, which is why detailed notes made closer to the time are so valuable, though even then the interview was two months after the event. All the IO did was ask a pre-prepared question and make a short note of what an interviewee said. Conflicts and inconsistencies which were crying out to be explored further, never were.

2.62. The next interview with the Head, two days later, started at 1 pm and finished at 3:15 pm The note is a mere 2 ½ pages. As for the SLT meeting the Head says the marks were on the claimant's wrists and could be seen because she was typing. The claimant said, as did the Head's own referral to OH, the marks were on the **inside** of her wrists and no one types with their hands facing upwards. The IO never asked the Head when Teacher A told her about the texts. The Head mentions on 8 January the LADO told her about the call from a parent on 2 January and the claimant herself had told the Head she was trying to avoid contact with Social

Services and the psychologist. She confirms on 9 January at a training meeting, when the claimant saw the headteacher of the school her children attend, she was visibly shaking. The claimant's account of herself as an emotional wreck at that time is thereby corroborated.

2.63. The interview of the Supply on 19 March refers to messages she received on What's App from the claimant which were never asked for, including one on 19 January saying she thought her room had been searched. Again Ms L was mentioned, but the IO never spoke to her. On 27 March the IO interviewed the caretaker who had little of relevance to say

2.64. The IO interviewed the TA on 19 March but the note was omitted from her later report , so the IO says because "*her evidence wasn't considered to be relevant to the allegations and I was unable to finalise and agree her minutes because she went on sickness absence (which I understand was due to the stress of the investigation) immediately following the interview. … I took the decision that there was no reason for it to be included ... In reaching this decision I took advice from … HR, who were in agreement with my proposal. This was not raised as a concern by the Claimant within her disciplinary statement, .. nor was it raised as an issue at the disciplinary hearing itself. .. it was raised at the appeal stage when* the TA *personally attended as a witness*". How any of this can be thought of as irrelevant is a mystery. Why would the TA find this stressful? The answer is she knew well before telling anybody the claimant was self harming . Just as Teacher A would not admit to the event in November 2017, so the TA was afraid when she did she would be accused of concealing an issue she had known of years earlier. To her credit, she did speak truthfully. Mr Stubbs rightly said some comments by the TA did not help the claimant but on balance the totality corroborated the claimant's version, especially as to the TA usually seeing new marks early in the day.

2.65. At an OH meeting on **11 April 2018** Dr D noted the claimant was feeling a little better , having fewer symptoms of anxiety, had stopped self harming and was well enough to attend the investigation meeting. Dr D says " *on examination today I certainly did not find any **new** marks*" which suggests she had documented marks on earlier examinations , but no one asked her what she found earlier , or when .

2.66. The claimant attended for an investigation meeting on **17 April 2018.** This was the first real contact since her suspension on 5 February. It started at 1 pm and finished at 1:45 pm. The IO accepts the claimant requested some amendments to the first version , "*which was absolutely fine, as it was important that she had every opportunity to put forward her version of events. The amendments were not substantial or controversial"*. She included all versions and the claimant's requests for amendments in her investigation report. The claimant confirmed by email on 17 May 2018 the minutes were agreed. Considering there was a notetaker, the claimant's description of the first draft as "*grossly incorrect*" is closer to the truth . With an interruption of 10 minutes because the note taker had to leave the room, 35 minutes produced nearly four pages of notes. Even in the first version the claimant completely denies key facts but mystifyingly the IO never went back to Teacher A for her comments or put in clear terms to the claimant what Teacher A had said. Throughout all the interviews the IO asks a question, records an answer but does not probe the answer even when it is crying out to be. It took a full month to get the third version right. Also, there was no reason to include all versions in the appendicies. This illustrates how the reasonableness of an investigation cannot be measured by the bulk of the report. It is quality, not quantity, at which one has to look.

2.67. The claimant was seen by an independent psychiatrist, Dr V, on **20 April 2018**. His report dictated on 23 April, which was not released to Dr D until 8 May, at page 280 includes "*The Claimant accepts that she had lost a blade, but stated that this was lost from her phone case and was later found in the door of her car. She denied ever taking a blade into the classroom and stated that she was at a loss as to how any could have been discovered there*. It says she appeared more anxious than clinically depressed and there was no "*major personality disorder*". It is an exceptionally thorough report as we would expect from one of the leading psychiatrists in the region.

2.68. Most importantly his report records precisely what the claimant's evidence has always been about where and how she self harmed and her denial that, apart from the occasion she says was in November, she ever brought a **razor** blade into school. He says he doubts she would ever harm anyone but herself, harm herself in front of children, or ever seek to involve them in her self harming activities. He has no reason to believe she ever did self-harm at school and he records her vehement denials.

2.69. The report addressed to Dr D says" *Your referral letter mentions that a search by health and safety discovered two **razor** blades **hidden*** in (the claimant's) *classroom*.( We interpose this is plainly untrue). *She said that she knew nothing of these matters and had never taken any razor blades into her classroom. Clearly I cannot determine the facts here . If razor blades were discovered in the classroom this brings with it the risk that they will be found by others, including children*." He says "*It is not of course my role to determine the facts of this case. If however, the investigation finds razor blades were found in* (the claimant's) *classroom (and I would reiterate she strongly denies this allegation) then it is likely that the employer would require* (the claimant) *to give an undertaking not to bring any form of blade into school with a penalty of disciplinary action should she fail to comply*". Dr D told the claimant the information **razor blades** had been found in her classroom had been included in an email to her from HR which is why she relayed that to Dr V. We accept that. From where else could either doctor get that information?

