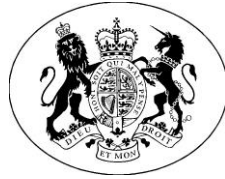


Case Number: 3331576/2018  
3331581/2018  
3335602/2018  
3300049/2019



# EMPLOYMENT TRIBUNALS

## Claimant

Rosa Philips (1),  
Elizabeth Tye (2),  
Monika Dye (3) &,  
Sarah Miles (4)

## Respondent

v The Diocese of Westminster Academy  
Trust

**Heard at:** Cambridge

**On:** 17 to 31 January 2020

**Before:** Employment Judge Johnson

**Appearances For the First and Second Claimant:** Mr Stephenson (Counsel)

**For the Third Claimant:** No attendance

**For the Fourth Claimant:** Mr Vickers (non-legal representative)

**For the Respondent:** Mr Williams (Counsel)

## JUDGMENT

1. The complaint of constructive unfair dismissal brought by Ms Dye (Third Claimant) is dismissed upon the withdrawal of her claim on 13 January 2020.
2. The complaint of unfair dismissal brought by Ms Phillips (First Claimant) is well founded and succeeds. This means that she was unfairly dismissed
3. The complaint of unfair dismissal brought by Ms Tye (Second Claimant) is well founded and succeeds. This means that she was unfairly dismissed
4. The complaint of constructive unfair dismissal brought by Ms Miles (Fourth Claimant) is well founded and succeeds. This means that the fourth Claimant was unfairly dismissed by reason of constructive unfair dismissal.
5. The first, second and fourth Claimants' claims will have remedy determined at a remedy hearing which will take place on a date to be advised in the Cambridge Employment Tribunal with a hearing length of one day.

## REASONS

### Background

1. These proceedings arise from claims presented by four teachers who were employed by Our Lady Catholic Primary School ('Our Lady School'), which is an academy within the Diocese of Westminster Academy Trust.
2. It is understood that the School which was originally voluntary aided, converted to an academy on 1 July 2012. The employees at the School, who were originally employed by its governing body, were transferred over to the Academy Trust on 1 July 2012. For the avoidance of doubt, the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006, etc. ('TUPE') are not however, relevant in these proceedings.

#### First Claimant – Rosa Philips

3. The first Claimant, Mrs Philips was employed by Our Lady School from 1 September 1998 until 13 March 2018 when she was dismissed for gross misconduct. A claim form bringing a complaint of unfair dismissal and breach of contract was presented on 27 July 2018 following a period of early conciliation from 11 June 1998 until 11 July 1998.
4. A response was presented on 14 September 1998 resisting the claim and arguing that the Claimant was fairly dismissed by reason of conduct following a fair proper disciplinary process. It was understood that the claimant is no longer seeking to rely upon her complaint of breach of contract and her claim was now only unfair dismissal.

#### Second Claimant – Elizabeth Tye

5. The second Claimant, Ms Tye was employed by Our Lady School from 1 September 2005 until 13 March 2018 when she was dismissed for gross misconduct. A claim form bringing a complaint of unfair dismissal was presented on 27 July 2018 following a period of early conciliation from 1 June 2018 until 1 July 2018.
6. A response was presented on 14 September 1998 resisting the claim and presenting similar arguments to those made in the claim against Mrs Philips.

Third Claimant – Monika Dye

7. The third Claimant, Ms Dye was employed by Our Lady School from 1 September 2013 until 31 August 2018. She had been dismissed for gross misconduct on 13 March 2018, but her appeal had been successful. She was reinstated, albeit with a final written warning. She resigned shortly after the appeal hearing and presented a claim of constructive unfair dismissal on 28 December 2018. This was following a period of early conciliation of 12 September 2018 until 12 October 2018.
8. A response was presented on 11 March 2019 resisting the claim. It is denied that there was any repudiatory breach on the part of the Respondent which supported a complaint of constructive unfair dismissal and that the Claimant had a reasonable opportunity to return to work.
9. Ms Dye gave notice on 13 January 2020 that she wished to withdraw her claim and did not propose to attend the hearing.

Fourth Claimant – Sarah Miles

10. The fourth Claimant, Mrs Miles was employed by Our Lady School from 1 September 2017 until 31 August 2018. Like Ms Dye, she was dismissed for gross misconduct on 13 March 2018. Her appeal against dismissal was successful and she had been reinstated, with a final written warning. She resigned and presented a claim of constructive unfair dismissal on 4 January 2019 following a period of early conciliation from 25 November 2018 to 10 of December 2018.
11. A response was presented on 28 February 2019 making similar arguments as those presented in the response to Ms Dye's claim.

Case Management

12. The case was subject to a case management hearing before Employment Judge Brown on 14 March 2019. Case management orders were made and the case was listed for a final hearing. It is understood that this hearing date had to be postponed and it was listed for 11 days commencing on 17 January 2020 and concluding on 31 January 2020.
13. A further case management hearing took place before Employment Judge Bloom on 28 November 2019. This primarily concerned an application brought by the third and fourth Claimants. It concerned without prejudice correspondence between the Respondent's solicitor and Ms Dye and Mrs Miles and which they wished to rely upon at the final hearing. Employment

Judge Bloom was concerned that his consideration of this matter may involve the hearing of evidence which should properly be left for consideration at the final hearing. Accordingly, he ordered that the application would be resolved at the beginning of the final hearing.

The Full Merits Hearing – preliminary matters

14. This was a case where the first day of the hearing was a reading day. Accordingly, I did not see the parties at Tribunal until Monday 20 January 2020. I firstly raised the issue of the withdrawal of the claim brought by Ms Dye and the parties agreed that they did not object to my making an order that this claim be dismissed on withdrawal.
15. I then considered the application by the fourth Respondent Mrs Miles (the other applicant and third Respondent Ms Dye having now withdrawn her claim). I heard submissions from Mr Vickers seeking an Order that correspondence between the Respondent's representatives and Mrs Miles be treated by the Tribunal as not privileged and capable of being used as documentary evidence within the hearing bundle. He argued that privilege should be waived because of issues of impropriety on the part of the Respondent's representatives.
16. A bundle of relevant documents had been prepared by Mr Williams' instructing solicitor in advance of the hearing in order that I could review these papers without them being added to the hearing bundle. I considered the 'application bundle' only insofar as it related to Mrs Miles because one half of it related to Ms Dye and which was no longer relevant given her withdrawal. I also heard submissions from Mr Williams resisting the application. The relevant documentation was correspondence between the Respondent's representatives and Mrs Miles and friends during 9 May 2018 to 19 June 2018.
17. Both parties accepted that these documents were in principle subject to 'without prejudice' privilege as the emails from the Respondent's solicitors were marked as being 'without prejudice'. While the replies by Mrs Miles and all her friends may not themselves have used the term 'without prejudice', they were clearly responding to emails described as being such.
18. I also considered whether or not Section 111A of the Employment Rights Act 1996 applied and the legal principles surrounding the general understanding of the term without prejudice in relation to correspondence.
19. Having looked at the claim form as presented, I noted that the parties accepted that Mrs Miles' resignation took effect on 31 August 2018. This was because the original dismissal on 31 March 2018 was rescinded by the

Respondent and thus effectively it had never happened. While discussions were taking place, Mrs Miles was still employed by the Respondent when she 'resigned' from her employment and gave her notice. As the correspondence between Mrs Miles and the Respondent's solicitors took place before she resigned and after she had been reinstated, section 111A of the Employment Rights Act 1996 could apply. But in any event, it is my view that the general 'without prejudice' provisions would also apply to this correspondence and it should be regarded as privileged.

20. I then considered whether there was any improper conduct on the part of the Respondent's solicitor or, (in relation to general practice regarding without prejudice correspondence), ambiguous impropriety on their part.
21. I explained that making a finding of improper conduct etc was not a decision that can be made lightly. Mr Williams had referred me to the relevant Acas Code of Practice on Settlement Agreements which gave examples of what would amount to impropriety. These were understandably serious matters such as fraud, undue influence, blackmail and perjury. I noted that while without prejudice discussions in situations of this nature can be tough for those involved, the correspondence between the parties was on the whole, amicable with first name terms being used.
22. Within the correspondence there was some recognition on the part of Mrs Miles that she had some concerns about what was being proposed by the Respondent following her successful appeal. While this might be the case, I could not see any suggestion that she was being intimidated by the Respondent's solicitor. Indeed, I noted that she had taken into account the fact that Mrs Miles was unrepresented and allowed her time to consider the issues raised. I decided that there was no impropriety within Section 111A of the Employment Rights Act 1996 or unambiguous impropriety in relation to ordinary without prejudice correspondence and I therefore rejected Mrs Miles' application. I explained that this meant that the without prejudice correspondence could not be admitted into the proceedings and used as evidence.
23. I also confirmed to the parties that insofar as I had read the without prejudice correspondence relied upon by Mrs Miles in her application, I would pay no attention to its contents or any other relevant information that remained privileged throughout this hearing. I deliberately ensured that this bundle was put to one side in the Tribunal room. Moreover, I explained that I would remind myself when preparing this judgment that I must not consider any of the issues discussed solely within the without prejudice correspondence. I was therefore content that I could still deal with this case fairly. None of the

parties objected to my continued involvement with this Full Merits Hearing at any stage during the case.

### **Evidence Used in the Hearing**

24. I noted that this hearing involved two unfair dismissal claims brought by Mrs Philips and Ms Tye and the Respondent did not dispute that either of these Claimants or (initially at least), Mrs Miles were dismissed by reason of gross misconduct. It was therefore appropriate for Mr Williams to call the Respondent's witnesses to give evidence first.
25. For the Respondent I heard from, (in this order); Ms Sarah Jacobs (Independent Investigating Officer), Mr Ray Anderson (Foundation Director of the Respondent Trust and panel member at the disciplinary hearing who made the decision to dismiss the Claimants) and Dr Kerry Sullivan (a Foundation Director and a member of the appeals panel)
26. For the first and second Claimants, I heard from Mrs Philips and then Ms Tye. They also called, Mr Paul Robinson (a former governor at the School), Mrs Gaynor Eden (a former Head Teacher at the School) and Ms Clare Davis (a former Inclusion Manager at the School) also gave evidence. For the fourth Claimant, I heard from Mrs Miles
27. Mrs Miles also wanted to rely upon the witness evidence of Dr Thomas Perry. His statement/report was enclosed within the bundle of witness statements and had been described as an expert by Mr Vickers. I explained that there no case management order had been made in these proceedings for the provision of expert evidence. Moreover, it would not be appropriate to make such an order taking into account the issues in this case. While his relevance was questioned by Mr Williams for the Respondent, there was no objection to him attending to give oral evidence. I did suggest to Mr Vickers that where Dr Perry's statement might be of most assistance, is in respect of the questions that he may wish to ask of the Respondent's witnesses by way of cross examination. As it turned out, Dr Perry was unable to attend the hearing. I explained to Mr Vickers that while his statement could be included as part of the witness evidence in this case, I could not give it the same weight I would give to that of the witnesses who have given oral evidence at the hearing.
28. This was a case which initially involved two level arch files of some 2,000 pages. To some extent, its size was understandable taking into account the four sets of disciplinary papers that were included for each of the four Claimants initially involved. Additionally, there were also the policies,

procedures, Department for Education (DfE) guidance and documents relating to regulatory matters.

29. Additional documents were also added during the proceedings with the agreement of the parties and these included an interim report produced by Ms Jacobs and the Respondent's board meetings.

