EMPLOYMENT TRIBUNALS

Claimant: Ms Millington

Respondent: Walthamstow Hall

Heard at: London South by CVP **On: 1, 2, 3, 4, 5, 8, 9 & 10 February 2021 and in chambers on 11, 12, 24 & 25 February 2021**

Before: Employment Judge Khalil sitting with members
Ms Mitchell
Mr O Connor

Appearances

For the claimant: Ms Smeaton, Counsel
For the respondent: Ms Azib, Counsel

RESERVED JUDGMENT

UNANIMOUS DECISION:

- The claimant's complaints of disability discrimination contrary to S.13 and S.15 Equality Act are not well founded and are dismissed.

- The claimant's complaint of victimisation contrary to s.27 Equality Act 2010 is not well founded and is dismissed.

- The claimant's complaint of detriment for making a protected disclosure contrary to S.47B Employment Rights Act 1996 is well founded and succeeds.

- The claimant's complaint of dismissal for making a protected disclosure contrary to s.103A Employment rights act 1996 is well founded and succeeds.

- The claimant's complaint of unfair dismissal contrary to S.94/98 Employment Rights Act 1996 is well founded and succeeds.

- A Remedy hearing will be listed in respect of those claims which have succeeded if the parties indicate this is required. The parties are encouraged to resolve remedy privately. Both parties are to write to the Tribunal 28 days after

receiving this Judgment to confirm whether or not a remedy Hearing is required and if so a time estimate.

REASONS

Claims, appearances and documents

(1) This was a claim for Disability Discrimination (Direct S.13 Equality Act 2010 ('EqA') and discrimination arising from (S.15 EqA), victimisation contrary to S.27 EqA, protected disclosure detriment contrary to S.47B Employment Rights Act 1996 ('ERA'), protected disclosure dismissal contrary to S. 103A ERA and 'ordinary' Unfair Dismissal contrary to S.94/98 ERA.

(2) The claimant was represented by Ms Smeaton, Counsel and the respondent was represented by Ms Azib, Counsel. The Tribunal states on record that it was impressed by the exceptional quality of both counsel.

(3) The Tribunal heard from two witnesses for the claimant in addition to the claimant herself: Mr Alastair Pearce (Director of Working with Creatives, parent/governor) and Mr Paul Millington (the claimant's father) and seven witnesses for the respondent: Ms Stephanie Ferro, (Head of Senior School), Mr Alun Evans (Governor), Mr Paul Howson (Deputy Head Senior School), Mr Nick Castell (Director of Music Senior School), Ms Karen Williams (Education Consultant), Ms Chrissie Conway (English Teacher/SMT member Junior School and Mr Andy Horner (School's Bursar).

(4) The Tribunal had an agreed list of issues, an agreed cast list and an agreed chronology. The claimant's counsel had also produced an opening note.

(5) An application was made on day 1 of the Hearing to include an additional medical report which went solely to the assessment of the claimant's evidence in the light of her underlying depression illness not specifically to any issue in the case. There was already a jointly agreed expert's report. The application was opposed, but based on the submissions made in support of the application and paragraphs 7 and 8 of Ms Smeaton's opening note, the report was allowed. In the exercise of its overriding objective to deal with the case fairly and justly, the Tribunal decided it ought to have regard to a report which may assist its task, to whatever degree, in assessing the evidence of the claimant. The report had already been disclosed to the respondent.

(6) The Tribunal also identified that the protected act (in the list of issues) relied upon by the claimant in support of the victimisation claim was not clear to the Tribunal. Following discussion with the parties and the Tribunal's permission for the claimant to give instructions to her Counsel (as she was giving evidence under oath), the victimisation claim based on alleged protected acts at 5.1.1, 5.1.2 and 5.1.3 of the list of issues were abandoned.

Relevant Findings of Fact

(7) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.

(8) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

(9) The claimant was employed as Head of Music at the respondent's Junior School from 1 January 2015 until her dismissal on 26 March 2019. The claimant also taught Religious Studies as an additional subject.

(10) The respondent has a senior and junior school operating on separate sites.

(11) At the time of the claimant's dismissal, Ms Ferro was the headmistress of the school. She had been in post since 1 January 2018. She had overarching responsibility for strategy and operations for both schools. She was based at the senior school site.

(12) Day to day operations of the junior school were delegated to the Junior school's Senior Leadership team ('SLT') which was overseen by Mrs Diane Wood in her capacity as Head of the Junior school. As such, she was the claimant's line manager.

(13) The claimant had been a member of the health and safety committee too. She had raised issues in the past in 2016 (May) and 2017 (October) about the emergency vehicle access and Epi pens respectively without criticism or punishment. This was accepted by the claimant under cross examination. These records were at pages 6 and 10 of the supplementary bundle. Mrs Wood was present at these meetings.

(14) The claimant suffered a bereavement in September 2018 as her mother passed away. This was a significant event in the claimant's life and essentially became the cause of the claimant developing a serious depressive disorder as a result of which the claimant became a disabled person within the meaning of S.6 EqA. This was the disability relied upon in these proceedings. It was conceded by the respondent that at the material time (from October 2018 onwards until the appeal outcome), the claimant was disabled. However it was not conceded that the respondent knew or ought to have known the claimant was disabled at the material time.

(15) The claimant was given 6 days of compassionate leave in relation to the passing of her mother. The funeral was on 3 October 2018. The claimant was given 2 days of compassionate leave as she also attended a separate funeral on 4 October 2018. The second day was unpaid. The respondent's evidence was that normally 1 day of compassionate leave was provided for a funeral of a

family member. The Tribunal noted the example of a staff member receiving 2.5 days because he needed to travel North and because he had not taken compassionate leave on the occasion of the bereavement itself.

(16) The claimant's evidence was that she exchanged a number of texts with Mrs Wood between 2 September 2018 and 11 September 2018 in relation to her mother's collapse, her death and about cover work and the visiting Music Teachers' ('VMT') timetable. The Tribunal was not taken to those texts. There was no evidence before the Tribunal that the exchange of texts was involuntary or that there was anything unreasonable or inappropriate in the content. The Tribunal also noted the claimant's evidence that Mrs Wood had suggested the claimant take time off until the funeral but the claimant preferred to remain at work as that is what her mother would want her to do (paragraph 22 of the claimant's witness statement). In the absence of evidence to the contrary, the Tribunal found this would have been either on the basis of unpaid time off or sickness absence. The conversation was in response to the claimant being tearful upon her visit on 6 September 2018 to drop things off.

(17) Before the claimant's bereavement, her relationship with Mrs Wood was strained. In particular, the claimant had raised concerns about her workload. There was evidence of this in the bundle (13 September 2017, pages 315-317). As a result, the claimant was allocated protected administration periods; she was also relieved from the requirement to teach Religious Studies, which had been part of her complaint on 13 September 2017. This was agreed by the claimant under cross examination. She had resisted lesson observation in June 2018 (pages 529-530). She had not provided the name of another child (4 - 10 May 2018, pages 169-171) when asked not to provide the name of a parent's child in relation to a maternity cover interview in May 2018.

(18) In the weekly team meetings in April and May 2018, staff were informed that the school calendar needed to be updated/populated with events to give parents advance notice of them. This was in response to parental feedback. The claimant was not present at the two meetings in April but was present at the meeting on 21 May 2018. The deadline given to staff was 25 May 2018.

(19) The claimant had responsibility over running several clubs. The key club was called 'Cantores' which was a choir. This club ran at lunchtime. There were some concerns expressed regarding some of the rehearsals not taking place in February 2018. It was not clear to the Tribunal if this was independent from or consequent on the timetabling change for that term meaning the Hall was no longer a venue which could be used for Cantores on Thursdays at 1.15pm as it was needed for PE. As a result of these issues, Mrs Wood presented 3 options to the claimant about when and where the rehearsals could run and a fourth option which was to allocate the rehearsals to an alternative music leader. These options were set out in a letter dated 22 February 2018 (page 147). The absence of rehearsals not having taken place consecutively on 1, 8 and 22 February 2018 was not disputed.

(20) Following a meeting on 16 March 2018 between the claimant ad Ms Ferro, it was decided by Ms Ferro that the claimant would not run the Cantores

rehearsals for the summer term but would resume responsibility for this in the Autumn term of the following academic year (i.e. from September 2018). There was an exchange of emails in this regard on 24 and 25 April 2018. It was clear that the claimant did not welcome the change but Ms Ferro's position was that as the claimant had not agreed or found acceptable any of the earlier 3 options, it was Ms Ferro's decision to re-assign the rehearsals for the summer term. These emails were at pages 166 to 167.

(21) On 1 and 2 November 2018, the claimant had meetings with Mrs Wood and Ms Allen. Mrs Wood informed the claimant about changes to the Carol service. The claimant did not support these changes as she considered them to be cuts to the service, including a reduction in the musical offering of the Cantores choir. Overall the carol service was being reduced from 45 minutes to 30 minutes. The claimant considered the changes short-sighted. A contemporaneous email exchange took place between the claimant and Mrs Wood on 6 November 2018 following these meetings. These emails were at pages 232 to 233 of the bundle. The Tribunal found the changes to the carol service were not mutually agreed and although there had been some consultation and meetings, the claimant had not engaged. Decision making authority however, ultimately lay with Mrs Woods.

(22) These were meetings, which the Tribunal found were more likely than not to have been recorded by the claimant. This is addressed below in the Tribunal's findings on credibility. If Mrs Wood's conduct had been as described by the claimant particularly through the account given of Ms Allen interrupting the claimant, shouting at the claimant and refusing to allow her to speak (1 November 2018 meeting, paragraph 32 of the claimant's witness statement) or reducing the claimant to tears and starting the meeting whilst the claimant was sobbing 2 November 2018 meeting, paragraph 33 of the claimant's witness statement) or to otherwise describe the mood or atmosphere or tone of the meeting including the claimant's emotions or well-being, this could have been corroborated by the claimant. It was not plausible, in the Tribunal's view for such a recording amongst many others to have been recorded and then simply recorded over. Additionally/alternatively, the recording could readily have been saved on to a memory stick or saved electronically. The Tribunal inferred from the absence of any recording and through its assessment of the claimant's credibility about what was recorded, that the recording would not/did not support the claimant's account.

(23) On 15 November 2018, the claimant had, what she described in her witness statement her 'meltdown' day. The claimant became very tearful that day, after assembly. It was the claimant's father's 70th birthday and the first family birthday since the passing of the claimant's mother. The claimant left assembly and sat in her office crying. The claimant explained that some VMTs who saw her in her office gave her some comfort. The claimant's father had also called the claimant, in error, but on calling him back, the claimant remained upset. The claimant's father subsequently called the school to inform them that someone should check up on the claimant. Mrs Wood did subsequently see the claimant though the claimant described her as not caring and not providing any comfort. The claimant described in her witness statement paragraph 43 that Mrs Wood

started 'firing' questions at her and fired a barrage of questions about Christmas plans, her family and health.