2.70. in Dr V's opinion, the claimant had no major form of mental ill health, but symptoms of "*an adjustment disorder*" linked to the disciplinary process since the turn of the year. Dr D, in a letter of 16 May 2018 to the Head, with a copy to HR, summarised Dr V's report much as we have and said a decision on the facts was necessary. The claimant accepted, when asked by our Employment Judge, she did not tell Dr V the extent of anxiety she includes in her impact or witness statements. He concluded she had self-harmed for years, had an anxiety and adjustment disorder and recommended Bereavement and Cognitive Behavioural Therapy.

2.71. On 4 May, by telephone for 15 minutes, the IO interviewed the Assistant Director who said of the marks she saw at the SLT meeting on 11 December ( nearly 5 months earlier) they were on the claimant's **forearms** and " *were fresh and looked quite angry*" She has raised this with the Head at the time , and at some point with one of the HR officers involved. The IO interviewed the Head again on 23 May 2018 for 45 minutes but not about any disputed facts, mainly about how the claimant's suspension had affected the school and staff. She interviewed the LADO **on** 24 May 2018, who in a forty minute interview dealt mainly with what Teacher A had told him the claimant had said. No probing of when, or in what circumstances, happened at that interview. The LADO stated "*I received information about text messages from Teacher*

*A .. who shared those with me,, was nervous and anxious about the thought of the claimant finding out about this and returning to work. She also had* ***concerns about bullying and abuse of power****, following this.*" (another meaningless and unexplained comment which went unexplored). The LADO also said Teacher A felt " ***it was her neck that was on the line***". She would feel that if she thought she may be in trouble for not telling people in authority about concerns she had earlier than she did.

2.72. On 6 June Dr D wrote to the Head with a copy to HR having seen the claimant that morning " *I could see immediately that she is not doing very well. Although she has not self harmed, she is feeling very low and commented that she feels worse now than at any other time through this process. She feels the situation has dragged out; originally she was told that the process would take six weeks and it has now been six months. This is having an impact on her day-to-day function and she feels reluctant to leave the house*" Dr D goes on to say how important it is the disciplinary hearing, which had been postponed from May, should take place on the scheduled date, 21 June.

2.73. The final investigation report dated 8 June 2018 and 24 appendices run to 123 pages. The meeting with the TA was omitted. We reject the argument the onus is on the claimant first to spot from the index item 11 was marked " N/A" then conclude the TA had been interviewed but the record was missing, and then either to raise that or call the TA as a witness herself at the disciplinary hearing. The claimant was suspended and prevented from contacting people.

2.74. In her statement the IO says " *In conclusion, weighing up all the evidence I came to the conclusion and recommendation for the matter to proceed to a formal disciplinary hearing on the basis there was a potential disciplinary case to answer*". That is wholly misleading. In respect of all three allegations, after giving her summary of the interviews, the IO writes under the heading " **Conclusions**" words like " ***on the balance of probability the allegation is substantiated"*** . Anyone reading this would think she had weighed two versions of the facts and found one preferable to the other . In evidence she accepted she had not, saying this was not her function but that of the disciplinary hearing. That would be fine, **unless** the panel at the disciplinary hearing simply relied on her report to conclude the claimant was guilty as charged. As will be seen that is exactly what we find they did. We do not expect an internal investigation to meet the standards of a police investigation but this lacked even basic competence. The result was the claimant after an investigation which falls far short of reasonable went to a disciplinary hearing which in our judgment rubber stamped the conclusions the IO had reached. We do not think the IO herself intended such a travesty of justice, but her lack of knowledge of how to do the job given to her, coupled with HR's lack of guidance to her, produced such a result.

2.75. The report and appendices were provided to the claimant, and three panel members by letter dated **13 June**. The disciplinary hearing was for **21 June**. A 123 page document which had taken four months to produce, seen by only the DO before in her role as Nominated Officer, therefore had to be digested by the other panel members and the claimant in a week. The claimant sent her comments on it in 16½ closely typed pages on 19 June . The IO says *Some of the occupational health documents were unintentionally omitted from the report, which led to the claimant providing these in advance of the disciplinary hearing as appendices to her statement. The omission of the April report .. was an oversight and the June report ..*

*was not available to me at the time my report was finalised.* That was Dr D's letter of 6 June referred to in 2.72. above which said the claimant was very low. She did well to reply in 5 days.

2.76. The IO does not agree the time taken to complete the investigation was unreasonable saying it was a complex case and required sensitivity. She adds "*I also needed to fit this around my normal day to day duties for my employer and had to work around the availability of the witnesses*." We find that is the main reason. Despite the claimant's job and career being at risk, the IO was expected to do her job in her spare time. She attended the disciplinary hearing to present her report and answer any questions which the panel, the claimant (or her TU rep) had. The only witness she called was the LADO. Nobody corroborated Teacher A's allegations the claimant cut herself at school, including those who worked closely with her daily. Teacher A was not called by the IO and the panel did not question that.

2.77. The disciplinary hearing should have been chaired by the DO as 'Nominated Officer'. On the day, one member could not attend, so the DP Chair, said she would stand in, as she was a governor at another school. In her job as a council employee, she was aware of the case, but the claimant was not told that. She said she would chair, because she had "*more experience*" than the DO. She may well not have seen the investigation report until the day, at best one or two before, let alone the claimant's detailed answers. The DO says the minutes are not verbatim but accurate from her recollection. The DP Chair is on long term sick leave and the other member has caring commitments. Neither were called to give evidence before us.

2.78. The allegations set out in the disciplinary hearing invite letter at page 423 were
(a) brought sharps(blades) onto school premises **with the intention of self harming**

(b) self harmed **on school premises during the school day**

(c) did not give a truthful account to the Head the LADO OH and HR **regarding this**.