### **The Issues**

30. The issues between the parties which were determined by the Tribunal were agreed at the preliminary hearing before employment Judge Brown on 14 March 2019 and they were as follows:

#### *Unfair dismissal*

- (i) What was the principal reason for the admitted dismissal of the first and second Claimants, and was it a potentially fair one in accordance with sections 98(1) and (2) Employment Rights Act 1996 ('ERA')? The Respondent asserts that it was a reason relating to the Claimant's conduct.
- (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

#### *Constructive unfair dismissal*

- (iii) In respect of the fourth Claimant, was she dismissed, i.e. (a) was there a fundamental breach of their contracts of employment? (b) if so, had either of the Claimants affirmed the contract of employment under which they worked before resigning? (c) if not, did the Claimants resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation - it need not be the reason for the resignation)?
- (iv) If the Claimant was dismissed: what was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98(1) and (4) ERA; and, if so, what the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

### **Findings of Fact**

1. The Respondent is an Academy Trust which is connected with the Catholic Diocese of Westminster. Although its official full name is the 'Diocese of Westminster Academy Trust', it is routinely referred to by its employees and governors in correspondence and documents as 'DOWAT'.
2. The Respondent, DOWAT is managed by a Board of Directors who oversee all of the Respondent's 11 schools; 6 of which are secondary and 5 are primary schools. Our Lady School is one of these primary schools. Staff working at these schools are employed by the DOWAT. The Respondent is a large employer with significant resources including access to Human Resources ('HR') and legal advice.
3. Each school has its Head Teacher with a local governing body. The Chair of Governors and the Head Teacher of Our Lady did report to DOWAT's Board of Directors and this is understandable given that the School's staff were employed by the Respondent. Accordingly, unlike community schools or voluntary aided schools, the local governing body at Our Lady School appeared to have less independence to make decisions.
4. Our Lady School is one of a number Catholic primary schools in the Hertfordshire area that are 'feeder schools' for the John Henry Newman School, which is a secondary school and is also part of DOWAT. Its Head Teacher is Mr Clive Mathew, who is also an executive head teacher on the DOWAT's board of directors.
5. The Claimants were employed in various teaching capacities at Our Lady School.
6. Our Lady School has a disciplinary policy and procedure which applies to all of its staff. It was a standard Catholic Education Service document and it is updated from time to time. The document in the bundle was updated in May 2018. Although this post-dated the commencement of the disciplinary process against the Claimants in this case, none of the parties informed me of any relevant changes being made as a consequence of this subsequent revision.

The concerns regarding pupil data

7. In November 2017 Mr Matthew attended the Respondent's strategic board and presented concerns that he had regarding historic pupil data which had been provided by Our Lady School. The data related to Key Stage 2 information concerning year six students at Our Lady School from 2014. This data was provided by all primary schools for their year six pupils and was



intended to give secondary schools such as John Henry Newman relevant information as to a child's abilities when they commenced year seven. Mr Matthew was concerned that Our Lady School had provided incorrect data which had an impact upon John Henry Newman's ability to teach children at an appropriate level. Mr Mathew was worried that incorrect data could potentially affect a child's performance at GCSE level and could also attract criticism from Ofsted when they inspected.

8. It was noted that the Head Teacher of Our Lady School who was in post when this data was provided to John Henry Newman was Ms Susan Brown. She had retired in August 2016. She has been replaced by Ms Ciara Nicholson. The Respondent board thought it may be necessary to conduct an independent investigation and they also agreed that Ms Nicholson together with Neil Adams who is the Chair of Governors at Our Lady School would attend the next Respondent board meeting to provide an update as to their findings.
9. The next board meeting took place in November 2017. Ms Nicholson reported that while she was not clear as to the extent of the 'data problem', she was concerned that historical data relating to pupil progress was inaccurate. She even had concerns regarding maladministration of ability levels set by teachers before she became Head Teacher and which were given to pupils following testing.
10. At the December 2017 meeting, the board instructed Ms Nicholson to contact the Regional Schools Commissioner ('RSC'), the relevant local authority ('Herts County Council') and the chair of the Respondent trust to explain the issues under investigation. Ms Nicholson confirmed she had already taken this action and the RSC advised that they would be writing to the trust. She was concerned that there have been data fabrication involving up to 5 to 6 teachers for a period of several years. Apart from Mr Sullivan, I did not hear any witness evidence from those present that the board meeting in December 2017. His evidence provided little information concerning what discussions took place concerning the evidence heard by board from Ms Nicholson at this meeting. What was clear however, is that the minutes of this meeting in the hearing bundle, did not provide any note of the board challenging the evidence that Ms Nicholson had provided. It appeared to simply accept her belief that maladministration had taken place. For an allegation as serious as this, the apparent absence of any evidence of challenge from board members is surprising.
11. Maladministration is identified by the government's Standards and Testing Agency ('STA'):

*'...refers to any act that: affects the integrity and security or confidentiality of the National Curriculum assessments [; and,] could lead to results and or outcomes don't reflect pupils unaided work.'*

While maladministration can include a number of various acts, it is understood that in this case it involved Ms Nicholson's concerns related to the inflation of teacher assessment judgments of pupil levels to influence school assessment.

12. It is noted that local authority or STA staff can visit schools and can gather evidence following an allegation being received of maladministration concerning testing procedure to ensure that data is correct and accurate. However, decisions relating to disciplinary action concerning staff remained an issue to be resolved by the school's governing body or in the case of DOWAT, its board. When Ms Nicholson contacted the local authority in November 2018 she spoke with Mike Pittendreigh, who was its Assistant Director of Education. He advised Ms Nicholson to contact her local School Improvement Partner. Their advice was for the Claimant to speak with the Respondent trust's HR team who in turn explained to her that, insofar as this matter related to staff, it was an internal retraining issue. While the HR team may not have considered all of the available evidence at this stage, their initial thoughts were that this was an issue relating to performance and capability and something where training was the appropriate measure to apply.

#### Suspension of the first and second Claimants

13. I heard evidence from Mr Robinson who was a governor of Our Lady School until early 2018. He was one of two vice chairs on the governing body and during Christmas 2017 Neil Adams in his capacity as Chair of Governors met with them. He explained that he was suspending the first and second Claimants at the end of the first week of school and starting an investigation into their practices. The governors were shown a statement which had been taken by Kelly Rose who was a teacher at the school and who had told Ms Nicholson during late 2017 that pupil data had been 'put up'.
14. On 5 January 2018, Mr Adams and Ms Nicholson informed the first and second Claimants that they were being suspended pending an investigation into allegations of:

*'historical examination irregularities and assessments at Our Lady Catholic Primary School over a number of years.'*

Neither of the Claimants were informed of any specific allegations which were made against them.

15. The school's disciplinary policy and procedure provided that:

*'In cases where the investigating manager considers it appropriate, the Head Teacher or the Chair may suspend a member of staff for up to ten working days.'*

It goes on to say that:

*'Depending upon the specific circumstances; the employee should be given the opportunity to attend a suspension meeting to comment on the perceived necessity to suspend within the context of the investigator repurposed before a decision is taken to suspend.'*

Additionally:

*'a record of the suspension should be kept of the determined purpose of the suspension for a period of up to 12 months and of any alternatives to suspension that were considered.'*

16. While the first or second Claimants attended a meeting on 5 January 2018 and were informed that they were suspended, they were not given the opportunity to comment upon whether a suspension was necessary. This would be especially important when the first and second Claimants were teaching staff in a relatively small primary school, where the dislocation to children caused by two senior teachers being suspended could be significant. No safeguarding concerns were involved and while there were historic matters to be investigated, I did not hear any evidence which clearly demonstrated that suspension was necessary at this stage. It was surprising that Mr Adams (or even Ms Nicholson), were not called by the Respondent to give evidence and explain the reasons for the decision to suspend.

17. In the absence of this evidence, it seems that following his earlier conversation with other governors before the commencement of the Spring 2018 term, Mr Adams had closed his mind. He does not appear to have followed the relevant procedure correctly and had decided some time earlier that a suspension would be necessary. He may well have had specific circumstances in mind which would justify him moving away from the disciplinary policy and procedure, but I was not taken to any evidence which explained what his thought processes were in relation to this matter.

18. Moreover, I noted that suspension according to the disciplinary policy and procedure is a matter where the Investigating Manager should play a part in determining its merits. Ms Sarah Jacobs who was appointed by the Respondent to carry out an investigation into alleged malpractice at Our Lady School, appeared to have been instructed to act as investigating manager under the disciplinary policy and procedure. She gave evidence to confirm that she was aware that the first and second Claimants were suspended, but that she was not involved with the actual suspension of any of the staff at Our Lady School.
19. Although the Respondent appeared to review the suspensions during January and February 2018 both the first and second Claimants remained suspended throughout the investigation led by Ms Jacobs. In the absence of evidence from Mr Adams to the contrary, I find that he took responsibility for considering the merits of the decision to suspend, decided to extend the suspensions and Ms Jacobs played no role in this particular process.

The investigation by Sara Jacobs

20. On 10 January 2018 Ms Nicholson and Mr Adams held a staff meeting to inform staff that an independent investigator had been appointed, who would conduct interviews with members of staff about historical issues. Staff at the meeting were urged to be honest and truthful in their meetings with her.
21. Ms Jacobs was appointed as the independent investigator by the Respondent trust and instructed to investigate historical allegations of examination and assessment irregularities, malpractice and maladministration at Our Lady's School going back several years. She confirmed in her report that she was the independent investigator and was supported by Mr Adams. She confirmed that he accompanied her at all interviews apart from one which took place with Mr Adams' wife; Amanda Adams, who was a Teaching Assistant at the School. She asserted that he did not play a central role in the investigation, but did acknowledge that during interviews, Mr Adams may have asked supporting questions. She acknowledged that the notes of the interviews contained within the appendices to her report were typed up within 48 hours of the meetings having taken place. She was not aware of what happened to the manuscript notes that had been prepared during the actual interviews.
22. On 12 January 2018 a telephone interview took place between Ms Jacobs Mr Adams and Mr Mathew, Head Teacher of John Henry Newman secondary academy. Mr Mathew stated there had been '*some conversations and 'mumblings' around the accuracy of the KS2 data which came to a head in 2017 with the Year 11 cohort where the KS2 data for a*

*small but significant number of students (4) didn't match their actual ability and it was evident that the students were never going to make progress they were predicted from their KS2 levels.'* Mr Mathew was of the opinion that the KS2 results had been inflated and were not a genuine reflection of the ability of the children on entry to his school.

23. Ms Jacobs and Mr Adams then proceeded to interview a number of teaching staff witnesses from Our Lady School on 15 January 2018. These were Ciara Nicholson, Kelly Rose, Mrs Phillips, Sarah Thorp, Amanda Adams and Andrea Shannon. Further interviews took place on 19 January 2018 with Ms Dye, Mrs Miles, Tracey Picone, Caroline Phipps, Sam Kelly, Sarina Dazzo, Ms Tye, Marie Marcantonio and Val Kinsella. She was unable to interview Kay Saunders, Teresa Tims or the former Head Teacher Susan Brown. Ms Saunders claimed that Mr Adams promised to arrange a meeting but failed to do so. Ms Brown sent a letter disputing the suggestion that there had been any mal-practice when she was Head at Our Lady School, but declined to attend an interview upon the advice of her union. Ms Tims was willing to attend, but Mr Adams refused to adjust the 'tight timetable' which he said the investigation was working to and she was not interviewed. Ms Jacobs was unaware of the email correspondence from these potential witnesses and agreed it would have been good to interview all of them as part of her investigation.
24. In her report dated 29 January 2018, Ms Jacobs set out the definition of maladministration for KS1 and KS2 and concluded that there was *'evidence of historical malpractice and maladministration...relating to the conduct of Phonics Check, KS1 SATs and KS2 SATs. In addition, there is evidence which demonstrates that teachers at the school, both past and present, regularly 'inflated' the assessment levels for the pupils they taught.'* She identified the evidence that she believed amounted to malpractice and maladministration and referred to incidents. She concluded that there *'was a culture and ethos (prior to September 2016), created and fostered by the Headteacher at the time, and supported by members of the leadership team, of inflating pupils' levels at all key stages.'* She identified bullying and intimidating behaviour by the Head Susan Brown which led to the normalisation of the inflation of levels with staff being complicit or supporting the culture.
25. She was of the view that DOWAT should report the malpractice and maladministration to the Standards and Testing Agency ('STA') and *'consider taking disciplinary action against the individuals above'*. Her recommendations however, did not identify which individuals should be considered for such action as a result of her findings of complicity or support of the culture identified.