(24) The Tribunal considered the contemporaneous email on 16 November and Mrs Wood's communications slip of 15 and 16 November 2018 at page 243 to 245 of the bundle. In the claimant's email to Ms Allen, which was sent in response to Ms Allen suggesting the claimant did lunch queue duty on Wednesdays and that she had removed her first aid commitment on that day to accommodate this, the claimant recorded that she had not received any support from the SMT for about 2 hours since she had left assembly in tears. She also referred to the call to the school from her father. She also asserted that she had found Ms Allen rude and aggressive in her pastoral role since the claimant's mother's passing. Mrs Wood's note of 15 November 2018 recorded that she had stayed with the claimant for about an hour and various options/avenues of support including talking to a school nurse and her GP. Mrs Woods also asked the claimant various questions surrounding what had made her become upset and if she had been able to speak to anyone. Under cross examination, the claimant accepted all of these questions had been reasonable. Mrs Woods did not suggest the claimant join the girls on creativity day and also asked if the claimant felt able and strong enough to return to her activities in response to which she said 'the girls would take her mind off things.' In oral testimony, the claimant said if Mrs Woods had offered her the chance to go home, it might have been different. The Tribunal found that in context, the absence of such an express offer was not unreasonable. The question about whether the claimant felt able and strong enough to return to work was an implicit if not explicit invitation to the claimant to leave work if she wished to do so. The claimant also asserted in oral testimony that the communications slip on page 243 was 'fabricated' in parts. There was however no specificity provided around what was a serious allegation and this was rejected.

(25) On the following morning (16 November 2018) Mrs Wood told the claimant that she would be offering the claimant a counselling session in the following week as well as a telephone helpline service.

(26) This was a meeting (15 November 2019), which the Tribunal found was more likely than not to have been recorded by the claimant. If Mrs Wood's conduct had been as described by the claimant particularly through the account given of Mrs Wood firing questions and barraging her with questions or to otherwise describe the mood or atmosphere or tone of the meeting including the claimant's emotions or well-being, this could have been corroborated by the claimant. The additional findings above are repeated.

(27) On 19 November 2018, the claimant was informed by a parent of a child that he wished to stop his guitar lessons with immediate effect. The email from the parent was at page 252. The email said the reasons had been explained to the claimant in an earlier call. The claimant's acknowledgement of this email on 20 November at 7.31am was at page 253 and was copied in to Mrs Wood. Before that email, Mrs Wood had emailed the claimant requesting a communications slip of this conversation on 19 November at 17.40 pm (page 297). A communications slip was a record of a conversation between a teacher and a

child's parent. The Tribunal will return in its findings to when this was required to be done.

(28) At 7.49am on 20 November 2018, Mrs Wood emailed the claimant asking (again) for the communications slip. The claimant responded at 9.15am saying a communications slip was not necessary as the pupil was going to be learning outside school now. Mrs Wood emailed the claimant 3 minutes later at 9.18 am saying a communications slip was required as the discussion with the parent was "*particularly significant and further detail is required. This is high priority".*

(29) Unbeknown to the claimant, at this time, there was a potential child protection concern in relation to the guitar teacher which was the reason Mrs Wood was asking for the further detail on a communications slip. This reason was not disputed. This email was at page 252. Mrs Wood sent another email at 17.09 on the same day asking for the communications slip to be completed again "*today"* and adding *"maximum information is necessary".*

(30) Mr Castell had also asked Mrs Wood in an email sent at 9.05 am on 20 November 2018 if she wanted him to find out what had happened. This was agreed by Mrs Wood (page 306 of the bundle). Mrs Wood had informed Mr Castell that she did not know what had happened in the conversation which had preceded the cancellation.

(31) There were additional emails exchanged between Mrs Wood, the claimant and Mr Castell on 20 November 2018 (page 355). It was not made clear that Mrs Wood's request of the claimant to call Mr Castell headed 'urgent request' was in connection with the same matter. The claimant did however attempt to call Mr Castell and sent an email at 14.44 and said she was free until 15.05 and then again after 16.45.

(32) The claimant was on leave on 21 November to attend a job interview and it was not until the morning of 22 November 2018 that Mr Castell went to see the claimant and asked her to complete the Communications slip in his presence. She then completed the communications slip which did provide more information but which did not, in the end, add any (further) concern to the potential child safeguarding issue.

(33) The claimant also met with Ms Ferro on 20 November 2018. This was pre-planned by Ms Ferro because the issue of the claimant's wellbeing was made known to Ms Ferro by Mrs Woods following the incident on 15 November 2018 and the recommendation of counselling the next day. There was a follow up email on 23 November 2018 (page 258) wherein Ms Ferro provided the external counselling contact details which the respondent subscribed to and the policy number and also confirmed an appointment with the school counsellor for 29 November 2018. There was no discussion at this meeting about the communications slip issue at all and the claimant's delay in providing it. The claimant did refer to bullying and harassment in her response (page 534).

(34) On 6 December 2018, there was a meeting between the claimant and Mrs Wood regarding Karen William's lesson observation feedback. This meeting

was recorded by the claimant. This was expressly admitted. The minutes were at pages 321 to 326. The allegation against the respondent in these proceedings was that Mrs Wood had been very critical of the claimant at this meeting. There was an appendix to Ms Williams' witness statement which set out the June and November 2018 observations of Ms Williams in summary. In relation to the November 2018, the claimant was assessed as 'just satisfactory' in contrast all other subjects had been assessed between a range of just good, good, good/excellent and excellent.

(35) Criticisms within the lesson observation were summarised as: "*mediocre lessons from SM, slow pace, limited coverage, over-praising, starting late. The Y5 lesson involved practising a song for Christmas – not what was on the planning on the network. Too early to devote so much time to preparation for Christmas. No noticeable difference between Y1 and Y5 lessons other than accuracy of singing and one or two questions about the structure of the song*" . The Tribunal did not consider it necessary or relevant to set out the specific breakdown of the feedback against various criteria, save that the Tribunal found there were negative comments although the feedback was not exclusively negative. For completeness, the overall assessment in June 2018 was 'unsatisfactory'. The feedback itself or the claimant's capability as a teacher was not a reason for the claimant's dismissal and neither was it an agreed issue in this case. The issue in the case was in relation to the feedback given to the claimant by Mrs Woods at this meeting and the reason for that. The claimant made comments at this meeting about Ms Williams' assessment of her, including that she didn't think much of her feedback, rating her as 'just satisfactory' was 'utter nonsense' and that her feedback would not change any of her teaching.

(36) In addition, at the meeting on 6 December 2018, there was a discussion about the school's migration to the new planning format from September 2018 which needed to be on the system. In the recorded minutes of this meeting, at page 321, the claimant said she was not aware of the new format. She said she had not been told about this and had not been in school in September 2018. On page 326, Mr Woods remarked she was "mystified" how the claimant had missed this as all the staff had changed over to new planning. (The Tribunal were taken to some of the staff meeting agendas in the period September to November which did refer to medium term planning to be in the appropriate format – for example pages 231, 252, but this was not conclusive). It was also explained that it was more than a cut and paste task as it would involve detail of naming individuals when differentiating and how each lesson was assessed. There was reference to planning needing to be of an excellent standard. In oral testimony, Ms Ferro had explained the drive towards improving standards from April 2018 onwards in anticipation of an Ofsted inspection in 2020. This was accepted.

(37) Mrs Wood made a communications slip about this meeting too which was at page 277. At the end of her note of the meeting she remarked that she had found the whole meeting surreal, that the claimant was apparently delusional and that she had found the claimant cold and negative in demeanour.

(38) A copy of the new planning template was sent to the claimant by Ms Conway upon Mrs Wood's request on 7 December 2018. The email to the claimant was at page 278 of the bundle.

(39) The claimant alleged that from 'January onwards' Mrs Wood began to address the claimant by her Christian name in front of pupils and parents. There was no evidence given of any specific occasion or occasions when this occurred either when the claimant was present or not. In addition, the scope for any such occasions (where the claimant was present) was very limited especially in the light of the allegation that this was a continuous or at least frequent pattern - the claimant was on sick leave from 10 January 2019 onwards (and did not in fact return to work thereafter) thus there would have been 3 working days only in January 2019 when this might have occurred in her presence. Of course it was possible that this was happening in the claimant's absence but no specificity was provided by the claimant and no direct or corroborating evidence from any other person. The only incident referred to when the claimant had been addressed (in her absence) in the presence of another teacher and pupils was in the dining hall on 10 January 2019 when on the claimant's own case, the claimant was addressed as 'Ms Millington' (paragraph 84 of her witness statement). Even in the absence of Mrs Wood's oral testimony, the Tribunal found that this did not occur. It was wholly generalist– the plurality of the allegation required something more.

(40) On 10 January 2019, Mrs Woods instructed a group of girls in the dining hall to finish their lunch before going to music rehearsal which she said started at 1.15pm. This was common ground. It was also common ground that the claimant was not present when Mrs Wood said this. There was no challenge by the claimant that the lunch rehearsal commencement time (at this time) was 1.15pm. The claimant alleged that she had also been told that Mrs Wood had informed the pupils that the claimant had been/was 'misleading' the pupils. The identity of person who told the claimant this was not made known at the time or during the course of the Tribunal Hearing and neither did the Tribunal hear oral testimony from anyone else to support the claimant's assertion. The reason for that was the claimant's reluctance to involve anybody else. This is not an uncommon reason given. The respondent did provide some oral testimony to rebut the allegation regarding the 'misleading' comment. Ms Conway was in the dining hall and heard Mrs Wood instruct the pupils to finish their lunch and that clubs (rehearsals) did not start until 1.15pm. She did not recollect a comment about misleading the girls. Her testimony was a recollection only rather than a more positive assertion that the comment was not said. The Tribunal found that Mrs Wood was more likely than not to have remarked that the claimant had misled the children. This was because the children had attempted to leave lunch and go to the rehearsal causing Mrs Wood to instruct them otherwise. There would inevitably have been some follow up discussion as a result regarding why they had got up to leave. Otherwise, the instruction to remain and finish their lunch (with the additional comments about rehearsals) would have made no sense. There had been previous tension about this too and a difficult working relationship. The claimant's evidence in this regard was accepted.