2.79. Before any panel member could ask relevant questions they needed to digest nearly 140 pages. The hearing started as planned at 2 pm. The IO gave an outline of her report. The minutes show she gave the charges as
(a) *brought sharp implements onto school premises* (the words "sharps(blades)" had been replaced by "sharp implements" and " with the intention of self harming" had disappeared)

(b) self harmed during the school day ( the phrase "on school premises" had disappeared)

Charge (c) was not repeated but the IO said, as in her report, she found **all** charges **substantiated**. The claimant asked no questions and the DP Chair only one.

2.80. The DO says the first time she saw the interview with the TA was in preparation for this tribunal hearing, but no concerns were raised by the claimant regarding the omission at the disciplinary hearing. No panel member asked either.

2.81. The letter calling the claimant to the disciplinary hearing had specifically said the IO did not intend to call any witnesses. The claimant had no advance warning the LADO would be there, let alone what he would be saying. He made general observations about "safeguarding", based on his training as a social worker, including the risk pupils may have access to blades,

and **the potential emotional risk**. In answers to the claimant he spoke of children seeing "*open" "bleeding"* and "*weeping"* wounds from self-harming. He emphasised the children's protection was paramount and the fact this had been **alleged** was enough for him to give the opinion children were at risk. He even talked of "cross-contamination concerns" from open wounds. He assumed everything Teacher A had told him was correct. He admitted he had information at meetings in January he was "unable" to disclose at the time. It is incontrovertible fact that **only once** in the claimant's 14 year teaching career, the last four of which had been at the school, had a child mentioned any mark on her. That was on 17 May 2017. **Only one person**, Teacher A, **on one occasion** said a wound was bleeding, that being on 11 December at the SLT meeting. The LADO's "evidence" was picking at scabs was in itself self harm at school. No such charge had ever been suggested. The LADO's evidence occupies two full pages of the minutes.

2.82. The panel never addressed their minds to whether Teacher A may have a motive for not telling the full truth. We do not find she deliberately lied apart from about the lost blade being in November. It never crossed the panel's minds Teacher A may have **misinterpreted** what the claimant said on 8 January or wrote in the texts, or that what she was alleged to have said may have been recorded inaccurately. There was unquestioning acceptance that wounds had been seen which were fresh and bleeding, when those who saw marks did not even agree with one another where on the claimant's arms they were. The DO said in oral evidence the text messages were not considered appropriate, especially by the male panel member whom she said was "appalled " by the bad language. This was never any part of the charges .

2.83. The next 2 ½ pages are the claimant's case . She is asked several questions and does not change her account. The whole hearing lasted two hours according to the DO followed by 1 hour of deliberations before they were required to vacate the building at 5pm. The DO says each panel member independently formed their own view on the balance of probabilities the allegations were proven and could not find any reasonable alternative, taking into account their duty of care to the children, but to summarily dismiss for gross misconduct and in the alternative, an irretrievable breakdown in trust and confidence.

2.84. The DO's statement sets out factors which contributed to this decision. They give no reason for preferring what Teacher A ( to whom they did not ask to speak) had allegedly said and thereby rejecting the claimant's denials. On the contrary they contain such comments as
(a) items found in the claimant's personal possessions on 3 February 2018 having the **potential** to cause significant harm to the pupils ( a charge not put but true, **if and only if**, the blades were accessible) but which leads to a finding "*the Claimant had brought blades and other items* (presumably the glass), *onto school premises, to self-harm"* and "*the panel was satisfied they were not present for legitimate school related reasons*".
(b) the claimant accepted during her meeting with Dr V and during the disciplinary hearing a blade **had been secretly hidden** in her phone case, which had fallen out into her car door. She never accepted that. It was in her phone case by omission.
(c) some of the cuts appeared fresh during the school day and Teacher A had confirmed the claimant had confided in her she was in fact self-harming during the school day, in school, but the school did not know that she was doing this. No basis for accepting this is given.

(d) the disciplinary panel was concerned about the claimant's honesty and truthfulness,due to the text messages and her statement to Dr D in June 2017 the marks were from gardening. They say it is more likely these were from self-harming, **given her history** of self-harm since a very young age. No basis for this is given. When asked, the DO said the untruthfulness which mattered mainly were her refusal to accept she was guilty of the charges **now** being put to her and her denials of harming herself in school to the LADO and HR on 31 January.

2.85. As to point (c) it is inherently improbable that if , as Mr Stubbs speculates, the claimant was going to the toilet to cut herself that, instead of slipping a small pack of razor blades discreetly into her handbag, she would retrieve from the classroom and carry with her to the toilet a Stanley knife or craft blade hidden in blu-tac or a broken piece of glass wrapped in an unhygienic cloth and choose to injure herself with that instead. As to point (d), on 20 December 2017 and at the meeting on 31 January 2018, she admitted she had been self-harming, but, when it was put to her she had at school, she denied only that . We find the disciplinary panel's view was no matter why she had hidden her self harming for 33 years and despite all the medical evidence it was now being addressed, " once a liar, always a liar" and " once a self harmer, always a self harmer " The DO said she agreed with the LADO there is always a possibility a person will revert to bad ways and gave the example "*it's like giving up smoking* ". The third charge was bound to be found proved if the first two were .

2.86. The DO's statement says "*Our primary consideration was the welfare of children entrusted in the care of the school .We were mindful to balance the needs of the Claimant against the needs and* ***potential risk*** *to children and we noted that specific concerns had been raised by* the LADO, *about the safeguarding risk to pupils posed by the claimant, including, as stated above, the risk that pupils may have access to blades, and secondly the emotional risk from pupils seeing cuts and marks from self-harming, and thirdly, that the pupils (primary school age) were not at an age where they could manage the risk safely.*

2.87. The DO herself was friendly with the claimant and we accept did not go to the hearing wanting to dismiss her. As she says at the end of her statement "*These were serious* ***allegations*** *and our findings were that the Claimant was not being honest about the problems she was facing – which posed a continued risk of harm to the pupils in our care. This view was supported by the LADO, who expressed similar concerns.* We have no doubt **the panel were literally afraid, after hearing the LADO**, that if they did not dismiss the claimant, and any suggestion arose at any future date a child had seen a mark on the claimant and been upset, the Governors would be held accountable.