26. Ms Jacobs interviewed the first Claimant on 15 January 2018 and the second Claimant on 19 January 2018. Although both Mrs Phillips and Ms Tye were allowed to be accompanied by their trade union representatives, the interview notes did not suggest that these meetings were being held as investigation meetings under the School's Disciplinary Policy and Procedure. While it was mentioned to the first and second Claimants that *'...the meeting was taking place to establish any basis of fact for allegations as to historical exam malpractice or maladministration...'* and that *'...any information provided to or obtained by the investigators will be used to inform the report that will be submitted to the Trustees...'*, it did not explain or identify the complaints or specific allegations that the two teachers need to answer. In that respect, the investigation interview appeared to be very general and did not put the first and second Claimants on notice that the outcome of the interview could lead to disciplinary action being taken against them.
27. It is also of interest that in both interviews, Ms Jacobs and Mr Adams were introduced as Investigators into the alleged irregularities. Mr Adam's role was not described as being an assistant or support to Ms Jacobs. Ms Jacobs had acknowledged that she did not have the manuscript notes of the meetings available and her typed notes did not capture the questioning taking place at the interviews. The Claimants did allege that Mr Adams took an active role in the interviews and was aggressive. While in most of the interviews, trade union representatives were present, both the first and second Claimants gave credible and reliable evidence on this issue. I acknowledge that Ms Jacobs did not think that this approach as an interview technique was helpful when seeking information from an interviewee, on balance of probabilities I find that Mr Adams played a significant part in the conduct of these interviews and was at times confrontational.
28. Documents were produced to the first and second Claimants without any warning. This included Progress 8 data obtained from John Henry Newman, a secondary school and whose data would have been unfamiliar to the first and second Claimants as primary school teachers. This was not helpful in allowing the first and second Claimants to consider the documents properly, determine their role in the gathering of the identified data and to provide meaningful answers to any allegations that have been made. This was especially important given that the allegations were historic, involved the interpretation of data. Understandably, the first and second Claimants were not fully aware of the issues which they were being invited to discuss at these interviews and they were not given an opportunity to assess the information disclosed in advance of the interview so they could properly analyse its contents and if necessary challenge its contents.

29. Ms Jacobs placed some reliance upon a document produced Kelly Rose, a teacher at Our Lady School and who was questioned about a 'Year 2 KS1 SATs Scores Reading' results sheet. This document contained handwritten changes which adjusted pupil's scores from the Age Related Expectation ('ARE') score to Greater Depth ('GD') which was a higher achieving level for the pupil's age than ARE. She said that the Head Teacher Susan Brown had told her and a colleague that there were not enough pupils at GD and some had their scores moved up by the Head from ARE to GD. This was despite Ms Rose's belief that these pupils were not at that level. Ms Rose said that she raised concerns with the Head and Mrs Phillips but had been ignored. Mrs Phillips denied that Ms Rose raised the issue of grade inflation with her and it is noted that Ms Rose did not feel it necessary to escalate her concerns described to Ms Jacobs to anyone else either inside or outside the School.
30. Ms Jacobs conceded that she was not an expert on primary school data, but believed that she knew enough to understand that data was being changed at meetings with colleagues. She did accept that the actual 'RAW' data on the KS1 Scores Reading Sheet remained unchanged and this was the actual result of the pupil's performance before moderation took place. A difficulty with the consideration of this particular assessment was that it relied upon the evidence of Ms Rose who described herself as being under pressure in her statement given to the investigation. There is no doubt that the way in which pupils are measured in relation to SATs places a great deal of pressure on the Head Teacher, Senior Leadership Team and of course the individual class teachers. Ms Rose construed conversations with the Head regarding a need to find children for the GD category as an admission of improper behaviour. However, this evidence alone does not justify the sole conclusion that deliberate grade inflation was taking place which amounted to maladministration by teachers.
31. Overreliance was placed upon the evidence of one member of staff and her interpretation of why moderation was taking place in relation to a particular document. Some of the scores appeared to be adjusted down as well as up. Ms Jacobs conceded that while this had been stated to her by Ms Phillips and Ms Tye in her interviews with them, she did not mention this in her actual report, (or indeed in her evidence at the disciplinary hearing). Ms Jacobs suggested during cross examination that her instructions were to explore an allegation that grades were *'going up'* and not *'going down'*, but accepted the concern raised by counsel that this had not been included in her report. She said that she *'...alerted the [disciplinary hearing] panel to the paperwork'* that was appended to her investigatory report. She also acknowledged that she did not include the evidence in her report of Sara Thorp who was another teacher whom she interviewed. Ms Thorp

mentioned that the Mrs Brown had expressed concerns about Ms Rose's teaching and the she herself believed teachers at the time followed relevant phonics guidance with regards to testing and she was not surprised by the improvement in results. Similarly, Ms Shannon who was interviewed and who inputted data onto the School's SIMs data management system confirmed that while assessment levels changed following progress meetings, this was not very often. She went on to say that the Head Ms Brown would check that everyone adhered to guidelines. While this did not rebut Ms Rose's evidence in its entirety, Ms Jacobs seemed place greater reliance upon Ms Rose's evidence and did not refer to evidence from others that might provide a more nuanced description of marking and moderation at the relevant time.

32. A further issue was the assistance that some students had allegedly received during KS2 tests and that some were tested in separate rooms. However, this appeared from the evidence to relate to the testing of those children with Special Educational Needs or other issues where testing in a larger classroom environment might place them at a disadvantage. From the evidence of the witnesses whose interview records were appended to Ms Jacobs' report, it did seem that this was not unusual and would involve invigilation by two members of staff.
33. Ms Jacobs interviewed the current Head of Our Lady Primary School Ciara Nicholson who referred to Ms Rose and Mrs Miles raising concerns to her about the Year 2 data and in particular referred to one pupil who passed his phonics test in 2016 but which they thought was contrary to his ability at that time. She referred to a number of documents contained in Ms Jacobs' report and which had been passed to her by Ms Nicholson. These were tables which she had produced showing attainment figures and which were presumably based upon original scoring sheets. The original data upon which these tables were based was not included as part of this disclosure and Ms Jacobs confirmed that she relied upon what Ms Nicholson had produced. She explained that '*Ciara Nicholson is a Head Teacher and I trust her on data*'. Unfortunately, Ms Jacobs was unable to interview her predecessor Susan Brown, who would have been the Head when the actual original data was produced. A concern for Ms Jacobs that the 'Trends of over Time' figures for Early Years children during the 2013/14 to 2015/16 academic years when Ms Brown was Head suggested a performance for phonics of 100% which compared extremely favourably with Herts County Council and National schools' data which ranged from 74% to 90% during this period. Although not recorded in Ms Jacobs' report, it is noted that Ms Shannon said a 100% phonics outcome could be right as the teachers worked hard. I noted that 100% did not mean that pupils had achieved maximum marks in the phonics test, but that 100% of pupils taking the phonics test that year had reached or exceeded the pass mark for the test.



34. Ms Jacobs acknowledged that Ms Phillips evidence that *'internal moderation is a tool used by teachers to adjust their teaching, tailor their classroom planning and target support for the needs of individual pupils so that they are properly prepared for Key Stage 1 and 2 tests'* was correct. She said that *'if that is what they are doing [it is] absolutely right'*. She acknowledged that Ms Phillips would have her class results moderated not just internally within the school, but externally too, with teachers from other schools who formed part of the local 'cluster' of schools. This provided a degree of an external scrutiny. She was also asked to consider a KS1 Moderation of Teacher Assessment 2013/14 documents and accepted that moderation was an acceptable safety net to ensure schools are judging children's ability accurately. It was noted that in documents such as these, teachers were asked to explain why a child was at a particular level and not at the one below or above and this suggested an expectation being placed upon teachers to be able to justify their setting of a child's levels at any time.
35. A further matter that Ms Jacobs investigated was the concern raised by Clive Mathew, Head of John Henry Newman school about the KS2 data which was provided to by Our Lady School to his school as the pupils moved from Year 6 to Year 7. He felt that when this data was added to the new GCSE Progress 8 scoring system in 2017 the performance of the former Our Lady School students was significantly lower than the KS2 data provided would have suggested. He also said that this out of line with the same data provided by other feeder schools for their Year 6 students. Ms Jacobs confirmed that she accepted Ms Mathew's data without challenging it. A calculation error was noted in the table during the hearing and it did not appear to have been questioned during the investigation. While there was a difference in performance of the former Our Lady School pupils compared to those from other schools, Ms Jacobs did not think it was extreme to find that the only explanation for this discrepancy was a conspiracy to inflate pupil's grades. She did not seem to consider other possible factors. While other intervening matters such as relative deprivation caused by children being classified as being Pupil Premium (having received free school meals at any time during the previous 6 years) or being Looked After Children could have affected the data obtained from Mr Mathew, Ms Jacobs simply said that *'I would imagine Mr Mathew would have taken that into account'*.
36. Like Ms Nicholson, it does seem that Ms Jacobs placed a great degree of trust in Mr Mathew as a head teacher and did not seek to challenge his evidence. She stated that she had *'...no reason to believe it was inaccurate...'* She acknowledged that the allegations made against the Claimants were very serious and career-threatening and this makes the lack of challenge of the head teachers, all the more surprising.

37. She explained that she was appointed as an independent investigator by the Respondent and believed that the Chair of Governors Neil Adams while accompanying her, played no part in writing her report or determining her conclusions. She described him as not having a 'central role' to the investigation. Although Mr Adams wife was a teaching assistant who was interviewed as part of the investigation, she did not feel that there was any conflict. Ms Adams suggested in her evidence that she had seen Mrs Brown, Mrs Saunders and Mrs Timms 'spending more time that was appropriate with pupils but she couldn't hear what was being said' and that she had seen this practice over the years. None of these individuals were interviewed by Ms Jacobs and she did not have an opportunity to see what they would have said with regard to this allegation. Ms Adams made a number of allegations without any specific evidence or detail and gave an impression that data didn't reflect pupil's true ability which was lower than recorded. She claimed that she had raised this issue with Mrs Phillips but she had not given a response. Ms Jacobs asserted that she looked at the totality of the interview evidence available, although she accepts with hindsight that she should have ensured that the manuscript notes were retained.
38. Ms Jacobs asserted that she played no role in the decision to suspend the Claimants and was an independent investigator instructed to produce a report and was otherwise not connected with decisions made in the disciplinary process. She was appointed to carry out a process of 'fact finding' with the intention of finding 'a broad basis of truth'. Ms Jacobs accepted that the Claimants would not have known what issues they were facing in this process
39. In considering the investigation report of Ms Jacobs and the instructions that she received from DOWAT, it reads as a general investigation into historic practices at Our Lady School relating to how testing and the moderation of testing during a specific period took place. It is not an investigation specifically into the alleged conduct of the Claimants. This is a concern because the report is ultimately used by the Respondent as an investigation report into the Claimants' alleged misconduct justifying disciplinary action. It should have instead been used as a means of commencing separate investigations of the Claimants in order that they could properly understand the issues *they* were being investigated for and could properly participate in the investigation. The statements contained in the bundle were summaries of what Ms Jacobs notes said and did not suggest that the Claimants were questioned in any way which treated them as the subject of the investigation. They do not give the impression that they knew they were under investigation rather than simply discussing the setting of the levels at the School when Ms Brown was Head and the culture and ethos of the School at that time. Ms Jacobs confirmed that her instructions were to carry out an

exercise of fact finding with a view to establishing a 'broad basis of truth'. She accepted that a 'broad basis of truth' should be distinguished from specific allegations. When asked whether the process was 'broad brush' in nature and allegations were found 'to hang on' to the conclusions reached, she simply replied that she carried out fact finding and then made recommendations.