(41) The claimant did not attend work from 11 January 2019. There were a series of texts exchanged between the claimant and Ms Allen between Friday 11 January and Sunday 27 January 2019. These were at pages 78 to 80 of the bundle. Whilst the texts were sent from the claimant's phone, they were written in the third person i.e. referring to the claimant by her first name. It was common ground (subsequently) that these were being sent by the claimant's father on the claimant's behalf but this was not made known at the time. In the third text in the exchange (Monday 14 January 2019), Ms Allen requested cover work 'if you feel up to it'. On Wednesday 16 January 2019, the claimant sent a text saying she would not be in for the rest of the week. In response, on the same day, Ms Allen reminded the claimant that sickness absences up to a week could be self-certified and absences for longer than a week would require a Doctor's certificate (the Tribunal found this to mean from Friday 18 January 2019). On Sunday 20 January 2019, the claimant sent a text saying she would not be in on Monday 21 or Tuesday 22 January 2019. In response, on the same day, the claimant was asked to send in her cover work. She was also asked to contact HR and send in her Doctor's note. Whilst the claimant's absence continued in to the week thereafter (i.e. week beginning 28 January 2019), there were no further texts sent to the claimant by Ms Allen. However Mrs Wood did text the claimant requesting cover work and a GP note on 22 January 2019 (page 82).

(42) Ms Ferro telephoned Mr Millington on 23 January 2019. This was because the respondent had only been receiving third party written texts on her behalf. As the respondent knew she lived alone, Ms Ferro said she wanted to check the claimant was safe. The Tribunal found this was not an enquiry which arose out of any suggestion or prospect of self-harm. This conversation was recorded by Mr Millington without Ms Ferro's knowledge or consent. Both parties produced notes of this conversation. These were at pages 84 to 85 and 86 to 89 of the bundle. In broad terms, there was no significant disparity between the respective notes. By way of summary, in Ms Ferro's note, she noted Mr Millington referred to seeing the claimant daily and cooking for her, the claimant's chest infection, alleged bullying by Mrs Woods, Sinusitis (and related breathing issues), mental fragility, her mother's bereavement, her workload and that she had seen a counsellor. In addition to the above matters, Mr Millington's verbatim note also referred to the claimant having slipped on a piece of cucumber in the playground and had hurt her back as a result and Mr Millington regarded the request for a fit note as over the top and officious. The verbatim note was, inevitably, more detailed and referred in several places to Mr Millington describing the claimant's physical weakness/ being physically low.

(43) On 28 January 2019, Mr Horner did request the claimant's fit note following Ms Ferro's conversation with Mr Millington on 23 January 2019 and said this could be sent by post or by scanned or photographed copy by email (page 91).

(44) On 6 February 2019, the claimant had a return to work interview with Ms Ferro. There were notes of this meeting on page 93 of the Bundle. These were Ms Ferro's (handwritten) notes. The notes recorded two references to bullying and harassment (by Mrs Wood towards the claimant). There was some supporting information: a 'barrage', a late night email, lack of duty of care, the claimants

bereavement being used as a weapon. The claimant complained about the quality of and limited number of vegetarian options too. The upshot of this meeting was that whilst the claimant was prepared to return to work, Ms Ferro said this would not be appropriate until there had been an investigation in to the allegations of bullying and harassment by Mrs Wood. Thus, the claimant was given three days paid time off to prepare and submit her formal grievance against Mrs Wood at the instruction of Ms Ferro. Ms Ferro's follow up letter was at page 96.

(45) What followed in the days thereafter the Tribunal found to be extraordinary. Ms Adams, Chair of the School Governors, received an email from Mr Horner, the school's bursar which was at page 538. He stated he felt the claimant was lining herself up against the school to pursue claims for bullying and harassment, breaches of health and safety and possibly discrimination for being a vegetarian. (The Tribunal accepted that the claimant had complained about the quality of the vegetarian options before. The Tribunal was taken to pages 285 and 286 in relation to a fall out from *the manner of* complaint about the food (salad) on 8 January 2019). The email also referenced advice being sought by Ms Ferro from Warners Solicitors specifically about who should investigate the bullying and harassment and a call was scheduled for that day at 12.30pm. There was also reference to a planned meeting on the following Friday. In evidence Ms Ferro said the planned meeting was for an unrelated matter and the planned call for 12.30pm on the same day did not go ahead. Whilst the Tribunal accepted there was a planned meeting for the following Friday for unrelated reasons, Ms Adams had also emailed Mr Horner in response to his email in which she had referred twice to advice they were expecting from the Solicitors in consequence. This related to the claimant and specifically the bullying and harassment.

(46) Ms Ferro then began reading the claimant's staff file to 'see how serious the bullying and harassment allegations were'. (though there was no formal grievance from the claimant at that stage). Ms Ferro stated that in so doing, she came across concerning patterns of the claimant ignoring simple requests from Mrs Wood and in particular an incident involving a potential child protection issue. The Tribunal found this related to the communications slip issue of 19/20 November 2018 of which Ms Ferro was already aware.

(47) As a result of these concerns, Ms Ferro decided to suspend the claimant. This was done by sending the claimant a letter dated 8 February (page 310). The letter provided no reasons and instructed the claimant to preserve confidentiality and to resist any communication with members of the school community.

(48) Thereafter, Ms Ferro asked Mrs Wood to collate documents relevant to the investigation. This was notwithstanding the outstanding 'serious' allegation of bullying and harassment against her by the claimant which the claimant had been asked to prepare. Mrs Wood did indeed compile a set of documents many of which had highlighted passages adverse to the claimant. It was confirmed in evidence that these were highlighted by Mrs Wood.

(49) Mr Howson was then instructed to undertake an investigation. This was essentially a review of the papers he was given (pages 101 to 309) (which were the documents prepared by Mrs Wood). He produced a 1 page report as an email to Ms Ferro. (page 99) which was shared with Ms Ferro and was altered (page 100). The changes were not substantial but the Tribunal found the interference with the objectivity and independence of the investigation findings/process was irregular. One of the changes was to conclude that there should be an investigation into whether the claimant's standards of behaviour '*demonstrated conduct amounting to misconduct'*. In oral testimony, Ms Ferro said the involvement of Mr Howson was a 'sense check'. This was at odds with her witness statement (paragraph 35) that Mr Howson '*concluded there was a case to answer'*. The Tribunal were left with an overwhelming impression that the investigation output was actually owned by Mrs Wood and Ms Ferro. The involvement of Mr Howson provided no objectivity whatsoever.

(50) It was alleged that from 8 February 2019 onwards, that Mrs Wood began to inform other teachers and pupils that the claimant was seriously unwell and would not be coming back to work. There was no primary evidence produced at the time or at the Tribunal Hearing regarding who informed the claimant this was being said or when. At the Tribunal hearing, the claimant said she did not wish to involve any other person because of the impact it might have on any such individual but also accepted that at least one of those witnesses no longer worked for the respondent. The evidence of Ms Conway and Mr Castell was that Mrs Wood had referred to the claimant not being well but neither had heard Mrs Wood say that the claimant would not be coming back to work. The Tribunal had no evidence before it to find that that Mrs Wood said what the claimant asserted and found it more likely than not that Mrs Wood not have said that the claimant would not be coming back, even more so to pupils. This was not an assertion of a throw away remark but a continuous (asserted) position Mrs Wood had taken.

(51) Thereafter, the claimant was invited to a disciplinary hearing to answer charges of misconduct. The invitation letter was worded in a way that the individual misconduct charges had led to a breakdown of trust and confidence. The invitation letter was dated 20 February 2019 and was at pages 311-312 of the bundle. The charges against the claimant were:

- Failure to provide her planning updates

- Failure to comply with procedures in relation to absence in respect of a job interview the claimant attended in March 2018 at short notice, the claimant's absence from school since 11 January 2019, the claimant's calendar submission (it was common ground this referred to May 2018).

- A failure to carry out a reasonable instruction from the claimant's line manager which potentially compromised a child protection investigation – it was common ground this was in relation to the communications slip completed on 22 November 2018.

(52) The letter forewarned that a possible outcome of the hearing was dismissal. Supporting documents were included with the invitation letter. The three enclosed document packs were set out in the index to the Hearing Bundle together with the Disciplinary Procedure. Surprisingly, the investigation report of Mr Howson was not part of the supporting evidence. The Hearing was set down for 4 March 2019. The hearing actually took place on 18 March 2019.

(53) The claimant had also submitted her formal grievance on 12 March 2019. This was at page 359 and there were 6 accompanying emails corresponding to the claimant's evidence in relation to each of her six grievances. The categories of her grievances were: unjustified interference with cantores choir, overloading of timetable, undermining of music department and the claimant's role, duty of care following bereavement, most egregious incidents of bullying and unacceptable communications while absent with sickness.

(54) The Grievance and Disciplinary Hearings took place back to back on 18 March 2019. The decision to proceed in this way and not to determine the grievances before the disciplinary hearing were not issues before the Tribunal. Mr Howson attended the disciplinary hearing.

(55) Three days before the disciplinary hearing, the claimant received a memory stick with additional documents. The respondent's position was these documents related to the claimant's grievance, the claimant said these were relevant to the disciplinary charges. The Tribunal found that there was an inevitable overlap between the processes. During the course of the grievance hearing (which took place first), the claimant said she had read each page of the additional documents disclosed (page 444 of the bundle). She said she had not seen some of the documents before and challenged the authenticity of others. There was no request made for further time or a postponement.

(56) The claimant was accompanied at the disciplinary Hearing by her union representative Ms Huckstep (from the National Education Union). The meeting was recorded on an agreed basis. The transcript of the meeting was at pages 430-466.

(57) Following the disciplinary Hearing, Ms Ferro decided to dismiss the claimant with a term's salary in lieu of notice. The dismissal letter dated 26 March 2019 was at pages 472-476. It appeared that all charges against the claimant were upheld. That was how the narrative summarising the decision on page one of the letter read. The letter was however ambiguous. The Tribunal found that the charge upheld against the claimant regarding planning was in relation to the Spring term *2019.* Whilst Ms Ferro had corrected the claimant's non-attendance at the team meeting on 4 September 2018, the claimant had been present at others. The Tribunal were taken to some of the minutes/notes of these meetings featuring 'planning' as an agenda item**.** It was not plausible that in none of the meetings at which the claimant was present that the new format for planning was not discussed or mentioned. In any case however, the claimant was being challenged regarding the Spring 2019 planning and that this should have been on the system following Mrs Wood's meeting with the claimant on 6 December 2018.