2.88. On 27 June Dr D wrote to the Head having seen the claimant that day who did not feel the disciplinary hearing had been satisfactory. On 28 June a 6 page outcome letter, containing more detail but no better quality of reasoning, was sent summarily dismissing her. It gave a right of appeal **within five working days**.

2.89. As for knowledge of "disability", the panel had reports from Dr D, Dr P and Dr V's all saying self-harming was a coping mechanism which had become learned behaviour. Dr V's report stated the claimant was not "*suffering from any major form of mental ill health*", nor any "*major personality disorder*". The panel's view, based on medical evidence and the DO's personal knowledge, was her mental state was due to the disciplinary process. We disagree

for reasons given in our conclusions but cannot say the disciplinary panel ought reasonably to have known she was disabled at the time. The DO adds " *even if her self-harming was linked to a medical condition, and even if this were to amount to a disability, we considered the associated risks to be too high and we felt there was no way we could adequately mitigate against these risks to protect and safeguard the pupils in our care (especially taking into consideration the previous lack of honesty displayed by the Claimant*". That was the LADO's view as a social worker, but not that of three doctors, two, Drs P and V, being specialists.

2.90. The AO is a council employee and Chair of Governors at another school . His "day job" did nothing to equip him to manage an appeal like this. The claimant was dismissed on 28 June 2018 and appealed on 5 July but with no detail. The five grounds drafted with her TU rep were *(i) the severity and appropriateness of the sanction (ii) insufficient weight placed on the consideration of available mitigation (III) challenging medical opinion which informed the decision (iv) procedural inaccuracies and (v) my previous exemplary record* " but she added " *I reserve the right to alter or add to my grounds of appeal*" . The school was shortly after closed for summer until 3 September 2018. We do not accept that as a reason for nothing happening. The appeal hearing took place on 19 October 2018. Delay was not the AO's fault and he does not consider the delay to be excessive or unreasonable. We do, but there was no chance, even in July,of witnesses recalling in more detail what had been said or seen six months earlier and of which no detailed note had been made close to the time.

2.91. In advance of the appeal the AO received and read relevant documents including the claimant's statement of appeal dated 2 October 2018 and appendices, which plainly added an "appeal against conviction" and the statement of case prepared by the DP Chair dated 5 October 2018. The notes from the meeting on 31 January were requested again by the claimant, and finally came. The other panel members were both governors at other schools. Each had an equal say and none had any prior involvement. It is unclear how much time any of them had to read the voluminous papers.

2.92. The hearing took from 9.30am to approximately 3.30pm, followed by deliberations. The persons present are listed at the top of the hearing minutes which are not verbatim, but from memory the AO is satisfied they accurately reflect what took place.

2.93. The DP Chair provided her summary of the reasons behind the decision to dismiss, referring to a pre-prepared statement. The panel asked her some questions as did the claimant and her TU rep. The LADO attended as a witness and his contributions are similar to those at the disciplinary hearing. The claimant set out her appeal referring to her pre-prepared statement. She called the evidence of Ms L and the TA. Some questions were asked by the panel, each party was given the opportunity to ask any final questions and to sum up. Despite his inexperience, the AO did a better job than any member of the disciplinary panel. However when our Employment Judge explained to him the different types of appeal, he frankly said the role of the appeal panel in his view had been to decide whether the decision of the disciplinary panel was what a lawyer would call "perverse". They decided it was not. In deliberations the panel were assisted by an HR Adviser, a different one to those involved earlier, on law and procedure, but the AO said she played no part in the decision making.

2.94. The procedural points raised by her union were not as important as the appeal against the factual assumptions upon which the disciplinary panel based its decision. In contrast to that panel, a summary of the appeal panel's deliberations are set out at the end of the minutes at page 512ff. They include: "*cannot establish from the notes of the original panel what consideration was given*" and "*considered whether health was an issue but medical reports state she did not have a major mental health condition*". The record says the claimant has admitted not being truthful but denies other allegations and " *From evidence we cannot prove allegations either way*". Later it says "*Cannot prove intent to self-harm at school. If she does not think picking at scabs is self harming then did she come with the intention to self-harm. Admitted that she picked at scabs but that she did not do it with intention of self-harm*". Later still "*Circumstantial evidence that items in school to self-harm. Text messages state she does it at school* (When examined carefully, they do not say that.)

2.95. The AO could not remember, understandably, which panel member said what and whether a remark was a conclusion or "musings" of that person. Whichever it is, in the relatively short time available they clearly did see failings of the disciplinary panel . However, their note says "*On balance of information they had, it was reasonable to conclude that she did self-harm at school. We have come to the same conclusion*". As for the soundness of "conviction" on the charges, the AO could not explain **why they did** despite (i) the claimant explaining craft blades and knives were present for the genuine purposes and showing pictures of display work for which she, like many teachers/teaching assistants across the country, used them and (ii) the inherent improbability she would cut herself with unclean implements (iii) the many inconsistencies in the evidence. They did not ask to speak to any of the key witnesses especially Teacher A as that was outside what they understood to be their remit. They considered a sanction short of dismissal and reinstating the claimant. As with the disciplinary panel the **potential risk** to pupils argued by the LADO was the main factor which caused the panel to find dismissal was the only appropriate sanction. Also as governors of other schools , to impose their view on this school would have been a brave step. Following the hearing the only further investigation requested by the panel was medical advice on whether the claimant was disabled. The HR Officer present at the appeal asked further questions, apparently of her own initiative, in her referral to Dr D which were "*What are the characteristics of self harming, for example would the picking of scabs be self harming in themselves? ... In your medical opinion could the self harming affect her ability to respond in a truthful way when asked if she was self harming or not?* Dr D did not answer these questions but in themselves they show this HR Officer saw two of the many weaknesses in the disciplinary panel's case. Dr D responded, "*in my medical opinion,* [the claimant] *does not meet the criteria of this section of the Act, however, this is a point of law and not medicine and therefore legal opinion should be sought if required*". None was taken. While the appeal was an improvement on what had gone before, we find it was "too little , too late".