40. While there were understandable pressures placed upon the School by having so many staff suspended, this was a matter of their own making and could have been avoided by them resisting suspension initially and waiting until Ms Jacobs had concluded her report. Ultimately, there seems to be a belief by Mr Adams that malpractice was taking place before the investigation commenced. There did not appear to be any consideration of whether the real issue was one of competence and perhaps the particular leadership style of a former Head whose failure to participate in the process, meant that it was difficult to gain a complete picture of what was happening in the School at the time.

#### What happened with the investigation report

41. While Ms Jacobs was concluding her investigation, a letter had been sent to parents dated 19 January 2018 advising them that teachers would be absent due to the ongoing external investigation. It would not have been difficult for anyone reading this letter to conclude that they had been suspended. The Our Lady Parish newsletter produced an article by Mr Adams dated 24 January 2018 and which pre-dated the delivery of Ms Jacobs' final report. In this article, he informed parents that there was an ongoing investigation into historical malpractice and maladministration at the School and that serious concerns had been identified. A subsequent letter dated 7 February 2018 confirmed that historic irregularities had been identified and stating that while it could not discuss details due to legal reasons, sought to reassure parents that the Head Ms Nicholson would ensure classes would be covered by teachers from within the Trust. It should be noted that some of the Claimant's children attended Our Lady School at the time and the Claimants would have been aware of the correspondence which was being produced and sent to parents.
42. Ms Jacobs said that she was not aware of this correspondence at the time. She could not explain how Mr Adams was aware of the action that was being taken before her report was finally released. She agreed that his comments raised in the newsletter should have not been made until her report was released. This particular incident gives a clear illustration of Mr Adams being more involved with the investigatory process than Ms Jacobs believed and was so determined to proceed with disciplinary action, that he had not allowed for a proper consideration of the report to take place. I was not taken

to evidence of a proper discussion with relevant governors from the governing body and Mr Adams. The original discussion over the Christmas period which was referred to in Mr Robinson's evidence suggests a belief that certain teachers would lose their jobs, that this was because of a deliberate manipulation of data and that this would result in teachers losing their jobs. Mr Robinson's further reference to a governors meeting on 12 or 19 January 2018 supports this rigid mindset adopted by Mr Adams. I find that on balance of probabilities that the decision to proceed was not discussed by the governing body of Our Lady School and the evidence supporting Mr Adams' belief was not shared with the governors as *'they did not need to see this evidence as it was very complicated to understand'*. Whether Mr Adams understood the evidence himself or not, was not clear. It appears that Mr Adams and possibly Ms Nicholson were not keen to discuss whether there was potentially a case of gross misconduct to consider or whether any data anomalies were caused by other factors. In any event, despite concerns being raised by Mr Nicholson and another governor Jo Chicco, Our Lady School's governors were kept away from the consideration of the disciplinary issues. This is another surprising element of this case and it would be reasonable for a governing body to be more involved. It is likely that they would understand data relating to KS1 and KS2 performance and may well have been able to assist with interpretation of the data being considered. As the actual disciplinary hearings involved directors from outside the School, there would not have been a need for governors to be kept away from the investigation due to a possible conflict of interest.

43. Since the initial discussions that had taken place at DOWAT board meetings in 2017, the STA had received a referral, had investigated the allegations and concluded their investigation on 24 January 2018. They decided to close the case as the moderation at the relevant time appeared to be secure. The local education authority; 'Herts for Learning' had received an email from the STA on 24 January 2018 informing them that this case had closed. Ben Fuller who is a Lead Assessment Advisor for the authority then contacted Ms Nicholson by phone 'to pass on the news'. While he did not have an email confirming this conversation, he told Ms Tye in an email dated 18 December 2019 that he recalled making that call. He also enclosed a redacted copy of the email that Herts for Learning received. It was sent by 'Maladministration, STA' to a redacted name dated 24 January 2018 and which said as follows:

*'I've taken on board the allegation you sent through on behalf of the school. [name redacted] is claiming that [name redacted] inflated TA results (some of which were inflated for current Y5/6 pupils).*

*This would have occurred in 2014 – the year you moderated (current Y6 pupils work would have been externally moderated in 2013/14) – any changes to this data will have been picked up by the local authority during the KS1 data checking process. It is my understanding there were no concerns from the 2014 TA data from Our Lady's.*

*You have also confirmed that the school is consistently high for the phonics screening results. Again, you monitored in 2014 and found the process to be robust.*

*Due to the timing of the allegation, plus the fact the LA have moderated the teacher assessment currently under question (which we consider to be secure) – this case is being closed.'*

The context of the letter suggests that as reference is made to the recipient monitoring results, it would have been sent to someone in Herts for Learning, especially given its disclosure by Mr Fuller to Ms Tye in response to her FOI request.

44. Given that the STA told Herts for Learning its decision on 24 January 2018 to close its case following an investigation and Mr Fuller had contacted Ms Nicholson with this decision, it does seem strange that Ms Nicholson and Mr Adams did not think that it was relevant to the investigation and which Ms Jacobs was in the process of concluding. In the absence of witness evidence from either of them rebutting knowledge of the STA report by late January 2018, I find that they would have known of its findings at this time. Taking into account the close relationship that would be expected to exist between a Head Teacher and Chair of Governors, I find on balance of probabilities that Ms Nicholson would have informed Mr Adams of the STA decision. It appeared to be connected with the issues of malpractice being considered in the investigation. While disciplinary action was a matter for the school, it does bring into question whether it would have been reasonable to commence a disciplinary process against the Claimants. Instead, it would have been more appropriate for the Respondent to consider whether other processes relating to capability or training would have been more appropriate.

45. Ms Jacobs completed her investigation and prepared her final report on 29 January 2018. She was not aware of what was happening with the STA at the time. Ms Jacob's explained that she produced an initial investigation report on 23 January 2018 for Kate Griffin, who was the Chair of the Board of Trustees and nobody else. She said that she did not recall any dialogue with her at this time and believed that the report was sent to her on the day that it was completed. During the hearing, Ms Jacobs was referred to her report in the supplemental bundle of documents entitled 'Initial Findings arising from the fact-finding investigation into allegations of historical

examination and assessment of irregularities at Our Lady Primary Catholic School' dated 23 January 2018 and describing the investigators as being 'Sarah Jacobs accompanied by Neil Adams: Chair of Governors. The actual report in the main hearing bundle was entitled 'Report of a fact-finding investigation into Historical Irregularities at Our Lady Catholic Primary School, Hitchin' dated 29 January 2019 and simply described the investigators as Sarah Jacobs and Neil Adams. Ms Jacobs was unable to recall what happened in relation to the production of these documents as she would delete emails used in an investigation once it had been concluded. She speculated that she might have been asked to produce some initial findings, but would have then produced the final report. I did not see anything to suggest that anyone other than Ms Jacobs had produced the two versions of the report and what is relevant that in both documents, Mr Adams was identified as investigator in addition to Ms Jacobs.

46. Her conclusion was that there was evidence of historical malpractice and maladministration at Our Lady School over several years relating to the conduct of the phonics check, KS1 and KS2 data. In addition, she said there was evidence which demonstrated the teachers at the school both past and present regularly inflated the assessment levels for the pupils who may taught. The report was lengthy and included many appendices which was understandable given the investigation she was asked to carry out. It included copies of the interviews that she had taken, pupil data and copies of standards and testing agency documents relating to KS1 and KS2. Her conclusions also suggest that there was a culture and ethos in the school prior to the appointment of Ms Nicholson which was created and fostered by the former head teacher Mrs Brown and supported by members of her leadership team relating to the inflation of pupils levels at all key stages.
47. In any event, the report once received Ms Griffin quickly proceeded to disciplinary action against the Claimants.

#### Decision to suspend the third and fourth Claimants

48. Following these interviews, Mr Adams then suspended several other members of staff including Ms Dye and Mrs Miles. I noted that the suspension letter dated 19 January 2018 provided to Mrs Miles, described her suspension as being as a result of a preliminary investigation into allegations of examination and assessment irregularities. However, the suspension appears to follow a similar format to that adopted by Mr Adams in relation to the Ms Philips and Ms Tye. I therefore have concerns about Mr Miles' suspension for the same reasons as I have given already in relation to the decision to suspend the first and second Claimants.

49. Additionally, the reference within the suspension letter to a preliminary investigation does suggest that a further formal disciplinary investigation would take place not only in relation to Mrs Miles' case, but also for that of Ms Philips and Ms Tye. No such further investigations actually took place and instead it was Ms Jacobs' investigation report which was relied upon by the Respondent when deciding that the Claimants should be subject to a disciplinary hearing.

#### Decision to commence disciplinary action against the first and second Claimants

50. On 7 February 2018, Mrs Phillips and Ms Tye were sent letters signed by Mrs Griffin, whose described role was Investigating Manager, Chair of Westminster Academy Trust. The letters were entitled 'Outcome of Investigation – Disciplinary Meeting' and referred to 'an Investigation Report having been completed, *as far as possible* (my emphasis), by the independent investigator Sarah Jacobs *assisted by Neil Adams* (my emphasis again)'. A copy was enclosed together with a copy of the School's Disciplinary Procedure. The letters refer to the relevant sections of Ms Jacobs' report which suggest that there is clear evidence that both Mrs Phillips and Ms Tye '*...inflated pupils' levels as a result of Pupil Progress meetings...*' and that both were aware of this being a culture and failing to take any action about it. The allegations in the letter were described as amounting to gross misconduct.

51. Both teachers were invited to disciplinary hearings and were warned that if the allegations were proven, they could be considered sufficiently serious to result in termination of their employment. I heard from Mr Ray Anderson who was appointed by the Respondent to conduct the disciplinary hearings with another director of the Trust, Julia Pearce. His statement was relatively short and he referred to the documents within the hearing bundle. He confirmed that Ms Jacobs' report of her investigation was the relevant document upon which the disciplinary panel relied, and that Ms Jacobs made clear that the report '*was hers and hers alone and the role of Mr Adams was to provide local background. Furthermore, Mr Adams did not have any involvement in the decision making*'. As I have already mentioned in this judgment, I am not convinced that Mr Adams played such a minor supporting role in the investigation and the decision to continue with the disciplinary action.

#### Disciplinary hearings and appeals against the first and second Claimants

##### The first Claimant

52. The letter to Mrs Phillips dated 7 February 2018 invited her to a disciplinary hearing on 2 March 2018. Mrs Phillip had prepared a statement in response and which emphasised the external moderation of in-house moderation by teachers from other schools. She questioned what evidence was available that pupil's grades had been inflated. She was clear that Ms Rose never raised concerns about the pupil data and questioned why more specific information had not been of when these conversations had taken place, who had been present and what was discussed. She questioned whether Mr Adams was conflicted in contributing to the investigation while his wife was working for Our Lady School and 3 of their children were pupils there. She also enclosed a copy of an email from Murray Sackwild of the NEU NUT union to Ms Jacobs on 22 January 2018. It referred to Ms Phillips' notes concerning the interview she had attended as part of the investigation and which questioned the 'data criticism', queried the way in which it was interpreted and suggested that while data issues should be considered, an investigation into historic malpractice was not appropriate. The statement was provided to the panel in a letter dated 28 February 2018. Once again, she emphasised that neither Ms Rose not Ms Adams raised concerns with her and that the details of when these concerns had not been identified.
53. The actual disciplinary hearing for Mrs Phillips took place on 5 March 2018. Both Mr Anderson and Ms Pearce were present as Disciplinary Managers and their roles as Directors of DOWAT were identified to Mrs Phillips. Ms Jacobs attended as presenting officer. Mrs Phillips was present and supported by Ms K Cogman who was a NEU Regional Officer. There was a clerk to the panel Mrs T E Doyle, and she prepared a detailed note of the hearing.
54. Introductions took place and then Ms Jacobs presented the 'management' case to the hearing panel. Questions could then be asked by Mrs Phillips and Ms Cogman, followed by questions from the panel. Mrs Phillips then presented her case to the panel and relied upon her documentation previously provided. Ms Jacobs was then permitted to ask questions, followed by questions from Mr Anderson and Ms Pearce. Significant questioning by the panel did not seem to take place of either Ms Jacobs or Mrs Phillips, although both had been provided significant paperwork. Ms Pearce expressed surprise at the number of invigilators used at the School during SATs and Mrs Phillips explained that this was decided by the Head Teacher, but in any event, she did not feel that it was a lot. She was also questioned by Mr Anderson about the raising of pupil's targets as Pupil Progress meetings. She explained the circumstances in which they were changed and that in addition to the data, books, lesson observations, knowledge of the children and the views of the SENCO (Special Educational Needs Coordinating Officer) would also be considered. Both parties were allowed to make final submissions and the panel retired to deliberate.