(58) In relation to the procedural breaches, there appeared to be no reasoned conclusion regarding the March 2018 interview at short notice. There was reference to the claimant's explanation about why she could not give greater notice but no comment on whether this was accepted or not. Reference to the November 2018 job interview was irrelevant and not part of the case against the claimant (and which appeared to relate more to a refusal to disclose the identity of the interviewer – also not relevant/and/or part of the case against the claimant). In relation to the absence since 11 January 2019, the charge upheld was in relation to the non-provision of a GP fit note until 6 February 2019. In relation to the Calendar submission in May 2018, there appeared to be no reasoned conclusion either. There was reference to the claimant's explanation about it (which was on page 457, in the disciplinary hearing) that the dates were in the diary apart from the workshops as the claimant's budget had not been confirmed) but no comment on whether this was accepted or not.

(59) In relation to the communications slip incident (19-22 November 2018), whilst the claimant's explanation and understanding was cited, there appeared to be another ambiguous or unreasoned conclusion regarding the upholding of this charge. There had been discission at the disciplinary hearing regarding when a communications slip was required and there appeared to be some implicit acceptance by Ms Ferro that there was a difference between her experience in the senior school where the parental contact was less common and more serious compared with the practice in the junior school where the occasions of parental contact were more frequent and commonplace and could be minor (pages 462-463).

(60) Separately, the claimant's grievance was not upheld. The letter rejecting the grievance dated 26 March 2019 was at pages 467-471 of the bundle.

(61) The claimant was given a right of appeal against both outcomes which she duly exercised. The Claimant's appeal letter dated 28 March 2019 against both decisions was at page 477 of the bundle. The appeal letter and appeal grounds were against both the decision to dismiss the claimant and to reject the claimant's grievance. The letter conflated the two decisions.

(62) The appeal grounds were: (1) breach of policies and procedures not followed correctly (2) failure to take in to account relevant evidence (3) evidence included that had been agreed as disallowed (4) unfair level of sanction.

(63) The appeal hearing was chaired by Mr Evans with two other governors, Mr Andrew Baddeley and Ms Sarah Lewis-Davies. The Tribunal found the appeal panel were independent with no prior involvement. The appeal was heard on 7 May 2019. The claimant was accompanied by her union representative, Ms Angela George (of the National Education Union). The appeal hearing was recorded on an agreed basis and the transcript was at pages 479-526 of the bundle.

(64) The appeal hearing appeared to focus on the grievance first, the disciplinary (dismissal) second. The claimant also stated that grounds (3) and (4) were

about the disciplinary not the grievance (page 494) though she did raise procedural issues regarding receipt of documents on the memory stick 3 days before the disciplinary Hearing, that the documentation was put together by Mrs Wood, she had received no report following the investigation and she was not spoken to or questioned as part of the investigation. It appeared that the claimant understood all charges against her had been made out at the disciplinary stage as the March 2018 interview, the May Calendar issue and the November communications slip issue were all actively discussed at the appeal hearing (pages 514-516).

(65) Mr Evans' approach to the appeal did have some casualness or apathy in relation to certain factors. When the discussion was about whether or not the planning had been in the new format, the claimant said that was part of the disciplinary (appeal). In response Mr Evans said 'Well I don't really care where it comes up' (page 492). In oral testimony Mr Evans confirmed that the fact of the claimant's clean disciplinary record was not taken in to consideration. The Tribunal also found that the claimant's length of service was not considered either. It was not apparent from the appeal minutes, the appeal outcome letter or Mr Evans' oral testimony. This was particularly surprising as the unfair level of sanction was an explicit ground for appeal. There was also no separate enquiry or investigation following the hearing, for example in relation to whether the claimant's remarks about the calendar submissions were or were not accurate (page 516)

(66) There was also discussion at the appeal hearing about whether the claimant's dismissal was for misconduct and for capability/poor performance. The Tribunal did not consider the respondent's dismissal of the claimant to be about poor performance or the capability of the claimant. The conflation and/or confusion which manifested itself at the appeal and was to some degree apparent at the disciplinary stage, was in relation to the lesson observations having been of rehearsals not lessons which Ms Williams said was because the planning information showed them as lessons. The claimant was not 'disciplined' by reason of/for the lesson observation feedback itself.

(67) The undated appeal outcome letter was at pages 527-528 of the bundle. The appeal against the grievance and disciplinary appeals were both declined.

Credibility findings

(68) The Tribunal considered it relevant to set out its specific findings on the claimant's credibility in the light of the evidence regarding whether or not her meetings with Mrs Wood, following her bereavement were recorded by the claimant.

(69) The issue arose for consideration during the course of the hearing for the first time when the claimant was being cross examined. In particular, the claimant was asked if the transcript of the meeting on 6 December 2018 had been

recorded by her. The claimant confirmed that it had been and it was covert i.e. without the respondent's knowledge or consent.

(70) The Tribunal questioned the claimant if she had recorded other meetings with Mrs Wood, the focus of the Tribunal's question being on whether she had rather than the reason why. The claimant stated she had started to record the meetings with Mrs Wood following her bereavement in order to discuss what the contents with her father. Upon being asked to provide further detail about frequency, the claimant stated that she had recorded the majority of her meetings with Mrs Wood.

(71) Following a short period of deliberation, the claimant was provided the opportunity to reflect on her evidence overnight (without discussing her evidence with anybody). This was partially because of the claimant's underlying major depressive disorder impairment and because the Tribunal had accepted in evidence the report of Mr Rajaloo which Ms Smeaton had asked the Tribunal to bear in mind when the claimant gave evidence. It was also considered appropriate as it had emerged as an issue for the first time during the course of the Hearing and the Tribunal needed the claimant's evidence to be clear and sure as possible.

(72) On the following day, the claimant stated that upon reflection, she had only recorded the meeting on 6 December 2018 and the disciplinary and appeal hearings (though the latter were with the respondent's knowledge and consent).

(73) The Tribunal announced following further deliberation that the claimant's evidence and explanations would go to the question of her credibility and the drawing of inferences.

(74) During the course of deliberations (in relation to Judgment), the Tribunal found that the evidence of the claimant on the first occasion of being questioned was more likely to reflect what had occurred. The evidence on the following day was significantly at variance with her initial position and something of a sea-change. A marginal variance might have been different. The claimant's recollection that she had recorded meetings with Mrs Wood was also stated with specificity – that it was a majority. This finding did not infect the claimant's credibility at large. However, the Tribunal went on to find it highly implausible that if these recordings supported the claimant's case in relation to the manner, emotional tone or pace of the meetings, even for example in relation to whether there were sighs, or in relation to the claimant's response to the number of questions, that the recordings were either erased by being recorded over and were not produced in evidence. This was relevant to the respondent's knowledge of disability too – see below.

<u>Knowledge of disability</u>

(75) The Tribunal had regard to a number of factors to determine whether the respondent knew or could reasonably be expected to know, or perceived the claimant to be disabled ('knowledge') This was relevant to all the disability

claims: direct discrimination (S.13 EqA), discrimination arising from disability (S.15 EqA) and Harassment (S.26EqA) claims.

(76) The case before the Tribunal was not that at the material time, the claimant had had a long term impairment which had lasted for 12 months or more but that the claimant had a mental impairment, which, at the material date, was *likely* to last for 12 months or more. Likely means that it could well happen (C3 of the the Guidance on matters to be taken into account in determining questions relating to the definition of disability).

(77) Some factors assisted the claimant's assertion that the respondent did, at the material date, have the requisite knowledge:

- The Tribunal noted that up until the appeal hearing, the claimant was still referring to how she had been struggling in the aftermath of her bereavement. This was approximately 8 months after her bereavement.

- There had been outbursts/manifestations of her emotions – in particular 15 November 2018 when she had become very tearful, the day when the claimant's father had called the school and asked for someone to check up on the claimant. Also, on 10 January 2019, when the claimant had remarked to Ms Allen, Head of Pastoral care, who had enquired if the claimant was ok: "*Why are you asking, you don't care, no-one does*"

- In the telephone call between Ms Ferro and the claimant's father, Mr Millington, he did refer to the claimant's mental fragility because of the bereavement. Mr Millington was also sending texts to the respondent (written on behalf of the claimant) indicating the claimant's fragility at that time.

- The claimant was known to be attending counselling (in relation to her bereavement). In her email of 10 January 2019 (page 351), she had stated she had had 2 sessions of counselling (over the Christmas holidays) as she was really struggling to come to terms with it.

(78) There were however other factors which did not support the respondent's knowledge:

- Whilst the Tribunal noted above the references to the claimant's struggles following her bereavement even at the appeal hearing, she referenced this in the past tense – she said "*which I found very difficult to cope with*". She also pinpointed her return to work on 6 February 2019 when she had mentioned she was struggling with her bereavement (about 5 months after her bereavement).

- The claimant said that she had informed her GP not to mention her mental wellbeing to the respondent when she visited her GP in January 2019. Thus the reason for absence on both of her Fit notes was to Sinusitis and back pain. The Tribunal were not satisfied that a GP in discharging its duty of care and professional conduct obligations, would

actively withhold a serious underlying mental impairment at the time; if the Tribunal was wrong about that, it would have expected some reference to such a discussion in the comments section of the patient records – but there was no such record. If the Tribunal was wrong in this regard also, the active non-disclosure of any mental health issue to the claimant's employer was consistent with the respondent's reasonable lack of knowledge. This conclusion was fortified by the claimant's evidence under cross examination that she was actively concealing her mental wellbeing at the time to 'not let the bully win'

- The claimant did not provide any medical evidence to the respondent between January to May 2019 in support of her alleged underlying mental health issues at the time – either in support of alleged discriminatory behaviour or in mitigation. This was remarkable. She had seen her GP at least 3 times in January and February 2019. In her visit of 22 January 2019, low mood had been referenced as had her mother's passing and that she was on the waiting list for bereavement counselling. The claimant did not provide any supporting report or note from her counsellor either.

- The claimant did not have any time off by reason of sickness (during the period 4 September 2018 to 10 January 2019). Thereafter she had 3 weeks' time off physical health. Whilst the Tribunal accepted that it was not uncommon for a person to work through adversity or unwellness, out of professionalism or wanting to be distracted for example, the absence of sick leave was inconsistent with the attribution of knowledge of unwellness as a result.

- As noted above, the Tribunal has found that the claimant had recorded a majority of her meetings with Mrs Wood following her bereavement. Only one of those meetings (transcribed) was in the bundle. The minutes of that meeting did not convey anything irregular about the tone or conversation which lent any support to evidence of the claimant's well-being. The absence from evidence of all other recordings which may have conveyed evidence of the tone, manner or emotional well-being of the claimant was significant. The Tribunal concluded that it was implausible that the pre-meeting period of those meetings would have shown exclusively the reduction to tears of the claimant. The Tribunal considered it likely that there would have been some manifestation of those emotions during the meetings too, or some cross reference in dialogue to the claimant's emotional state, perhaps even a request for a break. That the entirety of those recordings was not made available to the Tribunal was a compelling reason from which the Tribunal drew an inference that the description of those meetings or the pre meeting periods was not as suggested by the claimant with the effect that there was no evidence of emotional fragility which would have been relevant to knowledge.