2.96. The appeal outcome letter dated 19 November 2018 , plainly written by HR, sets out the five grounds of appeal contained in the letter of 5 July which was sent only to be within time for appeals, but with regard to her reserving the right to bring in additional grounds, it simply says "*the appeals panel were not aware of any additional grounds raised".* The long document of 2 October was about much more. The result letter itself is a whitewash of the deeply unsatisfactory investigation and disciplinary hearing stages .

2.97. On the medical advice, the panel were satisfied the claimant was not a disabled person. They considered the advice of Dr D, dated 7 June 2017 which is plainly outdated but also that of Dr P dated 15 January 2018 and 5 February 2018 . The latter stated:- "[The Claimant] *advises she has not self harmed **for 4 weeks** and this would indicate a degree of impulse control at least in the short term"….* Four weeks before 5 February 2018 would be about 9 January, which is exactly when the claimant says she last self harmed at home.

2.98. They also considered the advice of Dr D dated 14 March 2018 that her stress and anxiety were linked to the disciplinary process rather than any underlying medical condition and that of Dr V of 23 April 2018:- *"She appeared more anxious than clinically depressed"…. "I do not consider* [she] *is suffering from any major form of mental health. I do not think she is clinically depressed."…. "I suspect that, consequent upon her entanglement in disciplinary and bureaucratic processes, she has been going through an adjustment disorder since the turn of the year"….. "I do not believe* [the Claimant] *has a major personality disorder. She clearly has engaged in self-harming activities over the many years, but I do not think this is sufficient grounds to say that she has an emotionally unstable or borderline personality disorder."…. "I believe* [the Claimant's] *self harming began in response to a childhood emotional disorder…"* and she has "*taught herself to deal with emotional distress… through self harm".*

2.99. Since her appointment with Dr V the claimant has been more explicit describing the underlying mental health issues that have caused her self harming and is taking medication for depression/anxiety. Since she first disclosed the extent of her illness and accepted she needed help, she has been attending weekly 'Step 4' therapy sessions with Talking Matters and says Step 4 intervention is only given to patients with severe mental health issues. This has helped her. A decision was taken to refer her to the Teacher Regulation Authority (TRA), for them to assess whether there are concerns about her fitness to teach. It has appointed an independent lawyer to conduct a formal investigation, before taking any further action.

## 3. Relevant Law

3.1. Section 6 of the EqA includes
*(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.*
*(2) A reference to a disabled person is a reference to a person who has a disability.*
Section 212 defines "substantial" as " *more than minor or trivial*"

Schedule 1 includes
*(1) The effect of an impairment is long-term if—*
*(a) it has lasted for at least 12 months,*
*(b) it is likely to last for at least 12 months, or*
*(c) it is likely to last for the rest of the life of the person affected.*
*(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is **likely to recur**.*

*5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
*(a) measures are being taken to treat or correct it, and*
*(b)* ***but for that, it would be likely*** *to have that effect.*

3.2. SCA Packaging –v-Boyle 2009 ICR 1056 held the word "likely" in this context meant "could well happen ". Banaszczyk v Booker Ltd held UK law on who is protected as a disabled person should be interpreted in light of the wider concept of disability deriving from the UN Convention on the Rights of Persons with Disabilities, HH Judge Richardson said: "*It is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly; care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual's participation in that activity*."

3.3. Vicary v British Telecom made clear the decision as to whether a person is disabled is one for the Tribunal to make and not for any medical expert. In Hill v Clacton Family Trust, the Court of Appeal said *I also accept that no court or tribunal would come to a decision on the question of mental impairment without giving careful consideration to the medical evidence before it. That evidence must however be considered in the context of the totality of the evidence and the decision is of the tribunal not an expert however qualified he may or may not be".* Morgan v Staffordshire County Council, was decided when it was necessary for the claimant to prove the impairment was a clinically well recognised mental illness. But even in Morgan Sir John Lindsay said: *"This is not to be taken to require a full consultant psychiatrist's report in every case."* J-v-DLA Piper 2010 IRLR 936 said the Tribunal should be aware of the difference between alleged depression and a reaction to adverse circumstances. However, a person with depression may react more severely to such circumstances.

3.4. Section 15 EqA says
(*1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

3.5. City of York Council-v-Grossett held the respondent does not have to **know** the "something" arose in consequence of the disability. However, it must have actual or constructive knowledge of more than symptoms of poor mental health as explained by Eady J in A Ltd-v-Z 2019 IRLR 952. Ridout v TC Group [1998] IRLR 628 was a reasonable adjustments case where respondent must have knowledge of disability **and** its effects. With that caveat, the words of Morison P are helpful by analogy:

"*We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … On the other hand, a balance must be struck. .. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions ..* ***People must be taken very much on the basis of how they present themselves****".*

3.6. Gallop-v-Newport Council held an employer cannot avoid liability by unquestioning reliance on medical advice the employee is not disabled.

3.7. Section 98 of the ERA provides:
"(*1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –*
*(a) the reason (or if more than one the principal reason) for dismissal*
*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
*(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."*

3.8. Abernethy v Mott Hay & Anderson, held the reason for dismissal is a set of facts known to the employer, **or may be beliefs held by it,** which cause it to dismiss the employee. The reason must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal. Although it is an error to over minutely dissect the reason for dismissal, it is essential to determine its constituent parts. At this stage an employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did take place. The employer simply has to show a genuine belief.