55. It is understood that the panel deliberated in private and with only the clerk present. Their decision was identified in the note of the hearing. A letter was sent to Mrs Phillips on 13 March 2018 and the decision of the panel was that her employment should be terminated by reason of gross misconduct and without notice. The letter was eight pages in length and explained why the decision had been reached. In relation to the first allegation that Mrs Phillips inflated pupils' levels as a result of Pupil Progress meetings and as KS2 leader and members of the senior team, was aware that this was custom and practice across the school, they found it to be substantiated. Emphasis appeared to be placed upon a failure by Mrs Phillips to deny inflating results. However, it did not distinguish whether this was something more than genuine moderation which was a legitimate way in which data could be adjusted. Nonetheless, it was determined that Mrs Phillips was complicit in this activity and that she failed to act with honesty and integrity. The second allegation of whether Mrs Phillips was complicit in the raising of pupil levels was substantiated and that she was using flawed and falsified data. Specific examples were not provided within their conclusions concerning this serious allegation. The third allegation that both Ms Rose and Ms Adams raised concerns regarding pupil data with Mrs Phillips and that she did not act upon these concerns was also found to be substantiated. Despite Mrs Phillips having disputed these alleged concerns having been made and there being an absence of specific detail regarding these incidents, the panel did not explain why this allegation was substantiated '*on a balance of probabilities*'.
56. The panel advised Mrs Phillips in the letter that they had taken account of her twenty years' service and that there had been no previous disciplinary action. However, they concluded that dismissal was the only sanction that they could impose. Mrs Phillips' dismissal was therefore stated as taking place on 13 March 2018, but that she had a right of appeal against the decision.
57. Mrs Phillips gave notice of her appeal by letter on 23 March 2018 arguing that the sanction was too severe, procedural issues which were prejudicial to the final outcome and that in any event, her dismissal was unfair. Further details were obtained from Mrs Phillips by the clerk Mrs Doyle and in her letter dated 4 April 2018, she was invited to an appeal hearing on 2 May 2018 which would be before a panel comprising of Anthony Corish, Dr Kerry Sullivan and Nicola Kane, who were all directors of DOWAT. Mr Anderson would be invited to present on behalf of the original decisionmaking panel and Mrs Phillips was permitted to be accompanied by a trade union advisor. Mrs Phillips' NEU NUT Regional Officer Chris Grant, did ask Mrs Doyle in his email of 13 April 2018, that as the findings of fact in the decision were disputed, they wanted the opportunity to cross examine Ms Jacobs, even

though she was not the decision maker at the disciplinary hearing. While not being willing to do this, Mrs Doyle confirmed that any questions which Mrs Phillips had, could be put to Ms Jacobs in advance of the hearing and provided they were made before 24

April 2018, she would have a chance to provide her replies before the appeal hearing.

58. A grounds of appeal document was prepared by Mrs Phillips on 22 April 2018 of some 50 pages in length and including appendices, including character references from parents and questions for Ms Jacobs. Once again, she included a challenge of the reliance placed upon the evidence of Ms Rose and Ms Adams and the absence of details of the incidents to which they rely upon. Ms Jacobs responded to the questions, although in relation to Mrs Rose and Ms Adams' evidence, she simply referred to the statements as appended in her original investigation report and the terms of reference of her investigation.

59. The appeal hearing took place on 2 May 2018 with the three directors nominated in attendance. Mrs Phillips was present with her union representative Chris Grant. Mr Anderson was present as one of the dismissing directors, Mrs Doyle as clerk and Stephanie Fitzgerald, who was a solicitor with Winckworth Sherwood and whom it is understood provided employment law advice to DOWAT. It does not appear from the hearing note that the role of Ms Fitzgerald was explained at the hearing and while her role may have been simply to provide advice on the panel with regard to the correct procedure. The only recorded contribution from Ms Fitzgerald during the hearing was at the end when she asked Mrs Phillips whether she was happy for the outcome to be emailed to her and for her union representative to be copied in. It is understood from Mr Anderson's evidence that Winckworth Sherwood provided support in the process, but that he was critical of the quality of their drafting in relation to letters.

60. The appeal hearing was about 2 hours 17 minutes in length and involved Mrs Phillips first presenting her appeal with support from Chris Grant. She was then questioned by Mr Anderson and the panel. She was asked whether she believed there was a culture of coercion and bullying at the School. She replied that she never felt coerced in assessing a pupil's level and the first time that the 'culture' had been identified, was within the investigation report prepared by Ms Jacobs. Mr Anderson was allowed to respond and in turn was questioned by Mrs Phillips and her union representative and then the appeal panel. Both were then permitted to summarise their arguments.

61. The decision of the appeal panel was sent to the Claimant by letter on 14 May 2018. They were satisfied that the investigation was necessarily broad, but in relation to the case against Mrs Phillips was 'sufficient, reasonable

and proportionate'. They believed the investigation uncovered significant evidence which could not be ignored. They divided their consideration into two parts with the disciplinary managers' decision on the facts being first considered, followed by the decision on sanction. The panel placed particular emphasis on Mrs Phillips' role as acting Deputy Head from 2013 to 2014 and the senior leadership role that this involved. They found that there was an unchallenged culture to 'higher the levels' and a culture of coercion and bullying. Her unawareness of this culture was 'a serious abdication of your role as part of the senior leadership team'. Moreover, 'that an outright denial of knowledge of such a culture is credible'. They felt that she relied upon external moderation as a defence to her lack of knowledge in the irregularities. They therefore found her to be complicit in the inflation of pupil level data, was aware of the custom and practice of the culture and did not report the behaviour despite being a member of the senior leadership team. This they felt, amounted to gross misconduct. In terms of sanction, they felt dismissal was appropriate and while they considered mitigation, but they felt that as she did not take advantage of the retirement of the Mrs Brown as Head, to then raise the issue with her successor, meant that it would not be possible to repair the trust and confidence the School needed to have in her. The appeal does not appear to actually explain why the significant evidence presented by Ms Jacobs was convincing in relation to the data involved. Nor does it seek to address the concerns raised by Mrs Phillips as to the reliance placed upon Ms Rose, Ms Adams and the absence of specific detail in their complaints. In any event, Mrs Phillips' dismissal was upheld and that there remained a duty for DOWAT to refer the matter to the Teaching Regulation Agency ('TRA').

62. There was a referral to the TRA and in its letter to Mrs Phillips dated 11 July 2019, it advised no further action concluding:

*'Taking all of the above into account, including Mrs Phillips' submissions, the determination meeting agreed that given the lack of evidence to support the allegations, the case would be closed with no further action. it was further agreed that not only would a professional conduct panel be unlikely that they would find that the conduct would meet the threshold for prohibition'.*

The determination meeting agreed that there was no supporting evidence to show Mrs Phillips was aware of inflation of results and could not therefore raise a complaint. They also agreed that there was no evidence that Mrs Phillips knew or witnessed any bullying or inappropriate behaviour in pupil progress meetings. It also noted that most teachers who had been interviewed during Ms Jacobs' investigation were unaware of assistance

being given during KS2 tests. They also noted that the STA made no findings of maladministration at Our Lady School.

### The second Claimant

63. The letter to Mrs Tye dated 7 February 2018 invited her to a disciplinary hearing on 2 February 2018. Mrs Tye had prepared a statement in response and which emphasised her following of process correctly and that the Head had ultimate responsibility for accuracy of assessment and that only she was present at all pupil progress meetings. She said that '*she only spoke with Ms Rose about the pressure to achieve high results*'. The internal moderation process was described as a challenge for a teacher's judgment and results could go down as well as up. She described the former Head Susan Brown's behaviour during the investigation interview as 'bullying' from a position of hindsight and that she did not recognise it at the time, '*...as is usual in a bullying situation*'. She said that this was why she didn't report it. She also described her role in the senior leadership team as being 'marginal' with no responsibility for assessment. She advised that had she felt there was a problem at the time, she would have reported it. The statement was some 46 pages in length and had a number of appendices.
64. The actual disciplinary hearing for Mrs Phillips took place on 5 March 2018. Both Mr Anderson and Ms Pearce were present as Disciplinary Managers and their roles as Directors of DOWAT were identified. Ms Jacobs attended as presenting officer. Mrs Tye was present and supported by Ms K Cogman who was an NEU Regional Officer. There was a clerk to the panel Mrs T E Doyle, and she prepared a detailed note of the hearing.
65. Introductions took place and then Ms Jacobs presented the 'management' case to the hearing panel. Questions could then be asked by Mrs Phillips and Ms Cogman, followed by questions from the panel. She explained that on balance of probability she believed Mrs Tye had inflated pupils' levels because of pressure, was a senior leader, was aware of the Head's bullying behaviour and did not raise any concerns. Mrs Tye then presented her case to the panel and relied upon her documentation previously provided. Ms Jacobs was then permitted to ask questions, followed by questions from Mr Anderson and Ms Pearce. Significant questioning did not seem to take place of either Ms Jacobs or Mrs Tye by the panel, although both had been provided with statements by both Mrs Tye and Ms Jacobs. Both parties were allowed to make final submissions and the panel retired to deliberate.
66. It is understood that the panel deliberated in private and with only the clerk present. Their decision was identified in the note of the hearing and a letter to be sent to Mrs Phillips was agreed. The letter was sent to Mrs Phillips on 13 March 2018 and the decision of the panel was that her employment

should be terminated by reason of gross misconduct and without notice. The letter was ten pages in length and explained why the decision had been reached. In relation to the first allegation that Mrs Phillips inflated pupils' levels as a result of Pupil Progress meetings and as part of her duties included the assessment of pupil level data. It also referred to her statement from the investigation report that she felt when leaving meetings that levels were not correct, but that she would accept the Head's decision and that Ms Rose agreed with her that some pupils were given levels higher than their own professional opinion. Reliance was placed upon the data provided by John Henry Newman School and an interview with Mr Mathew. However, the letter did not explain whether it had interrogated this data as part of its investigation nor whether it had taken into account the question of possible external moderation and whether mitigated against a finding of deliberate inflation of pupil's levels. It determined that Mrs Tye was complicit in inflating pupil's levels. The second allegation of whether Mrs Tye did not report the Head Susan Brown's bullying behaviour or raising levels. The panel noted that Mrs Tye

had said that she only realised the Head was bullying when Ms Nicholson became Head and she could compare it with her management style. But other than that, they mentioned her membership of the senior leadership team, the panel did not explain in detail why this allegation was substantiated '*on a balance of probabilities*' against Mrs Tye.

67. The panel advised Mrs Phillips in the letter that they had taken account of the fact that she had more than ten years' service and that there had been no previous disciplinary action. However, they concluded that dismissal was the only sanction that they could impose because she did not share her concerns regarding data levels until the investigation took place. Mrs Tye's dismissal was therefore stated as taking place on 13 March 2018, but that she had a right of appeal against the decision.