(79) Having regard to the foregoing considerations, the Tribunal concluded unanimously that the respondent did not know and could not reasonably be

expected to know and neither did it perceive the claimant to be disabled within the meaning of S.6 EqA at the material date. The absence of provision of any medical evidence by the claimant, in the entire period since her bereavement was particularly significant to the Tribunal. The respondent did not embark on an ill health capability process which might have triggered the need for occupational health at some point. In the Tribunal's collective experience that would normally be triggered by a lengthy period of continuous absence or intermittent absence with a potential underlying cause. Neither applied here. Even a proactive enquiry of the GP was unlikely to have disclosed an underlying mental illness based on the contemporaneous patient notes. The Tribunal considered the respondent had knowledge of episodic depression only but not of any substantial impairment that could well last 12 months or more (or perceived the claimant had an impairment which was likely, progressively, to have a substantial adverse effect) on the evidence and information they had and more importantly what they did not have.

Applicable Law

(80) Discrimination claims

S.13 (1) Equality Act 2010 ('EqA') provides:

Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

S.15 EqA provides:

Discrimination arising from disability

A person (A) discriminates against a disabled person (B) if

A treats B unfavourably because of something arising in consequence of B's disability, and

A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

S. 26 EqA provides:

Harassment

A person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic, and

the conduct has the purpose or effect of:

violating B's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for B

S.27 EqA provides:

Victimisation

A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act:

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Pursuant to S. 212 EqA,'substantial' means more than minor or trivial.

(81) The general burden of proof is set out in S.136 EqA. This provides:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

(82) S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(83) The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(84) In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

(85) In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

(86) In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

(87) In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN*** the EAT stated:

"26. *The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

(88) 27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

(89) In ***Pnaiser v NHS England & Anor UKEAT/0137/15/LA*** the EAT stated, in reviewing the authorities:

"*31 (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

31 (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it"

(90) In ***Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ*** the EAT stated:

"*15. In those circumstances, I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established.*

16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in Weerasinghe. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?"

(91) In relation to perceived discrimination, this is possible claim within the scope of S.13. EqA. In ***Chief Constable of Norfolk v Coffey [2019] IRLR 805***, the Court of Appeal confirmed that the starting point in a perceived discrimination claim is that the putative discriminator had to believe that all elements in the statutory definition of disability were present. The Court of Appeal also

confirmed this could include a perception that the an individual had a progressive condition within S. 8 of Schedule 1 EqA.

(92) By S.123 (1) EqA, a claim may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

(93) Pursuant to s.123 (3) (a) EqA, conduct extending over a period is treated as done at the end of the period.

Protected Disclosure claims

(94) Under S.103A ERA, an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason, for the dismissal is that the employee made a protected disclosure.

(95) By virtue of S.47B ERA, a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. In ***NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

(96) A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

S.43B ERA says:

Disclosures qualifying for protection:

In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

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

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

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

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

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

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

(97) S.43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above (subjective test) and if so, was that belief a reasonable one (objective). ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA*** and ***Babula v Waltham Forest College 2007 EWCA Civ 174.***

(98) Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

(99) In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in ***Kuzel v Roche Products Ltd [2008] EWCA Civ 380, CA*** :

"57…*when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced

by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

(100) Pursuant to S. 48 (3) ERA, an Employment Tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Unfair Dismissal – S.98 (2) & (4) Employment Rights Act 1996 ('ERA')

(101) The respondent relied on S.98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

(102) Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case. The test in this case was as set out in the well-known case of ***BHS v Burchell 1978 IRLR 379*** : that the respondent genuinely believed that there was a loss of trust and confidence in the claimant, that belief was based on reasonable grounds and that there was as much investigation as was reasonable.

(103) Further, the Tribunal needed to be satisfied that the dismissal was within the range of reasonable responses. This does not entitle a Tribunal to substitute its view for that of the employer. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure ***Sainsburys Supermarkets Ltd v Hitt EWCA Civ 1588.***

Conclusions and analysis of the Issues

(104) The following conclusions and analysis on the issues are based on the findings which have been reached above by the Tribunal having regard to the applicable law. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

2.1.1 – S.13 Equality Act 2010 ('EqA') Direct Disability Discrimination ('*From January 2019 onwards, Mrs Wood began to refer to the claimant by her Christian name in front of pupils and parents')*

(105) In the light of the findings above, the Tribunal concluded that the claimant was not subjected to less favourable treatment than a hypothetical non-disabled person. As the Tribunal found the alleged 'treatment' did not occur, the burden of proof did not shift as there were no or insufficient facts from which the Tribunal could conclude an unlawful act of direct discrimination.

(106) Alternatively/additionally, even if the Tribunal was wrong in its finding that the treatment did not occur, in the light of the Tribunal's findings and conclusion on knowledge, the reason for the treatment was not the claimant's disability or because the claimant was perceived to be disabled (actually or because she had a progressive condition).

2.1.2 – S.13 EqA Direct Disability Discrimination ('*On 10 January 2019 Mrs Wood accused the claimant of misleading a group of girls')*

(107) In the light of the findings above, the Tribunal concluded that the claimant was not subjected to less favourable treatment than a hypothetical non-disabled person. The Tribunal has found the alleged 'treatment' did occur, but notwithstanding, the burden of proof did not shift as there were no or insufficient facts from which the Tribunal could conclude an unlawful act of direct discrimination. The reason why Mrs Wood remarked in this way was because of the historic tension regarding the timings of lunchtime clubs (and Cantores rehearsals) and the difficult relationship between Mrs Woods and the claimant, but that was in no sense whatsoever because of the claimant's disability or perceived disability.

(108) Alternatively/additionally, in the light of the Tribunal's findings and conclusion on knowledge, the reason for the treatment was not the claimant's disability or because the claimant was perceived to be disabled (actually or because she had a progressive condition).

2.1.3 S.13 EqA Direct Disability Discrimination ('*The respondent continued to request paperwork between 11 January 2019 and 29 January 2019 during the claimant's sickness absence'*)

(109) In the light of the findings above, the Tribunal concluded that the claimant was not subjected to less favourable treatment than a hypothetical non-disabled person. The Tribunal found the alleged 'treatment' did occur – the claimant was asked for paperwork (cover work and her doctor's note) in this period, both more than once, but notwithstanding, the burden of proof did not shift as there were no or insufficient facts from which the Tribunal could conclude an unlawful act of direct discrimination. The reason why the claimant was asked for a fit note was because the claimant's absence had been for more than a week and it required to be certified by a doctor's note. That remained the case even after Ms Ferro's discussion with the claimant's father on 23 January 2019. It was not the case that the claimant's father had conveyed an excuse (despite his resistance) on behalf of the claimant not to be able to provide a certificate especially as the claimant already had one by 22 January 2019 and the reason for absence (even though the claimant was disabled by reason of a major depressive disorder) was physical – because of sinusitis and her back (following her fall) (expressly and exclusively on the certificate) and was expanded to recovery from a chest infection in the call although her mental fragility and bereavement were mentioned too. The reason why cover work was requested (though that ceased after 22 January 2019) was because this was protocol under the unplanned absence procedure. Although that procedure

provided for the parallel form teacher or the subject leader to set appropriate tasks if the teacher absent was 'too ill' to set work, the Tribunal concluded that because the respondent was not informed of the (or any) reason for the absences until 23 January 2019, it would not have been able to make such an assessment and decision in this regard.

(110) Alternatively, in the light of the Tribunal's findings and conclusion on knowledge, the reason for the treatment was not the claimant's disability or because the claimant was perceived to be disabled. In the further alternative, the Tribunal concluded, the reason for the continued requests for a fit note was because of the respondent's concerns about the bullying and harassment allegations made to Ms Ferro (on 20 November 2018 and on 23 January 2019 by the claimant's father) and whether there was any causative link to her absence but that was in no sense whatsoever because of the claimant's disability or perceived disability (actually or because she had a progressive condition).

(111) 2.1.4 S.13 EqA Direct Disability Discrimination ('*Deliberately avoided seeking OH advice')*

(112) In the light of the findings above, the Tribunal concluded that the claimant was not subjected to less favourable treatment than a hypothetical non-disabled person. The alleged 'treatment' did not occur – that is, *deliberate* avoidance to seek OH advice. The burden of proof thus did not shift as there were no or insufficient facts from which the Tribunal could conclude an unlawful act of direct discrimination. The Tribunal concluded, based on its collective industrial experience, that OH advice would normally be commissioned following a long period of absence, unlikely to be less than 4 weeks or if there were repeat reasons for intermittent absence. Neither applied here. There was no policy document which the Tribunal were taken to which provided any contrary/separate protocol. The respondent did not, in the Tribunal's conclusion, approach the dismissal procedure by reason of the claimant's capability – ill health or otherwise. The Tribunal also had regard to and accepted Ms Ferro's evidence that during the same period as the issues with the claimant, the respondent had made adjustments for two other teachers by reason of their health. This evidence was not challenged. Whilst there was no evidence of OH engagement in either of those cases, this course of action suggested that the respondent was prepared to make practical adjustments where required. Indeed, many adjustments had previously been made for the claimant – for example, in relation to giving her protected administration time, removing the requirement to teach Religious Studies. There was no evidence at all to support a prima facie case of deliberate exclusion of OH advice. It was also notable that the claimant herself had not produced any medical evidence at the time, for example, a GP letter recommending a referral or even in mitigation of the alleged misconduct. Alternatively/additionally, even if the Tribunal was wrong in its conclusion that the treatment as alleged did not occur, in the light of the Tribunal's findings and conclusion on knowledge, the reason for the treatment was not the claimant's disability or because the claimant was perceived to be disabled (actually or because she had a progressive condition).

2.1.5 S.13 EqA Direct Disability Discrimination (‘*Chasing the claimant for a fit note on 23 January 2019’*)

(113) This issue was withdrawn and no longer pursued by the claimant.