3.9. In unfair dismissal claims, we try to read the mind of the " employer" as to the reason why it dismissed . Corporate employers and public authorities do not have a mind, human beings do, so which human beings' minds are we to read in cases where the decision maker acted on information he believed to be complete and true, but which some other person knew was not . In Orr-v-Milton Keynes Council Moore-Bick LJ said

*58. The answer to the question "Whose knowledge or state of mind was for this purpose intended to count as the knowledge or state of mind of the employer?" will be "The person who was deputed to carry out the employer's functions under section 98."*

*60. Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly* ***if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. …If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained****.*

3.10. Even if the dismissing panel's reason is fair, some types of influence may render their decision unfair. The Supreme Court in Chhabra v West London Mental Health NHS Trust considered the extent to which an HR department could permissibly influence an investigation under a contractual disciplinary procedure. In Ramphal v Department for Transport, the EAT thought Chhabra should also be applied in determining fairness under S.98(4) where the

decision maker had been heavily influenced by HR's advice. The EAT reiterated that for a dismissal to be fair there has to be a fair investigation and disciplinary procedure. A third party materially influencing the decision maker might well render any consequent dismissal unfair. Very recently in Cadent Gas Ltd v Singh the EAT referred to the judgment of Underhill LJ in Royal Mail Ltd v Jhuti but in both the person materially influencing the decision maker was an employee of the same employer, which neither the LADO nor HR officers were.

3.11. Section 98(4) of the ERA says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
*(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*
*(b) shall be determined in accordance with equity and the substantial merits of the case."*

3.12. At this stage the Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for its belief after as much investigation of the circumstances as was reasonable (British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald. In Weddel v Tepper Stephenson LJ said
*Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."*

3.11. In A v B [2003] IRLR 405, Elias J ( as he then was ) said

*"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than*

*an even-handed approach to the process of investigation would not be reasonable in all the circumstances.*

*Whether an employer has carried out such investigation as is reasonable in all the circumstances also necessarily involves a consideration of any delays. In certain circumstances, a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. Where the consequence of the* ***delay*** *is that the employee is or might be prejudiced, for example because* ***it has led to a failure to take statements which might otherwise have been taken, or because of the effect of the delay on fading memories****, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process.*

*Where the investigation is defective, it is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact that it may have caused no adverse prejudice to the employee goes to compensation."*

3.13. Linfood Cash & Carry Ltd v Thomson concerned a situation in which, for fear of reprisals, witnesses refused to be identified, but we think the following guidance is applicable to any situation in which a "live" witness will not be present at a disciplinary hearing :

*1. The information given by the informant should be reduced into writing. …..*

*2. The following are important in taking statements: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence, such as knowledge of a system ..and why certain small details are memorable. (d) Whether the informant has suffered at the hand of the accused or has any other reason to fabricate.*

*3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.*
*…...*
*6. ……, it is desirable at each stage the member of management responsible for the hearing should himself interview the informant and satisfy himself what weight is to be given to the information.*

*8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, it may be desirable to adjourn .. to make further inquiries of the informant.*

*9. It is particularly important that full and careful notes should be taken."*
We do not expect the IO , HR or the LADO to know case law, but the principles in the last two paragraphs are incorporated in the ACAS Code of Practice , which should be known to HR, and are , in any event basic fairness and common sense .

3.14. In Santamera v Express Cargo Forwarding the EAT said .

*"The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means. That is why cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct. There may be cases, however, in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted. Ulsterbus Ltd v Henderson could not be read as laying down the proposition cross-examination can never be required in any investigation carried out by a reasonable employer. The issue under s.98(4) is reasonableness and fairness. In each case, the question is whether or not the employer fulfils the test laid down in British Home Stores Ltd v Burchell and it will be for the tribunal to decide whether the employer acted reasonably and whether or not the process was fair.*

3.15 Strouthos v London Underground held the employee should only be found guilty of disciplinary offences with which he has been charged. One found guilty of and sentenced for something that had not been charged will not have received fair treatment. Pill LJ said;
*It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and evidence should be confined to the particulars given in the charge. ..*
*it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.*

3.16. Retarded Childrens Aid Society v Day held that if an employee does not appear to recognise what he did was wrong and is "determined to go his own way" , it would be reasonable for the employer to conclude a warning would be futile and may fairly dismiss even for a first offence. Conversely, if the employee admits fault, apologises and promises never to do the same again, no reasonable employer would dismiss on the basis of her apology and promise being "unreliable" without some factual basis for concluding it was.

3.17. Taylor-v-OCS Group 2006 IRLR 613 held whether an internal appeal is a re-hearing or a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " ( per Smith L.J.)

3.18. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt) held a Tribunal must not substitute its own view for that of the employer unless the view of the employer falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson put the matter perfectly thus:
*"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances*

*dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.*

3.19. In Software 2000-v-Andrews Elias P. set out the law applicable at the time which now must be adjusted since the repeal of s98A (2) of the ERA but much his Lordship says still applies including *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, it is for him to adduce any relevant evidence on which he wishes to rely. (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact* ***an element of speculation*** *is involved is not a reason for refusing to have regard to the evidence.*

3.20. Sections 122(2) and 123(6) permit a reduction in a compensation on account of an employee's conduct. Nelson-v-BBC (No2) held the conduct under s123(6) must be culpable and blameworthy, which behaviour caused by a disability probably would not be, and it must be just and equitable to make a reduction.