68. Mrs Tye gave notice of her appeal by letter on 23 March 2018 arguing that the sanction was too severe, procedural issues which were prejudicial to the final outcome and that in any event, her dismissal was unfair. Further details were obtained from Mrs Tye by the clerk Mrs Doyle and in her letter dated 4 April 2018, she was invited to an appeal hearing on 4 May 2018 which would be before a panel comprising of Anthony Corish, Dr Kerry Sullivan and Nicola Kane, who were all directors of DOWAT. Mr Anderson would be invited to present on behalf of the original decision-making panel and Mrs Phillips was permitted to be accompanied by a trade union advisor. Mrs Phillips' NEU NUT Regional Officer, Des Hart, did ask Mrs Doyle in his email of 5 April 2018, that as the findings of fact in the decision were disputed, they wanted the opportunity to cross examine Mr Mathew and Mrs Adams. He felt that Mr Mathew needed to explain why he had not queried the pupil progress data and Mrs Adams needed to explain why she did not report her

concerns mentioned to Ms Jacobs at her investigatory interview. While not being willing to do this, Mrs Doyle confirmed that questions could be put to Mr Mathew and Mrs Adams in advance of the hearing. Mrs Adams replied by email and said that she had nothing to add to here statement. He was also advised that questions could be put to Ms Jacobs before 24 April 2018, so she would have a chance to provide her replies before the appeal hearing.

69. A grounds of appeal submission was prepared by Mrs Tye on 24 April 2018 of some 39 pages in length and including appendices, including character references from parents and questions for Ms Jacobs. In this document she referred to her year as Assistant Inclusion Manager and that when she raised concerns regarding SEN, the then Head Ms Brown was dismissive. She was adamant that she did not inflate pupils' levels.
70. The appeal hearing took place on 4 May 2018 with the three directors nominated in attendance. Mrs Tye was present with her union representative Des Hart. Mr Mathew attended as a witness. Mr Anderson was present as one of the dismissing directors, Mrs Doyle as clerk and Stephanie Fitzgerald, from Winckworth Sherwood.
71. The appeal hearing was about 3 hours in length and involved Mrs Tye first presenting her appeal with support from Mr Hart. She was then questioned by Mr Anderson and the panel. She explained that she had little support in SEN at the relevant time and she felt this was relevant because her knowledge was being brought into question in the disciplinary process. She explained that she did not understand Ms Brown's behaviour to be bullying and she only mentioned this in 2017, having previously seen her as a strong leader. Mr Mathew gave evidence and he explained his concerns about a cohort of disadvantage pupils, a large number of which came from Our Lady School. He felt that their figures were significantly different to those from other schools' SATs results from the same time. He believed these results had been inflated, but did not explain how this could be the only explanation and what other possibilities had been considered and rejected. When asked whether she believed there was a culture of coercion and bullying at the School, Ms Tye did mention her ill health which was suggested as being work related stress and this was why she could not stand up to Mrs Brown. She did say that she expressed her opinion to her, but that as Head, Mrs Brown had the final say. She did suggest that taking into account the SEN knowledge that she now had, some of the children whom she had trained and who had passed phonics during that time, should not have passed. However, she also explained that when children entered her class, a figure of 100% for phonics did not mean that they were exceptional, simply that 100% of the children performed phonics at ARE (in comparison to GD), for a particular year at 100%. She also recognised the high level of supportive

families at Our Lady School could mean that a low level child there could compare well with pupils from another school. Both were then permitted to summarise their arguments and Ms Fitzgerald asked whether Mrs Tye was happy for the outcome to be emailed to her and her union representative.

72. The decision of the appeal panel was sent to the Claimant by letter on 14 May 2018. They were satisfied that the investigation was necessarily broad, but in relation to the case against Mrs Tye, it was 'sufficient, reasonable and proportionate'. They believed the investigation uncovered significant evidence which could not be ignored. They divided their consideration into two parts with the disciplinary managers' decision on the facts being first considered, followed by the decision on sanction. The panel placed particular emphasis on Mrs Tye being aware of levels being inflated and that phonics data at 100% for three years was something she should have led to a conclusion of malpractice. They did not address Mrs Tye's suggestion as to why it might be possible or dismiss possible other explanations as to an error in data, save that it is 'either right or wrong'. They did not place any reliance on external moderation and instead suggested that Mrs Tye used it as a defence. Her failure to raise any concerns with Ms Nicholson was also criticised. This they felt, amounted to gross misconduct. In terms of sanction, they felt dismissal was appropriate and while they considered mitigation, they felt that as she did not report her concerns, it would not be possible to repair trust and confidence by the School in her. Like Mrs Phillips' appeal decision, this letter does not appear to actually explain why the significant evidence presented by Ms Jacobs was convincing in relation to the data involved. Nor does it seek to address the concerns raised by Mrs Phillips as to the reliance placed upon Ms Rose, Ms Adams and the absence of specific detail in their complaints. In any event, Mrs Phillips' dismissal was upheld and that there remained a duty for DOWAT to refer the matter to the Teaching Regulation Agency ('TRA').

73. There was a referral to the TRA and in its letter to Mrs Tye dated 30 January 2019, it advised that the case no longer reaches the required threshold and as such her case would be closed. Although there had been an initial decision to investigate, they concluded that there was no documentary evidence to suggest that Mrs Tye had committed serious misconduct. It noted that '*...the majority of the evidence is hearsay; which comes from other teachers being considered without any form of external corroboration.*'

#### Disciplinary hearings and appeals against the fourth Claimants

74. The letter to Mrs Miles dated 7 February 2018 invited her to a disciplinary hearing on 2 March 2018. It explained that the investigation report produced by Ms Jacobs would be relied upon and in appendix 7.4:

*'Through the interviews undertaken and documents examined through the investigation, it is clear that SM (sic) inflated pupils' levels despite not agreeing with the Headteacher and others at the Pupil Progress meetings, and she was aware that there were pupils all through the school with higher levels than they really were. She allowed pupils to be taken off by the Headteacher to be given additional time to complete more of their KS1 SATs test after it had been marked. Whilst it may have been difficult to prevent the Headteacher from doing this or challenge, she did not report her concerns to anyone at the time, or subsequently to the current Headteacher SM, said that she was aware of the guidance and therefore was aware that this was wrong.'*

She was advised that these were allegations of gross misconduct. She was informed that Mr Anderson and Nicola Kane would form the panel, that Ms Jacobs would present evidence and Mrs Doyle would take notes.

75. Mrs Miles had prepared a statement which she sent to Mrs Doyle on 26 February 2018. She dealt with the allegations that she inflated pupils' levels and that she was aware that there were pupils throughout the School with levels higher than they really were. She advised that pupil progress meetings were attended by colleagues and it was not uncommon for different teachers to have different opinions on moderation and would look at workbooks to seek evidence. She said that if she disagreed with a group's decision she would make it clear. She also accepted that as a more junior member of staff, she would comply with reasonable management instructions from more senior members of staff. She mentioned external assessment, that she respected Mrs Brown and that the senior leadership team had been regularly praised in external moderation. She provided evidence in support. She described Mrs Brown as 'a micro-manager'. While she conceded that this could be annoying, she had no reason to suspect her dishonesty. She denied that she knew there were pupils who had higher levels than they really were as she only taught children for a particular year and was not involved with a child's education as they progressed through the school. She acknowledged other teachers faced challenge at pupil progress meetings. She denied that she allowed pupils to be taken by the Head to be given additional time to complete SATs and cannot remember these incidents taking place. She included positive references from parents as appendices to the statement.

76. The actual disciplinary hearing for Mrs Tye took place on 5 March 2018. Both Mr Anderson and Ms Pearce were present as Disciplinary Managers and their roles as Directors of DOWAT were identified. Ms Jacobs attended as presenting officer. Mrs Tye was present and supported by a companion,



Mrs J Martin. There was a clerk to the panel Mrs T E Doyle, and she prepared a detailed note of the hearing.

77. Introductions took place and then Ms Jacobs presented the 'management' case to the hearing panel. Questions could then be asked by Mrs Tye and Ms Cogman, followed by questions from the panel. She explained that on balance of probability she believed Mrs Tye had inflated pupils' levels because of pressure, was aware of malpractice taking place but didn't challenge this. Mrs Miles then presented her claim and Ms Jacobs was then permitted to ask questions, followed by questions from Mr Anderson and Ms Pearce. Significant questioning did not seem to take place of either Ms Jacobs or Mrs Miles by the panel, although like the hearings involving Mrs Phillips and Mrs Tye, statements had been provided by both Mrs Miles and Ms Jacobs. Both parties were allowed to make final submissions and the panel retired to deliberate.
78. It is understood that the panel deliberated in private and with only the clerk present. Their decision was identified in the note of the hearing and a letter to be sent to Mrs Miles was agreed. The letter was sent to Mrs Miles on 13 March 2018 and the decision of the panel was that her employment should be terminated by reason of gross misconduct and without notice. The letter was nine pages in length and explained why the decision had been reached. In relation to the first allegation that Mrs Miles inflated pupils' levels despite not agreeing with the Head teacher and others at Progress meetings and she was aware that there pupils all through the school with higher levels than they really were, reliance was placed upon the allegation made by John Henry Newman School. It was felt that the Mrs Miles accepted the Head's judgment even though professionally, she did not agree. On balance it was felt that this allegation was on balance of probabilities was substantiated. The second allegation that Mrs Miles allowed pupils to be taken off by the Head Teacher to give additional time to complete their KS1 SATs tests was not substantiated. However, the panel relied upon an admission by Mrs Miles as to contravention of KS1 guidance was determined to raise 'worrying issues'. In relation to the third allegation that Mrs Miles failed in her duty to report to report her concerns over the regrading of assessments, it was felt that she was at best complicit in normalising the behaviour of grade inflation or worse, she furthered the practice. It did not address the lack of knowledge which argued in her statement submitted before the hearing and her explanation of how the assessment of levels was considered. They simply described the system of external moderation referred to by Mrs Miles as not being a defence. They did not provide detailed reasoning as to how Ms Jacobs' report demonstrated deliberate inflation of data and how Mrs Miles played a part in this practice with knowledge of it. The allegation was considered substantiated.

79. The panel advised Mrs Miles in the letter that they had taken account of the fact that she had ten years' service and that there had been no previous disciplinary action. However, they concluded that dismissal was the only sanction that they could impose, although they did not explain why this was the case other than that Mrs Miles was described as being; *'fully conversant with the Teacher's Standards'*. Mrs Miles' dismissal was therefore stated as taking place on 13 March 2018, but that she had a right of appeal against the decision. Reference was made to a possible referral to the National College for Teaching and Leadership. However, no referral would be made until the conclusion of the appeal process.
80. Mrs Miles gave notice of her appeal by letter on 26 March 2018 arguing that there were inconsistent and inappropriate allegations in that she never inflated pupil levels as it was Ms Brown's role as Head to make the final decision and that at no stage was she aware that pupils had higher levels than they really were. Additionally, she mentioned the intimidating nature of the investigatory interview and that the notes did not reflect her recollections of events concerning the allegation that she allowed the Head to give pupils' additional time in KS1 SATs. She said that the finding that she contravened the KS1 Code was not in respect of an allegation that had been put to her in advance of the hearing and which should have been provided under the ACAS Code of Practice and the Respondent's own disciplinary procedure. She argued that she did not have a genuine opportunity to respond to this allegation and the disciplinary meeting should have been adjourned. She noted that the finding in respect of the third allegation that it had been widened to suggest that not only she failed to report concerns, but that she was aware of the KS1 guidance. This she said, had resulted in her not being able to prepare her response to this widened allegation before the hearing took place. She argued that no consideration had been given as to the context in which the allegations had been made with regard to pupil progress meetings and that while disagreements took place, they were on a sub-level basis. She was also unhappy that reference had been to phonics data which she had little involvement with this work area, in her teaching role. She said that this issue was only introduced by Ms Jacobs the night before the hearing and that she had not been referred to the specific KS1 guidance during the investigation.
81. She also questioned the serious conflict of interest which she believed existed by Mr Adams being an investigating manager and which he described himself in her letter of suspension dated 19 January 2018. She said that during her investigatory interview, he asked at least 50% of the questions. He was also the only remaining non-staff governor in post for the period of the allegations and that his wife was Teaching Assistant at the School. The conduct of the interviews and the inaccuracies in their reporting was identified as a ground for complaint in that the style of interview was

described as intimidating. This she believed led to rushed answers and inaccuracies in her reply. Finally, she argued that the sanction was harsh in that she was dismissed despite having an unblemished record, in respect of issues such as KS2 which she did not teach.