2.1.6 S.13 EqA Direct Disability Discrimination (‘*Suspension on 8 February 2018 pending an investigation into allegations of misconduct’*)

(114) In the light of the findings above, the Tribunal concluded that the claimant was not subjected to less favourable treatment than a hypothetical non-disabled person. The Tribunal found the alleged ‘treatment’ did occur – the claimant was suspended pending an investigation in to allegations of misconduct, but notwithstanding, the burden of proof did not shift as there were no or insufficient facts from which the Tribunal could conclude an unlawful act of direct discrimination. Whilst the stated reason (by Ms Ferro) for why the claimant was suspended was because Ms Ferro had identified concerns in relation to the claimant’s conduct, the Tribunal concluded, the reason for the suspension was because the claimant had made a serious allegation of bullying and harassment against Mrs Wood at her return to work interview with Ms Ferro on 6 February and the respondent had formed an advanced view that the employment relationship between Mrs Wood and the claimant had broken down and that the claimant’s employment was to end. The Tribunal will address below its conclusion on the appropriateness of the suspension and its reasons for the conclusion on why the claimant was suspended in its analysis below of the Protected disclosure and Unfair dismissal claims, but the reasons were in no sense whatsoever because of the claimant’s disability or perceived disability (actually or because she had a progressive condition).

(115) Alternatively, in the light of the Tribunal’s findings and conclusion on knowledge, the reason for the treatment was not the claimant’s disability or because the claimant was perceived to be disabled (actually or because she had a progressive condition).

3.1.1 & 4.1.2 S.15 EqA Discrimination Arising from Disability and S.26 Harassment (‘*not adjourning the meeting on 2 November 2018’)*

(116) The Tribunal understood this issue to be specifically about not adjourning the meeting because the claimant had begun to cry, rather than the changes to the carol service. There was no oral testimony given by Mrs Wood. However, as found above, the claimant did not provide in evidence the recording of this meeting which could have corroborated her version of events and further as found above, the Tribunal inferred that the absence of recording was because it did not support the claimant’s version of events. There was also no reference at all to the claimant’s emotions in this regard in the claimant’s contemporaneous email on 6 November 2018. Accordingly, the Tribunal found there was no unfavourable treatment in not adjourning this meeting as the Tribunal was not satisfied that the claimant had begun to cry. There was no evidence offered that the claimant had asked for the meeting to be adjourned too. As there was no

unfavourable treatment the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(117) Alternatively, if the Tribunal was wrong in its conclusion, the sickness absence could not have caused the unfavourable treatment as the claimant had not had any at this time. In relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.2 & 4.1.3 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (*'Subjecting the claimant to a barrage of questions on 15 November 2018 and failing to offer her a break or a shorter day')*

(118) In the light of the findings above, the Tribunal concluded there was no unfavourable treatment in relation to this issue. The claimant was not subjected to a barrage of aggressive questions. The claimant agreed under cross examination the questions were reasonable. There was no recording provided of this meeting which from which the Tribunal could have formed a view on the alleged tone/aggression of the questions. The Tribunal has also found that Mrs Wood did offer the claimant not to return to her activities (work). The Tribunal concluded that Mrs Wood was looking for a solution on the day, a way forward and there was nothing improper about Mrs Wood's enquiries/suggestions about the claimant seeing the school nurse, her GP or a colleague. There were certainly a lot of questions but not a barrage. As there was no unfavourable treatment, the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(119) Alternatively, if the Tribunal was wrong in its conclusion, the sickness absence could not have caused the unfavourable treatment as the claimant had not had any at this time. In relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.3 & 4.1.4 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (*'Requiring the claimant to submit a communication slip on 19 November 2018'*)

(120) This issue was withdrawn and no longer pursued by the claimant.

3.1.4 & 4.1.5 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (*'Repeating a request for a Communications slip on 20 November 2018')*

(121) In the light of the findings above, Mrs Wood did repeat her request for a communications slip. This was because she had not received it from the claimant and because it was a high priority issue, which she had made clear. The reason for the high priority was the potential child protection issue. That was not made known to the claimant for confidentiality reasons (there was no challenge in this regard) however by the time of Mrs Wood's email of 17.09 on 20 November 2018, that was her fourth request. Whilst the Tribunal accepted that the number of requests was excessive for a more regular communications slip matter – for example cessation of music lessons where there was no potential child protection issue – that was not the case here. Whether the claimant felt at the time that Mrs Wood was being overbearing because of their difficult relationship or that she ought to have become aware that there may be an important concern 'behind the scenes' because of Mrs Wood's language – 'high priority' 'maximum information is necessary' was not material. The repeat request had its roots exclusively in the Mrs Wood's concern about the potential child protection issue. In that context and with the above analysis in mind, there was no unfavourable treatment. As there was no unfavourable treatment, the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(122) Alternatively, if the Tribunal was wrong in its conclusion, the sickness absence could not have caused the unfavourable treatment as the claimant had not had any at this time. In relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.5 & 4.1.6 S.15 EqA Discrimination Arising from Disability & S.26 Harassment ('*Mrs Wood telling other members of staff that the claimant was refusing to provide a communication's slip')*

(123) There was no express/unambiguous refusal on the part of the claimant which the Tribunal were taken to. The use of the word refusal was referenced in Mr Castell's report about the communications slip dated 11 February 2019 on page 294 of the bundle (after the claimant had been suspended) which was sent to Mrs Wood and Ms Ferro. It was referenced twice, once in the narrative accompanying the timeline and once in the timeline itself ('*Article 4').* The Tribunal also heard oral testimony from Mr Castell and considered his evidence to reinforce *his* view that when the claimant said she did not think a communications slip was necessary, he considered this to be a refusal. He said the same in his witness statement. The issue the Tribunal was being asked to determine was whether Mrs Wood was erroneously telling other members of staff that the claimant was refusing to provide a communications slip. Whilst the Tribunal did not hear oral testimony from Mrs Wood, there was a large volume of contemporaneous emails. The Tribunal concluded that Mr Castell had proactively volunteered to find out what had happened and *whether* the claimant had a communications slip for the conversation (page 306), though this was before the claimant's email saying she didn't think it was necessary.

The Tribunal concluded that there was no step taken by Mrs Wood to tell others that the claimant was refusing to provide a communications slip. This appeared to be a consistent interpretation or view of Mr Castell. Telling Mr Castell that she did not know what discussion had preceded the parent's cancellation (page 306) and telling Ms Ferro that the claimant had not communicated the reasons (page 294) was not evidence that Mrs Wood was saying the claimant was refusing. In that context and with the above analysis in mind, there was no unfavourable treatment. As there was no unfavourable treatment, the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(124) Alternatively, if the Tribunal was wrong in its conclusion, the sickness absence could not have caused the unfavourable treatment as the claimant had not had any at this time. In relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.6 & 4.1.7 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (*'On 6 December 2018, lesson observations feedback by Mrs Wood and being very critical of the claimant')*

(125) The feedback given by Mrs Wood to the claimant of Ms Williams' observation of the claimant was not unfavourable treatment of the claimant by Mrs wood. Mrs Wood was bound to report back what Ms Williams had observed in relation to the claimant. If that feedback was negative and critical because that is what Ms Williams had observed then that was the feedback which Mrs wood had to unavoidably give the claimant. The claimant was able to challenge that assessment in the feedback meeting on 6 December 2018 and did do so – she was forthright in her views of Ms Williams stating that she had only observed rehearsals (not lessons), she (the claimant) didn't think much of her feedback, assessing her as 'just satisfactory' was 'utter nonsense' and that her feedback would not change any of her teaching. There was however some additional discussion regarding whether Recorder lessons being taught in music. This followed a parent providing some feedback on his decision to change his child's school during he had stated that his child had been disappointed by the infrequency of Recorder lessons being taught in music which had become apparent during the taster session in the new school when the child had realised how far ahead the children in that school were in comparison. In the meeting on 6 December 2018, Mrs Wood had said that the child had left school '*because of you, because she has not learnt the Recorder at the level that her counterparts have'.* In the light of the contemporaneous note (page 274), the Tribunal concluded that this was not an absolute or exclusive reason, but the note did otherwise support Mrs Wood's comments and she had also had noted that she had intended to check Recorder teaching with the claimant as a result. The Tribunal did have regard to the claimant's own note of her conversation with the parent on page 329 which did not specifically

mention the Recorder concerns. The Tribunal resolved however that a parent was more likely to convey adverse feedback to a person above the teacher of the lesson (s) in question.

(126) Overall, viewed holistically, the Tribunal concluded that the primary focus of the 6 December feedback and the consequential criticism of the claimant was based on Ms Williams' observations. The Recorder lessons issue was peripheral. There was no unfavourable treatment. As there was no unfavourable treatment, the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(127) Alternatively, if the Tribunal was wrong in its conclusion, the sickness absence could not have caused the unfavourable treatment as the claimant had not had any at this time. In relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment. It was also the case that the claimant's assertion about the reason why she received the feedback she did was because Ms Williams had observed a rehearsal not a lesson.

3.1.7 & 4.1.8 S.15 EqA Discrimination Arising from Disability & S.26 Harassment *('On 6 December 2018 Mrs Wood describing the claimant as extremely cold and negative and delusional in a communications slip'*)

(128) This issue was intertwined with the preceding issue (above). Mrs Wood did describe the claimant as delusional and cold and negative in the communications slip at page 277 of the bundle which followed her meeting with the claimant on 6 December 2018. This was unfavourable treatment, these were adverse comments in relation to the claimant. However the Tribunal concluded these arose directly from the claimant's comments relayed at the meeting on 6 December 2018 and did not arise because of the claimant's need for counselling and additional support (there was no sickness absence at this stage). There were no or insufficient facts from which the Tribunal could conclude the unfavourable treatment arose because of the claimant's need for counselling and additional support. The Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, there was no unwanted conduct related to disability.

(129) Alternatively, if the Tribunal was wrong in its conclusion, in relation to the claimant's need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.8 & 4.1.9 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (‘*On 9 January 2019, upon Ms Allen enquiring about the claimant’s well-being , she walked out of the room upon the claimant saying ‘why are you asking , you don’t care, no-one does”)*

(130) This issue was withdrawn and no longer pursued by the claimant.