## 4. Conclusions

4.1. We begin with the EqA claim. The World Health Organisation definition of an impairment, includes **any** abnormality of psychological function. Anxiety is a normal human condition but the measures the claimant formerly used to cope indicates some abnormality. The doctors accept that, though say it was not "major". Because she did not tell the medical professionals how much she struggled with anxiety, they diagnosed no serious mental illness. On what the claimant has told us, self -harming was for her the measure she took to prevent her anxiety having the effect she could not even go to work or function in day to day life . Now she needs weekly 'Step 4' therapy sessions with Talking Matters and medication to enable her both to work and perform other normal day-to-day activities. We accept this effect was not confined to the period of the disciplinary process, has been a major problem for her for over 30 years and probably will remain so for the rest of her life. On that basis we find she was at all material times disabled, but until recently hid it very well.

4.2. We cannot find the respondent knew ,or ought reasonably to have known, what we have discovered now. It did not blindly follow medical advice, but considered it and came to a decision she had symptoms of temporary mental ill health. The respondent having discharged the burden imposed upon it by section 15(2), the only EqA claim pleaded cannot succeed and the remaining issues under the EqA become otiose.

4.3. On the ERA claim our conclusions are incorporated in our findings of fact, but some should be summarised here. The claimant, who felt shame about what she did, kept it secret , even from her family. The TA knew, Ms L knew and from November 2017 so did Teacher A. The Head believed she was self harming probably from 2015 but definitely in May 2017. Therefore, when she saw what she considered to be a fresh wound on 11 December she went straight to HR who suggested a further OH referral . The terms of that referral demonstrate the Head's mind she was self harming was already made up. After the claimant admitted she had been to Dr D on 20 December 2017, over the Christmas holiday she was in a dreadful state and, as her texts show, could not see her way forward to stopping it, until on 11 January she was taken to hospital and realised not only that she had to stop but also that not all conventional treatment would have the adverse effect which Mirtazapine had in 2014.

4.4. On 20 December 2017 Dr D's letter said , after consulting the Head of OH , the claimant should return to work. The Head and others then knew that was likely to happen unless something else emerged. An"anonymous call to the LADO on 2 January and Teacher A giving him access to the texts provided that something else. We doubt Teacher A did so out of malice towards the claimant. She clearly felt "her neck was on the line" because of what she had not disclosed in November 2017. Some time that week definitely by 11 January she also provided a version at least to the LADO of what the claimant said on 8 January.

4.5. The difficulty for the respondent is the evidence of their witnesses was evasive, contradictory with documents as well as with each other and, on many points, simply untrue. They were plainly trying " to say the right thing" to advance their case. The effect of the way they dealt with the internal processes and with these proceedings has been to make the claimant believe there was an orchestrated plan to get rid of. She may be right. However, there is another possibility and we need not go as far as to decide which is correct. In comparison the claimant's case hung together well. For example, when the claimant said "I've **still** have not found that **blade** I lost", one would have expected Teacher A to ask " What blade? When?". There is no suggestion she did, even from her.

4.6. There are different versions, at paragraphs 2.35 and 2.59 above, of what claimant said to Teacher A on 8 January, both of words used and importantly the order in which they were said. Unlike the disciplinary and appeal panels we heard Teacher A and formed the view she had no wish to cause the claimant harm. As Sedley LJ said in Anya -v-Oxford University "*a witness maybe credible and honest but mistaken*". **Hypothetically**, if one compares

"You know I do it in school. They just don't know. I can't get thro' school without it".

"You know I don't in school. They just don't know, I can't get to school without it."

the first is what the claimant is accused of saying, while the second is exactly the case she puts in her own defence. With phonetic spelling of "through", they differ by three letters and three punctuation marks. If these words were spoken by the claimant when in tears, the potential for misinterpretation is even greater. We now know Teacher A herself had recently had a difficult time. Quite simply, it never crossed the mind of the IO, DO, the Head, HR or the LADO, Teacher A may have put two and two together and made five.

4.7. Apart from what Teacher A reported, the only evidence capable of supporting a conclusion the claimant self harmed in school, was the observations of what various unqualified people saw mainly on 11 December , 9 and 10 January. We have chosen the unfair dismissal case law cited above carefully. All the HR advisers would have told the IO, as the DP Chair told the Head in May 2017, of the importance of detailed notes and statements taken as near to the event as possible. Had anyone, including the LADO, followed the steps in Linfood we would not have the problem of witnesses saying they cannot now remember what happened nearly two years ago. Had anyone asked any of the OH doctors to report on their physical findings we would know what marks existed and probably have some medical opinion as to how old they were. We have not even a second hand version of the " anonymous parent" telephone call to the LADO on 2 January, if indeed she was anonymous, not only asking for her identity not to be revealed. If the phone call and/or the number from which it was made was recorded, at least the IO and ourselves maybe could have been assured it was not from a member of staff. Knowing the matters being investigated could result in the loss of a career as well as a job, it beggars belief HR would not have realised a thorough even handed investigation was needed as explained in A-v-B and told the IO how to do it properly. The evidence of the Head was HR said matters revealed first on 2 February "changed everything" was untrue. Most if not all those present on 11 and 31 January already knew a diligent investigation into the disputed facts was needed urgently. Mr Stubbs in submissions said this was not a council maintained school and had limited resources. We disagree. Our findings show they had plenty of HR and medical advice.