82. The clerk Mrs Doyle acknowledged the appeal in her letter dated 4 April 2018 and Mrs Miles was invited to an appeal hearing on 2 May 2018 which would be before a panel comprising of Anthony Corish, Dr Kerry Sullivan and Nicola Kane, who were all directors of DOWAT. She advised what documentation would be available to the appeal panel. She also advised that Ms Jacobs would not be present at the appeal but that questions if forwarded to her before 26 April 2018, would be responded to before the appeal hearing. These were made and responded to by Ms Jacobs. One point of relevance in her answers was that she described her investigatory meeting with Mrs Miles as being; *'part of a School-wide fact-finding investigation and it was prior to the applicability of the Disciplinary Policy and Procedure which I understand only became applicable once there were allegations against her'*. She also said that while she did not have reports from outside bodies relating to external moderation, she felt that this in any event could be unreliable as they relied upon the honesty and integrity of the School.
83. The appeal hearing took place on 4 May 2018 with the three directors nominated in attendance. Mrs Miles was present with her friend, Jeanette Martin. Mr Anderson was present as one of the dismissing directors, Mrs Doyle as clerk and Stephanie Fitzgerald, from Winckworth Sherwood.
84. The appeal hearing was about 2 hours 20 minutes in length and involved Mrs Miles first presenting her appeal. Mr Anderson had no questions to ask and the panel then proceeded to questions. Mrs Miles confirmed that she was aware of teaching standards and whistleblowing. While she acknowledged it might *'potentially'* be difficult to question things due to the Head's experience, she denied that she was ever bullied to do things she didn't want to do and she had no reason to believe the Head Mrs Brown was dishonest. Mr Anderson asserted during his response as disciplinary manager that the panel's reference to the phonics issues was a concern and not an allegation which impacted upon their decision. He was questioned by Mrs Miles and the panel. Both parties were allowed summarise their case and a decision was promised in 5 working days by Dr Sullivan as chair of the appeal panel.
85. The appeal letter was not actually sent until 4 June 2018 and the decision and the panel determined that Mrs Miles' concerns about the breadth of the investigation were not proven as the investigation was *'necessarily broad, given the scope of the alleged malpractice and maladministration'*. They

were satisfied that the investigation was sufficient, reasonable and proportionate. They remained satisfied that Mrs Miles attended pupil progress meetings and knew pupils' levels had been altered and should have known this was wrong. They did not agree that the Head had superior knowledge and that Mrs Miles had not control over the process. In relation to data generally, they emphasised that this was published, that she should have looked at it and should have known there were problems with it. External moderation was not seen a means of Mrs Miles avoiding her obligations. As a consequence, they were satisfied that there was gross misconduct. In considering sanction however, the panel felt there were mitigating factors as Mrs Miles was not a member of senior leadership and she was; *'not the instigator of the falsification of pupil level data'*. They therefore felt that a final written warning remaining on file for two years was appropriate with close supervision on all matters connected with the assessment of pupils, further professional training to reaffirm her expected conduct and responsibility. The sanction would be effective from 13 March 2018 with reinstatement of salary and continuous employment. A return to work interview had already been raised on 31 May 2018 and the letter advised that Mrs Nicholson would be in touch to arrange a date for this to take place.

#### The Claimant's decision to resign

86. The Claimant did not actually return to work and instead gave notice of her intention to resign in a letter dated 31 May 2018:

*'I write to inform you that I am resigning my post of teacher at Our Lady Catholic Primary School with effect from 1 September 2018. My last date of employment will thus be 31 August 2018, and my last date of attendance will be 20 July 2018'*

No reasons were given in the letter as to why Mrs Miles had decided to resign. I have taken into account the closing comments in the appeal hearing outcome letter dated 4 June 2018 about a return to work interview being discussed on 31 May 2018 and the notice of resignation being dated 31 May 2018. For these reasons and the further matter which will be discussed in the paragraph below, I am satisfied that Mrs Miles knew her appeal had succeeded insofar as it related to sanction and that she had been reinstated. Accordingly, the Claimant's letter of 31 May 2018 amounted to an effective letter of resignation from her employment. The notice given by Mrs Miles, took into account the remainder of the academic year for 2017/18 and I understand this would ordinarily be the notice period

a teacher would give at this time of year when resigning with notice in the normal way.

87. Mrs Miles explained that at the time of the appeal she felt aggrieved by her belief that the disciplinary process had been poor and the bullying and intimidating way the investigation had been carried out. Despite this, she remained positive about her work at Our Lady School. She said that she felt optimistic about her appeal. It appears that discussions took place between a representative of DOWAT's solicitors which were without prejudice in nature. As I have stated above, I have not considered these discussions in making these findings of fact. However, on a balance of probabilities by 9 May 2018 she would have known that a decision had been made to reinstate her. Whatever else was being discussed, the actual appeal hearing decision letter was not sent until 4 June 2018. This was outside of the agreed timescale under the School's disciplinary procedure and it also meant that the Claimant did not have a formal document to rely upon confirming the reduction in sanction and final written warning. It is understood that this letter would have been drafted by DOWAT's solicitor following consideration of the issues by the appeal hearing panel and would not be sent without their approval. But taking into account the solicitors' involvement in this matter, it is surprising that this letter was not sent to Mrs Miles sooner. This lack of certainty would no doubt have caused or contributed to the confusion which she was feeling during May 2018 and anxiety as to whether she would be allowed to return to work at Our Lady School. On balance of probabilities, I also find that by 31 May 2018, Mrs Miles would have reached a stage where she would have felt a breakdown in trust and confidence in DOWAT due to their treatment of her during the investigation, disciplinary process and with regard the resolution of the appeal following the decision concerning sanction.

#### DOWAT's appraisal of the disciplinary process

88. Both Dr Sullivan and Mr Anderson gave evidence as to their views concerning the way in which the disciplinary process was conducted.

89. As has been described above, Mr Anderson was critical of the support provided by DOWAT's solicitors and the involvement of Mr Adams who should not have asked questions during the investigatory interviews and who should have recognised the conflict of interest which existed through his wife's role as a Teaching Assistant at Our Lady School. He maintained a belief that Ms Jacobs was correct in saying that Mr Adams had no involvement in the preparation of the investigation report. He remained convinced however, that his concerns impacted upon the fairness of the disciplinary hearings.

90. Dr Sullivan expressed concern that there was a lack of records and documentation of the actual marking process at the School and that Mr Adams should have '*excused himself from the process because of a possible conflict of interest*'. He also felt however, that while there were shortcomings in the process, the decisions made were fair.
91. Both Dr Sullivan and Mr Anderson gave reliable evidence at the hearing and I agree that they were right to have concerns regarding Mr Adams. He should have been aware that he was conflicted both in terms of his relationship with a member of staff at Our Lady School and also in terms of the views which he had expressed to Mr Robinson and other governors shortly before the suspension of Mrs Phillips and Mrs Tye. I find that on balance of probabilities he had already concluded that issues relating to pupils' levels amounted to deliberate inflation by leadership at the School at the relevant time and had closed his mind to other possible explanations. The lack of precision in the allegations contained in the suspension letters confirm that he did not have evidence to support these conclusions. Ms Jacobs was constrained by her perception of her terms of reference and she did not consider herself to be an investigating officer under the disciplinary process.
92. Despite instigating the disciplinary action and suspending the Claimants, Mr Adams assumed the role as a joint investigating officer when working with Ms Jacobs. It is understandable that she did not challenge him given her instructions. While he did not play a part in the drafting of Ms Jacobs's investigation report, I do find that on balance of probabilities, he influenced the outcome. This was because he played an active role in the interviews which took place and whose witness statements were appended to (and referred to), in the report. Having considered the evidence of the Claimants which was credible and reliable, I also find on balance of probabilities that Mr Adams behaved in an intimidating and aggressive way towards them during their interviews. While Ms Jacobs might not have felt this was the case, she was not the subject of the questioning and in the absence of rebuttal evidence from Mr Adams, I am satisfied that he did not behave appropriately in this investigation. As such, and in the absence of further disciplinary investigations taking place for each of the Claimants, with specific allegations being identified to them beforehand, I do find that on balance of probabilities, Mr Adams involvement in this process will have affected the fairness of the investigation process and the report which was used at the disciplinary hearings.

## Unfair Dismissal

93. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
94. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.
95. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in 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; and must be determined in accordance with equity and substantial merits of the case.
96. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:
- a) The employer must show that he believed the employee was guilty of misconduct;
  - b) The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and,
  - c) The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
97. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance

Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

98. In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
99. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.
100. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:
- a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?
  - b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?



- c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

101. Mr Stephenson helpfully provided written closing submissions on behalf of the first and second Claimants and in setting out the relevant law, in addition to the cases above, relied upon Ramphal v Department of Transport [2015] IRLR 985; improper influence over a dismissing officer's decision to dismiss, Strouthos v London Underground Ltd [2004] IRLR 636; an allegation against an employee should be precisely framed, London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322; a suspension must be reasonable, and Shrenstha v Genesis Housing Association Ltd [2015] EWCA Civ 94; the reasonableness of a disciplinary investigation must be considered as a whole.

### **Constructive Unfair Dismissal**

102. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

103. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

- a) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.
- b) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of

contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); and,

- c) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

104. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

105. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.

106. In relation to all of the claims and on behalf of the Respondent's submissions, Mr Williams relied upon the additional case of London Ambulance v Small [2009] EWCA 220 Civil; in that a Tribunal must not substitute its own view for that of an employer. In respect of Mrs Miles, he relied upon Patel v Folkestone Nursing Homes 2018 EWCA Civ 1689; in that a successful appeal 'wipes out the dismissal'.

## **Discussion and Analysis**

### The dismissal of the first and second Claimant

107. It was not in dispute that both Mrs Phillips and Mrs Tye were dismissed by the Respondent by reason of gross misconduct. Conduct is a potentially fair reason for a dismissal under section 98(2) of the Employment Rights Act 1996. The Claimants were suspended for reasons potentially

connected with conduct and were invited to disciplinary hearings on this basis.

108. In determining the question of whether the dismissal was fair, I have taken into account the size and administrative resources of the Respondent. While Our Lady School was a relatively small primary school, it was part of the Respondent trust DOWAT which was a relatively large academy trust, connected with the Diocese of Westminster and which had access to Human Resources advice and legal representation. The Respondent would therefore be reasonably expected to understand its obligations under the Employment Rights Act 1996, be aware of the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures and also have effective internal procedures in place to deal with issues relating to disciplinary matters involving staff. It is noted that the Catholic Education Service standard disciplinary procedure had been adopted by Our Lady School.
109. In considering whether the Respondent had in its mind reasonable grounds upon which to sustain a belief of gross misconduct, it is necessary to consider the information available at the disciplinary hearings and the investigation carried out by Mr Anderson and Ms Pearce into the matter that they were required to consider and whether it was reasonable in all the circumstances.
110. There was an investigation report available at both hearings, which is the report prepared by Ms Jacobs and completed on 29 January 2018. She was appointed as the independent investigator by the Respondent trust and instructed to investigate historical allegations of examination and assessment irregularities, malpractice and maladministration at Our Lady's School going back several years. As explained above, this was due to concerns being raised by Mr Mathew at John Henry Newman secondary school regarding issues concerning pupil progress data obtained from Our Lady's School in or around 2014 and his belief that pupil levels set by the primary school were too high and had impacted upon how these pupils were dealt with once they reached the secondary school. These children had not performed as well as expected and this was a concern for Mr Mathew and DOWAT not only in relation to the relevant children's' outcomes, but also how they would be deemed to be performing by Ofsted.
111. While this was an understandable concern for DOWAT, it did not necessarily mean that maladministration had taken place. It was understood that Our Lady School had joined DOWAT and converted to an academy in 2012. The Head Teacher Mrs Brown and the Chair of Governors who were in place during the 2014 period had since left and had since been replaced by Ciara Nicholson and Neil Adams respectively. The

DOWAT minutes which would have been read by the directors involved with the disciplinary process suggested that there was little interrogation of Ms Nicholson's and Mr Adams' findings which they reported to the DOWAT board in late 2017. Mr Adams, in particular had a belief that inflation of pupil levels was taking place. Whether or not this was based upon conversations with his wife who worked at the school or due to concerns that Ms Nicholson had independently is not clear as neither gave witness evidence in this case. However, very quickly Mr Adams became a driving force in looking at the issue as being one of maladministration and seeking to discipline staff whom he suspected of committing acts of gross misconduct. This was demonstrated by the evidence of the former governor Mr Robinson, his decision to suspend Mrs Phillips and Tye and his decision to become heavily involved with Ms Jacobs' investigation.