3.1.9 & 4.1.10 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (‘*On 10 January 2019 Mrs Wood accused the claimant of misleading a group of girls’*)

(131) The Tribunal refers to its conclusions in 2.1.2 above in relation to Direct Disability Discrimination. For the avoidance of doubt, there were no or insufficient facts from which the Tribunal could conclude the unfavourable treatment arose because of the claimant’s need for counselling and additional support (there was no sickness absence at this stage). The burden of proof did not thus shift. (***Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(132) Alternatively, if the Tribunal was wrong in its conclusion, in relation to the claimant’s need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal’s findings on the respondent’s lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.10 & 4.1.11 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (‘*From January 2019 onwards, Mrs Wood began to refer to the claimant by her Christian name in front of pupils and parents’*

(133) The Tribunal refers to its conclusions in 2.1.1 above in relation to Direct Disability Discrimination. For the avoidance of doubt, there was no unfavourable treatment and the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(134) Alternatively, if the Tribunal was wrong in its conclusion, in relation to the claimant’s sickness absence (which was from 11 January 2019 onwards) and the claimant’s need for counselling and additional support, whether or not this was the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal’s findings on the respondent’s lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

3.1.11 & 4.1.12 S.15 EqA Discrimination Arising from Disability & S.26 Harassment (‘*The respondent continued to request paperwork between 11 January 2019 and 29 January 2019 during the claimant’s sickness absence’*)

(135) The Tribunal refers to its conclusions in 2.1.3 above in relation to Direct Disability Discrimination. For the avoidance of doubt, there was no unfavourable

treatment and the burden of proof did not shift ***(Pnaiser & Weerasinghe*** applied). In addition, this was not unwanted conduct related to disability.

(136) Alternatively if this was unfavourable treatment, this arose from the respondent's requirement for a doctor's certificate after a week's absence (because of the claimant's sickness absence) and the requirement for cover work under the respondent's unplanned absence procedure (because of the claimant's sickness absence). However, because the respondent did not have knowledge of the claimant's disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

(137) In the further alternative, the respondent had a legitimate aim in seeking a doctor's certificate from the claimant after a week's absence – it was entitled to know the certificated reason for the absence (diagnosis) and the prognosis and in requesting this from the claimant, even more than once, it was acting proportionately pursuant to S. 15 (1) (b). The Tribunal concluded that because the respondent was not informed of the (or any) reason for the absences until 23 January 2019, it would not have been able to make any assessment or decision about whether the claimant could not comply with this requirement.

3.1.12 S.13 EqA Discrimination Arising from Disability ('*Chasing the claimant for a fit note on 23 January 2019')*

(138) In the light of the findings above, the claimant was asked for a fit note in the telephone call between Mr Millington and Ms Ferro. The reason why was because up until then and since 11 January 2019, the respondent had not been informed of the reason for the claimant's absence or the prognosis of it. There had been one text from Ms Allen on 20 January 2019 and one from Mrs Wood on 22 January 2019. Even as a result of the conversation with Mr Millington, the overwhelming reasons for the claimant's absence were physical and not, in the Tribunal's conclusion an inhibiting reason for the claimant being unable to provide a certificate or that it was unreasonable to ask for it. The claimant had it by then and could have provided it or asked her father to do so. It was not unfavourable treatment. (***Pnaiser & Weerasinghe*** applied). The Tribunal's conclusions under 3.1.11 above are repeated.

3.1.13 S.15 EqA Discrimination Arising from Disability ('*Suspension on 8 February 2018 pending an investigation into allegations of misconduct')*

(139) The Tribunal repeats its conclusions and analysis under 2.1.6 in relation to Direct Disability Discrimination. This was unfavourable treatment – the claimant was suspended from work. However there were no facts from which the Tribunal could conclude that the reason why was because of the claimant's sickness absence and/or her need for counselling and additional support and/or her displays of emotions at work which included sudden tearfulness and distress. (***Pnaiser & Weerasinghe*** applied).

(140) Alternatively, if the Tribunal was wrong in its conclusion, whether or not the claimant's sickness absence, the claimant's need for counselling and additional support and/or her displays of emotions at work which included sudden

tearfulness and distress were the effective cause of or a significant influence on the unfavourable treatment, because of the Tribunal's findings on the respondent's lack of knowledge of disability, the Tribunal concluded that there could be no liability on the respondent because of S.15 (2) EqA or for Harassment.

4.1.13 S.26 EqA Harassment ('O*n 8 February 2019, the claimant was suspended pending an investigation into alleged misconduct and was not permitted to contact other members of the school community*')

(141) The Tribunal concluded that the reminder about confidentiality in the suspension letter was not uncommon but the prohibition against contacting any members of the school community was excessive especially in circumstances where Ms Ferro provided no reasons for the suspension at the point of suspending the claimant. However, this was not unwanted conduct related to disability, alternatively because of the Tribunal's findings on knowledge of disability). The Tribunal refers partially to its conclusions in 2.1.6 above.

4.1.14 S.26 EqA Harassment ('*From 8 February 2019, Mrs Wood told staff and pupils that the claimant was seriously unwell and would not be coming back to work')*

(142) The Tribunal has found that this was not said by Mrs Wood from 8 February 2019 onwards. (The comment about the claimant being unwell was made but this was not unwanted conduct related to disability amounting to harassment, alternatively because of the Tribunal's findings on knowledge of disability). That comment was consistent with the claimant's recent sickness absence and although it may not have been an accurate description of the claimant's absence from 8 February 2019 onwards, it was not harassment when the alternative was to say the claimant had been suspended.

5.1-5.1.3 – S.27 EqA Victimisation (Protected Acts)

(143) These issues were withdrawn during the course of the Hearing and no longer pursued by the claimant.

5.2. S.27 EqA Victimisation (' *By 6 February 2019, the respondent believed the claimant was going to bring a claim to the Tribunal arising out of the EqA')*

(144) The Tribunal concluded that the respondent did believe that the claimant may do a protected act – namely bringing a discrimination claim for being a vegetarian. The contemporaneous email written by Mr Horner (page 538) was unambiguous in what it stated. There were series of claims Mr Horner thought might be made: bullying and harassment, breaches of health and safety and *discrimination* (emphasis added) due to being a vegetarian. The email followed the return to work interview just conducted at which the quality of and the number of vegetarian options had been raised by the claimant. The context of the email was that it was an update to the School Governor and in circumstances where legal advice was being sought. The use of the exclamation mark was not considered by the Tribunal to trivialise the comment or sentiment or to make the assertion sound humorous but that it conveyed a

sense of ridicule (along with the reference to the claimant's concern about being sent an email at 10.00pm), albeit a real feeling or sense, that such a claim may be pursued.

5.3.1 S.27 EqA Victimisation ('*On 8 February 2019, the claimant was suspended pending an investigation into alleged misconduct and was not permitted to contact other members of the school community*')

(145) In the light of the Tribunal's conclusion in 2.1.6 above, the Tribunal concluded that the respondent's belief that the claimant may do a protected act was not the reason why the claimant was suspended and was not permitted to contact other members of the school community. The Tribunal also had regard to the email from Mr Horner which had listed a number of reasons for why he thought the claimant may bring a claim. He was covering all possibilities in his mind and the reference to a claim for being a vegetarian arose from the claimant's comments at the return to work interview about vegetarian options. There was no evidence before the Tribunal that these were the views or thoughts of Ms Ferro who suspended the claimant (or indeed Mrs Wood). There was no evidence of any formal or informal tension between the claimant and Ms Ferro or Mrs Wood about the claimant being a vegetarian. This was unlike bringing to Ms Ferro's attention her assertions regarding the alleged bulling and harassment of Mrs Wood, which although raised before, was the focal point of the return to work interview. The complaint of 8 January 2019 was a complaint *to* Mrs Wood about the manner in which the claimant had spoken to staff about the food options/quality and was handled as such. The Tribunal concluded there were insufficient facts to conclude that the burden of proof shifted to the respondent.

5.3.2 S.27 EqA Victimisation ('*From 8 February 2019, Mrs Wood told staff and pupils that the claimant was seriously unwell and would not be coming back to work')*

(146) The Tribunal has found that this was not said by Mrs Wood from 8 February 2019 onwards. (The comment about the claimant being unwell was made but the Tribunal concluded that the reason why was not because of the respondent's belief that the claimant may do a protected act.) That comment was consistent with the claimant's recent sickness absence and although it may not have been an accurate description of the claimant's absence from 8 February 2019 onwards, it was not a detriment when the alternative was to say the claimant had been suspended.

6.1.1 & 6.1.2 S.47B Employment Rights Act 1996 ('ERA') Protected Disclosures

(147) The claimant's email of 10 January 2019 disclosed information to Mrs Wood, Junior School Headmistress which showed that the health and safety of individuals has been, is being, or is likely to be endangered or that the respondent had failed, is failing or is likely to fail to comply with a legal obligation to which he is subject. The claimant herself had slipped on a cucumber which was in part causative of her sickness absence by reason of the consequential back pain. The claimant had referred to other debris too and wet

leaves, her concern was that the playground was not being cleaned daily. In addition, this was made worse in the dark when the security lights did not work.

(148) The Tribunal concluded that the claimant did subjectively believe that this was a health and safety matter/breach of a legal obligation and which was in the public interest. She had previously been a health and safety representative and had raised such matters before. The Tribunal accepted her statement (in the email of 10 January 2019) that she had raised the state of the playgrounds before. This was not challenged. The Tribunal also concluded this was objectively reasonable. She was a teacher in a school primarily occupied by children and was raising a health and safety concern about slip hazards/or visibility which should be addressed.

(149) The Tribunal also had regard to the 4 factor test/guidance on the objective element of whether the claimant held a reasonable belief that the disclosure was in the public interest in ***Chesterton***. The Tribunal concluded the numbers in the group whose interests the disclosure served were large – children, teachers, other school staff, governors and parents; the nature of the interests affected were more than trivial; the nature of the wrong-doing however was not deliberate, rather careless or neglect; in relation to the identity of the alleged wrongdoer, this was against a school which had a large community of interest. The Tribunal was satisfied, holistically, of the public interest of the disclosure.

(150) Thus, the Tribunal concluded this was a qualifying protected disclosure. The Tribunal noted, for completeness, this was conceded by the respondent (paragraph 89 of the respondent's closing submissions.)

(151) In relation to the allegation of bullying and harassment made at the return to work interview on 6 February 2019, the claimant disclosed information to Ms Ferro, Senior School Headmistress which showed that the health and safety of individuals has been, is being, or is likely to be endangered or that the respondent had failed, is failing or is likely to fail to comply with a legal obligation to which he is subject. The record of meeting was not verbatim but made reference twice to bullying and harassment, a 'barrage', a late night email, a lack of duty of care and harassment – her bereavement being used as a weapon.

(152) The Tribunal concluded that the claimant did subjectively believe that this was a health and safety matter/breach of a legal obligation and which was in the public interest The claimant had made reference to bullying and harassment before on 20 November 2018 (paragraph 56 of the claimant's witness statement was accepted) - there had been some reference in earlier documentation too albeit with less obvious terminology (pages 353 & 396) and the claimant's grievance dated 12 March 2019 started with the bullying and harassment assertion that she said she had mentioned *again* on 6 February 2019. The Tribunal also concluded this was objectively reasonable. She was a teacher in a school making a serious allegation of ill treatment/breach of duty of care against the Junior school Headmistress.