4.8. The investigation was hugely delayed and wholly inadequate. If the IO had been trying to find the truth, she would have spoken to Teacher A, and all those who saw marks, well before she did, kept a very careful note of what they said , not waited six weeks before speaking to the claimant and, when she did, put clearly to her what those she had interviewed had said. When she received the claimant's denials in a short interview on 17 April , she never went back to any of them to explore the possibility of misunderstanding or mis-observation. The claimant has been self harming for over 30 years. Her medical records do not show she has been in need of treatment for infections. Why would anyone who could discreetly take razor blades into school, if determined to self-harm on the premises, choose to do so with Stanley or craft knife blades and hide them in blu-tac? A search which included the seizure of all the blu-tac and the use of a metal detector found no blades. A search on 13 February found broken glass. We think it was missed on the first search 10 days earlier not "planted", which would be an act of extraordinary wickedness, but if it was put into the cupboard by somebody it cannot have been the claimant between 3 and 13 February because she was not even in the school and the cupboard had been secured. We understand the claimant being suspicious because no one has ever explained to her how Teacher A could have described the glass when interviewed by the IO on 7 March .We think the Head , despite her denial ,or possibly someone else, showed it to Teacher A. None of these contradictions, improbabilities or untruths were explored by the IO at all. Despite saying it was not her job, she wrote "conclusions" the charges were "substantiated", the illogicality of which she could not explain .

4.9. Somebody from HR told Dr D razor blades had been found in the school which was untrue. That was passed to Dr V who said it was important the facts should be decided, and despite being told razor blades had been found gave the opinion the claimant was no danger to children. Still no further investigation took place.

4.10. The disciplinary hearing was abysmal. The huge IO report was given at short notice to the panel and the claimant's answers shorter notice still. There were no changes to the charges but the panel strayed into everything from safe storage of sharps, to the blade taken by accident into the school in November, about which the claimant had told them, to the bad language in the texts . No-one asked to speak to Teacher A. We do not expect a hearing to the standards of court proceedings but "double hearsay" (ie. what the IO said Teacher A said the claimant said on 8 January) is best avoided if possible , and it was easily possible at least for the DO and the panel to speak to her direct as recommended in Linfood . Cross examination of Teacher A , as in Santamera, may not have been needed. The evidence of the claimant was frank as to her past problems but none of it was believed for reasons the DO could not logically explain. Every piece of evidence pointing away from the claimant's guilt was ignored. The panel ignored the inconsistencies in the respondent's evidence and simply rubber-stamped the IO's conclusions . In effect they ended the claimant job and career in a mere three hours during which time they could not have given any serious thought as to whether the evidence contained in the IO report showed she was guilty of the charges against her. It took us more time than they spent just to read the report and the claimant's answers.

4.11. Why would they do this ? The DO herself had been friendly with the claimant and may well have thought that if she did not go along with the others and the views being put to them by the IO and LADO, she would be accused of bias in the claimant's favour . We do not like to draw conclusions about people we have not heard. However, the LADO's comments to the IO and both internal hearings express views that if a person has self-harmed she may well do so again and poses a risk to children. The phrase used repeatedly by him, and by many of the respondent's witnesses, was "potential risk". A "risk" is the "potential" for some harmful consequence so the phrase is strictly speaking a tautology, but we are not concerned with matters of grammar. In the context in which the phrase was used by people here, and in ordinary language, it indicates a risk **in theory** that **some** harm may **conceivably** happen.

4.12. We agree with the claimant's statement at paragraph 95 where she says the LADO's generalisations to those delegated by the respondent to decide her future that " *people like me*" who had self harmed in secret until she "came out", would always be an unacceptable risk to children so had no place working in a primary school, had a massive influence. It was not only on the sanction to be applied. The disciplinary panel thought where children are involved, any allegation, which if true may pose even a minimal risk, justified the strongest sanction, regardless of whether evidence showed guilt of the charges actually put. They allowed that to dictate the outcome in a way that defied logic.

4.13. History, and the opinion of three doctors, two being specialists and all being well familiar with assessing risk of emotional damage to children, was the risk now the claimant had "come out" and accepted treatment was, in the word of Dr P, ***minimal*** . That did not prevent the LADO telling the disciplinary and appeal panels that in his opinion as a social worker where children are involved, the claimant must be seen as a "risk", and no risk should be taken. If a person believes or perceives that due to the nature of the claimant's particular condition , they need not dwell on the step of establishing guilt of the charges that she had brought sharps into school for the purpose of self harming and did so on the premises and treats her less favourably by dismissing her , it may be direct discrimination as explained in Stockton Borough

Council -v- Aylott and more recently Chief Constable of Norfolk-v-Coffey. . That was the view the minutes show the LADO held . It is possible the Head, and others, shared that view.

4.14. That said , narrowly, we conclude the dismissing and appeal panels held a genuine belief the claimant was guilty as charged because they accepted what they were told, and did not give it thought . Also, we detected no motive or desire on the part of the DO or any member of either panel to want rid of the claimant. However, no reasonable employer on the evidence before them could have concluded she was guilty of the charges put to her and was continuing to lie by not admitting to those charges.

4.15. Mr Stubbs in his submissions said the claimant, who gave evidence first , accepted in cross examination their view was reasonable. We do not accept she did. He put the proposition **if** the respondent did think Teacher A was truthful and wounds spotted late in the day were fresh, they could put those pieces of information together and logically come to a conclusion she had self harmed at school. That would be right if the disciplinary and appeal panels had gone through that mental process, but they did not. The claimant never accepted the premise of his questions. In his gentle but very effective style he led her, like the proverbial lamb to the slaughter, into an answer which was only an apparent admission.

4.16. We conclude the dismissal was, substantively and procedurally, grossly unfair. It is necessary to decide whether any reduction under the principle established in Polkey v AE Dayton or under s123(6) of the Act is just and equitable . It is now far too late to attempt to decide what might have happened had a proper investigation and hearing taken place. We are wholly satisfied the claimant was not guilty of culpable and blameworthy conduct. Both her self harming, and not “coming out” earlier than she did, are a symptom of her disability as explained by the extracts she quoted at paragraph 2.6 above.

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T M GARNON EMPLOYMENT JUDGE

SIGNED BY EMPLOYMENT JUDGE ON 27 NOVEMBER 2019

SENT TO THE PARTIES ON

27 November 2019

Miss K Featherstone
FOR THE TRIBUNAL