112. This was a complicated matter involving historic allegations, interpretation of data and a leadership structure of a primary school where 'the controlling mind' of Our Lady School, Susan Brown, had since retired and was unwilling to participate in the investigation due to advice from her union. Instead, attention appeared to focus on the management team who remained employed by the School. As I have described above, Ms Jacobs' report took the form of a preliminary and wide-ranging review of the historic allegations and was not asked to specifically investigate any teachers. As a consequence, the interviews were not disciplinary process interviews and although Mrs Phillips and Tye had been suspended, they had not been warned of specific allegations before they were interviewed and were not provided with copies of relevant documentation for consideration. Ms Jacobs was not involved with the decision to suspend, but Mr Adams should have been aware of his difficult position and kept himself separate from this process. His decision to become involved in the investigation together with his intimidatory and aggressive form of interview technique would not have assisted in the fairness of the investigation.

113. It is telling that each of the teachers produced in advance of their disciplinary hearings lengthy statements to be used as submissions, accompanied by appendices. This is indicative of their belief that the investigation was fundamentally unfair. It would have been far more appropriate for DOWAT, having considered Ms Jacobs' report, to have then considered whether staff should have been subject to formal disciplinary investigation and whether it was actually necessary to suspend them. While suspension can be a neutral act, this was a case where suspension was carried out at far too early a stage and by a person who had clearly made up their mind as to their conduct. The alleged practices related to a time before Ms Nicholson commenced employment as Our Lady School's Head and it would not have been difficult for her to ensure that both Mrs Phillips and Mrs Tye remained in post under appropriate supervision until formal

investigations had concluded. The suspension of these teachers at an early stage placed a burden upon the School with staffing cover being required and the Respondent trust which required them to resolve the disciplinary process quickly. This could have been avoided.

114. An additional concern is that the actual report reaches conclusions where maladministration was the only explanation for the issues relating to KS2 and KS1 SATs results and pupil progress meetings and it does explain why it could not some other issue. It also did not satisfactorily explain how external moderation did not identify issues concerning data at the time. It did not have an opportunity to consider evidence from the former Head Susan Brown, who would have been the person ultimately responsible for the levels being set. In her absence, there simply appeared to be an assumption that the Claimants as members of the leadership team must have been complicit without considering the dominant role that a Head Teacher plays in a primary school. In addition, it is clear that Ms Jacobs did not consider the data behind the tables provided by Mr Mathew and Ms Nicholson and placed a great reliance upon their integrity as head teachers.

115. All of these concerns were known to Mr Anderson and Ms Pearce at the disciplinary hearing. Indeed, with hindsight, Mr Anderson raises concerns about Mr Adams' involvement in the process and his conflict of interest. But while this might be the case, the disciplinary hearings did not carry out an inquiry into the accuracy of the data being relied upon, the absence of specific incidents being identified concerning Ms Rose's and Ms Adams' concerns and to what extent it was reasonable to assume maladministration and whether there had been gross misconduct on the part of Mrs Phillips and Mrs Tye. In their disciplinary letters, there was little detailed explanation as to how it was reasonable to conclude the allegations were proven. The challenge provided by the Claimants in their pre-hearing statements did not appear to be considered and rebutted in any depth other than to deny the role that external moderation would play in preventing the improper inflation of pupil levels. This is supported by the decision reached by the STA that there was no concerns regarding data from 2014. While for some reason, this was not passed onto the hearing managers by Ms Nicholson, from the DOWAT minutes, they should have been aware of the process as directors of DOWAT and could have made enquiries as to the progress of the STA investigation. Both Mr Anderson and Ms Pearce were experienced in education and education governance and could be expected to have considered the involvement of external agencies.

116. It is for these reasons that I am not satisfied that the disciplinary panel had reasonable grounds in all the circumstances to make a finding of gross misconduct.

117. It does initially appear that the disciplinary procedure was fair in that there was a suspension letter, an investigation, a disciplinary hearing where a union representative could attend, and the Claimants could request that certain evidence be provided. There was also a right of appeal. However, as I considered in the findings of fact above, the suspension took place without specific allegations being identified and this continued to be the case with the investigation conducted by Ms Jacobs who was not investigating any teacher in particular with regard to possible disciplinary action. At this stage and taking into account the resources of the Respondent, the seriousness of the allegations being considered and the potential consequences for the Claimants, specific investigatory processes for each Claimant would have been reasonable. The Claimants detailed submissions prepared for the disciplinary hearings and documentation in support, demonstrates that the parties' perception of unfairness was real and reasonable. The appeal hearing simply repeated the errors found at the disciplinary hearing and did not seek to question the process, instead relying upon the findings of Ms Jacobs. Having taken into account these issues, I must conclude that the hearing was procedurally unfair.
118. The decision to dismiss the Claimants would have potentially been reasonable if there was evidence to demonstrate that the Claimants had deliberately inflated pupil levels to improve Our Lady School's figures. However, in the absence of clear evidence demonstrating that they were responsible and the role of the former Head Susan Brown not being properly investigated, it is difficult to see how such a sanction would be appropriate. They were members of the leadership team and subject to the authority of the Head Teacher. There was no evidence that put them first and second Claimants on clear notice that this practice was happening. The evidence of Ms Rose and Ms Adams did not identify specific incidents where genuine concerns were identified. Dismissal was not within the range of reasonable responses, especially taking into account the unblemished service given by the Claimants and the possibility that any failure related more to a lack of awareness rather than gross misconduct.
119. In making this decision, I have reminded myself that I cannot substitute my own decision in place of the dismissing managers.
120. I have taken into account the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedure in reaching my decision and I do have reservations as to how the Respondent has carried out its disciplinary process. There was a failure to establish the facts in the case and to inform the employees of the issues they are being investigated for and affording them a proper investigation. However, the errors were made within the framework of a disciplinary process. The real issues relate to Mr Adams taking decisions at a local level without proper consideration by

DOWAT and an understandable misunderstanding about the role of Ms Jacobs, whose involvement added a further layer of complexity to an issue which in itself complicated and unclear. There was an attempt to follow procedure and for these reasons, I do not think it is appropriate to impose an uplift for a failure by a Respondent to follow the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedure.

121. In terms of the application of Polkey, I am not satisfied that had the procedural defects not taken place, the Respondent would have dismissed the Claimant anyway. There is insufficient evidence to demonstrate that the issues raised concerning testing could amount to inappropriate inflation and maladministration. At best, it may have resulted in concerns regarding the Claimants' capability, but even this is not identified within the investigation. For this reason, the Respondent would not have reasonable grounds for their belief in misconduct and even if I am wrong, such a finding would not have reasonably resulted in the Claimants' dismissal.

122. Finally, I have considered whether there is any contributory fault on the part of the Claimants and I do not find that there is evidence that they behaved in such a way that demonstrated culpable or blameworthy conduct on their part. The issues under investigation related to historical matters which had not been subject to any criticism at the time by external moderators and under the supervision of a Head teacher who was not a subject interviewed in the investigation process or taken through a disciplinary process.

#### The dismissal of the fourth Claimant

123. As I have set in out in the findings of fact, by the time Mrs Miles gave notice of her resignation, she was aware that the decision of the appeal panel was to vary the sanction from dismissal to a final written warning. This is the case, even if her decision to resign on 31 May 2018 predated the formal confirmation of this decision in the letter of 4 June 2018. The matter had been raised with Mrs Miles on 31 May 2018 and in any event, she would have been informed of the decision in principle, following her conversation with DOWAT's solicitors on 8 May 2018. She therefore gave notice of her resignation and the termination of her employment.

124. At the point of the Claimant's resignation, it is necessary to consider whether there was a fundamental breach of her contract or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach of contract. It is correct that at the time the employer terminated her employment she had been dismissed and reinstated and that

she was still positive about some of the experiences she had had as a teacher at Our Lady School. However, she was clear in her evidence that the way in which the process had been conducted had taken its toll on her confidence in her employer. Although she was not suspended until the investigation was almost concluded, she shared the same concerns about how this process had been conducted and in particular, the role played by Mr Adams. She had felt intimidated and bullied and this was consistent with the evidence of the other two remaining Claimants. While the decision to reinstate had been an attempt to rectify concerns about sanction, it did not address Mrs Miles' complaints regarding the allegations and her belief that it was unreasonable for the disciplinary panel to consider the allegations proven. Nonetheless, had the letter confirming the decision of the appeal panel been sent out quickly, it may well have made a difference to Mrs Miles' decision as to a return to work.

125. However, my findings of fact are that by 31 May 2018, a stage was reached where she felt there to breakdown in trust and confidence in DOWAT. This was due to the cumulative effect of their treatment of her during the investigation, and disciplinary process combined with the lengthy resolution of the appeal being 'the last straw'. This was a repudiatory breach and a breach of the implied term that the employer should not conduct itself in a way that destroys the employment relationship. This was enough to cause Mrs Miles to resign. The employee did enter into discussions which I have not taken into account due to their privileged nature. However, it was reasonable for her to enter into these discussions and in any event, she decided to resign before the formal decision letter dated 4 June 2018 was sent and received by her. As a consequence, she did not wait too long before resigning.

126. The Respondent did not argue in its response that in the event a claim of constructive dismissal was successful, that the dismissal was nevertheless fair. As a consequence, a potentially fair reason for the dismissal has not been identified. This is perhaps understandable given that the notice of resignation was given after a decision had been made to reinstate Mrs Miles and the Respondent was willing for her to return to work. Accordingly, she would not have been dismissed had she not resigned and the letter sent on 4 June 2018 makes clear that Respondent intended the Claimant to return to work. It might be considered that this letter was only finally sent when the Respondent knew the Claimant was resigning and was a device used by the Respondent to protect its position. As I have mentioned in my findings of fact, I understood that DOWAT's solicitors were responsible for drafting the letters of the disciplinary and appeals panels once a decision was reached, but any such letter would only be sent out with the decision-maker's approval. It seems likely that this letter was not sent because discussions were taking place between the parties. While it



was unfortunate that it was not sent out as soon as possible after the appeal hearing and within the disciplinary procedure timescales, I do not believe that it had been deliberately withheld. It appears that this was simply an oversight on their part. In any event, unintentionally or not, it did contribute to the undermining of the trust that the employee had in the employment relationship. Mrs Miles was entitled to resign as a result of the cumulation of the identified breaches and she did not wait too long before doing so. As a consequence, she was constructively dismissed.

**Conclusion**

- 127. The first and second Claimants' complaints of unfair dismissal are well founded and succeed. This means that the first and second Claimants were unfairly dismissed by the Respondent.
- 128. The third Claimant's claim was dismissed on withdrawal.
- 129. The fourth Claimant's complaint of constructive unfair dismissal is well founded and succeeds. This means that the fourth Claimant was unfairly dismissed by reason of constructive dismissal.
- 130. The first, second and fourth Claimants' claims will now have remedy determined at a remedy hearing which will take place with a hearing length of one day on a date to be advised in the Cambridge Employment Tribunal.

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Employment Judge Johnson

Date: 30 March 2020

Sent to the parties on: 27 April 2020

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For the Tribunal Office