(153) The Tribunal also had regard to the 4 factor test/guidance on the objective element of whether the claimant held a reasonable belief that the disclosure was in the public interest in ***Chesterton***. The Tribunal concluded the numbers in the group whose interests the disclosure served were large – children, teachers, other school staff, governors and parents; it was far beyond the private interests of the claimant; the nature of the wrong-doing was asserted to be more deliberate than unintended; in relation to the identity of the alleged wrongdoer, this was an allegation against a Headmistress of a school which had a large community of interest and as an independent school the fee-paying parents would have a keen interest in such allegations. The Tribunal was satisfied, holistically, of the public interest of the disclosure.

6.4.1 S.47B ERA Protected Disclosure – ('O*n 8 February 2019, the claimant was suspended pending an investigation into alleged misconduct and was not permitted to contact other members of the school community*')

(154) The Tribunal refers to its conclusions in 2.1.6 above. The Tribunal concluded that the bullying and harassment protected disclosure did materially influence (more than trivially) the respondent's decision to suspend the claimant. The chronology was significant in the Tribunal's view. The suspension followed the raising of the bullying and harassment allegation in the return to work interview two days previous. An email was sent by Mr Horner that a bullying and harassment claim, amongst others, was being lined up. There was an immediate decision to take legal advice. The nature of the conduct for which the claimant was suspended, was not, in the Tribunal's conclusion misconduct of a kind which would warrant or justify a decision to suspend. It was not on any reasonable interpretation individually or collectively gross misconduct territory or necessary to prevent interference with an investigation. It was astounding, in the Tribunal's conclusion, that the claimant was suspended by letter without being made aware of the reason(s) for the suspension. Even once the reasons were made known in the disciplinary invitation letter this did not retrospectively help because of the reasons for the misconduct referred to above. There was little doubt in the Tribunal's mind that the bullying and harassment allegation materially influenced the respondent's decision to suspend the claimant and deny her the opportunity to contact any other members of the school community at the same time. It mattered not that the claimant had previously made an allegation on 20 November 2018 or indeed that the claimant's father had referred to this too in his conversation with Ms Ferro on 23 January 2019. This was an allegation which the claimant was now making clear she wished to pursue and would not 'drop'. She had raised it proactively on the first occasion possible following her return to work from sickness absence.

(155) The claimant was thus subjected to a detriment on the ground that she had made a protected disclosure on 6 February 2019 regarding the allegation of bullying and harassment against Mrs Wood. The burden of proof passed and the respondent did not discharge this pursuant to S.48 (2) ERA.

(156) The Tribunal concluded there was no detriment however in relation to the protected disclosure on 10 January 2019 regarding the playground. The Tribunal had regard to the contemporaneous response from Mrs Wood which

did not show any concern as a result. As found above, the claimant accepted under cross examination that she had raised health and safety concerns before without any retribution. Viewed holistically, there was comparatively little or no focus on this matter in any of the meetings. There was no evidence of any formal or informal tension between the claimant and Ms Ferro (or Mrs Wood) about raising health and safety concerns.

6.4.2 S.47B ERA (‘*From 8 February 2019, Mrs Wood told staff and pupils that the claimant was seriously unwell and would not be coming back to work’)*

(157) The Tribunal refers to its conclusion in 4.1.14 above. The Tribunal concluded that the reference to the claimant being seriously unwell was not a detriment (and not influenced at all by either protected disclosure).

6.4.3 S.47B ERA *(‘On 20 February 2019, the claimant was invited to a disciplinary hearing to answer various allegations of misconduct which have resulted in a breakdown of trust and confidence’ and informed that she may be dismissed’)*

(158) The Tribunal refers to its conclusions in 2.1.6 and 6.4.1 above. The Tribunal concluded that the bullying and harassment protected disclosure did materially influence (more than trivially) the respondent’s decision to invite the claimant to a disciplinary hearing and threaten the claimant with dismissal.

(159) The misconduct issues were individually and collectively minor and no reasonable employer would have contemplated dismissal. The territory of misconduct, if indeed it required a formal process, could only warrant action short of dismissal. The documents in support of the investigation, highlighting exclusively adverse evidence against the claimant, which laid the foundation for the disciplinary process were put together by Mrs Woods the alleged perpetrator of the bullying and harassment at the instruction of Ms Ferro who suspended and then invited the claimant to a hearing. The claimant was not interviewed or spoken to at all as part of the investigation. It was an investigation in name only, in reality it was a review of papers to give Ms Ferro a sense check. No reasons were given in the lead up to the invitation letter. It came completely out of the blue. At least 3 of the issues in the invitation were historic – as long ago as a leave application to attend a job interview in March 2018; the other two were from May 2018 and November 2018 (communications slip, which both Mrs Woods and Ms Ferro had been comprehensively aware of at the time).The disciplinary invitation preceded receipt of the formal grievance reasons against Mrs Wood, the reason the claimant had been given space and paid time off for, to gather her thoughts. What occurred instead – to be invited to a disciplinary hearing threatening dismissal as a sanction – was, in the Tribunal’s unanimous conclusion, a bombshell.

(160) As a result of the above analysis, the Tribunal concluded that the claimant was subjected to a detriment on the ground that she had made a protected disclosure on 6 February 2019 regarding the allegation of bullying and harassment against Mrs Wood. The burden of proof passed and the respondent did not discharge this pursuant to S.48 (2) ERA.

7.1 Automatic Unfair Dismissal S.103A ERA *('Was the reason, if more than one, the principal reason for the claimant's dismissal that she had made a protected disclosure')*

(161) The Tribunal concluded that the principal reason for the claimant's dismissal was the bullying and harassment protected disclosure. The Tribunal repeats its conclusions in 6.4.1 and 6.4.3. The Tribunal did note that over a passage of time the relationship between the claimant and Mrs Wood had deteriorated (which had started before the claimant's bereavement) and Mrs Wood had begun to find the claimant difficult to manage. In accordance with the findings above, the Tribunal were taken to various concerns relating to the claimant. For example, there had been issues in relation to the claimant's workload (13 September 2017, pages 315-317), the need to provide administration time, the claimant had stopped teaching religious studies, the claimant had resisted lesson observations in June 2018 (pages 529-530), the claimant had not provided the name of another child (4 - 10 May 2018, pages 169-171) when asked to provide the name of a parent's child. However the claimant had not been taken to task over any of these matters in any formal context at the time and none of these matters were part of the case against the claimant. The respondent did not approach the case against the claimant as a breakdown in the employment relationship. The case against the claimant was based on the identified areas of misconduct in the disciplinary invitation letter. In light of the findings and conclusions made already about these, it felt like a desperate search to peg something on the claimant motivated by the realisation that the assertions of bullying and harassment were being pursued and would not go away. The decision to put the claimant on paid leave which was converted to suspension was orchestrated to keep the claimant off site, the claimant was told not to contact anyone and was invited to a disciplinary hearing long before her formal grievance was received. These matters were interwoven and not separable from the decision to dismiss.

(162) Following ***Kuzel***, the claimant had put forward sufficient evidence of a different reason and the respondent did not satisfy the Tribunal that its asserted reason was the reason for the claimant's dismissal. The reason was that as asserted by the claimant in relation to the bullying and harassment protected disclosure.

(163) In relation to the appeal against dismissal, the Tribunal concluded that the appeal panel was independent – none of the panel had previously been involved. Further, the Tribunal concluded that the appeal reviewed the decision to dismiss having regard to the grounds of appeal rather than conduct an appeal hearing afresh. The claimant was subjected to a detriment, her appeal was declined. Having regard to Mr Evan's oral evidence, the Tribunal considered that he placed a high threshold on the claimant to prove her assertions and restricted the appeal consideration to the papers/evidence before he panel without any regard to the possibility or need to undertake further investigation or enquiry. This was in particular notable in respect of the calendar submission. There was no consideration of the claimant's length of service or her clean disciplinary record. The Tribunal posed the question about consideration of any lesser sanction but were left far from convinced that there

was any consideration of any alternative. In relation to these foregoing conclusions, the Tribunal felt that Mr Evan's had a closed mind. The Tribunal were of the view that Mr Evans and the appeal panel had a desire to support the school's decision. It was these considerations which infected the outcome of the appeal rather than any material influence on the appeal panel of the bullying and harassment protected disclosure. They had also been detached from the earlier conjoined involvement of Mrs Wood and Ms Ferro especially around the time of the return to work.

8.1 – 8.5 Unfair Dismissal S.94 ERA

(164) Applying the ***Burchell*** test the Tribunal was satisfied that the respondent did have a genuine belief in *some* of the misconduct for which the claimant was dismissed.

(165) The dismissal letter was however vague in relation to what had been upheld and the oral testimony was similarly vague in relation to the conclusions reached. In fact Ms Ferro conceded under cross examination that the charges in relation to the March 2018 leave application to attend a job interview and the May 2018 calendar submission were not made out. It was unclear to the Tribunal if Ms Ferro believed this at the time or was accepting that to be the case looking back. It was not necessary to resolve the point however as in relation to whether she had reasonable grounds to hold her belief, the March 2018 leave application for the claimant's job interview was very historic and had been approved. The May calendar submission was also historic and which the claimant said had been done (apart from the music workshops which required budgetary approval). There was no evidence that this was disputed by Ms Ferro/or checked. The November communications slip had also happened along time ago and crucially was well known to both Mrs Wood and Ms Ferro, including the urgency of the requests made and the safeguarding context but no action was taken at the time, reserved or even mentioned. These were not matters which the respondent was discovering for the first time without previous awareness; these were not reasonable grounds upon which the respondent held a reasonable belief in these elements of misconduct; neither did the Tribunal conclude that the respondent had reasonable grounds to believe there was any evidence of any pattern of behaviour.

(166) In relation to the concerns regarding the claimant's planning documentation not being on the new format, although there was a dispute about whether the claimant was aware prior to 6 December 2018, she was expressly made aware on that date and the conclusion against her in the dismissal outcome was in relation to the Spring term. The claimant did not provide this before the end of the Autumn term or in the first week of the Spring term (before the claimant went off sick on 10 January 2019). Thus this was not done and the respondent did have reasonable grounds on which to hold its genuine belief. Similarly, the claimant did not, until 6 February 2019, provide a GP certificate in relation to her sickness absence. Whilst the text messages beforehand and the telephone call with the claimant's father on 23 January 2019 provided the respondent with lay information about the claimant's absence and was informative it was not compliant with policy and the respondent did not have knowledge of a diagnosis

or prognosis. Thus the respondent had genuine belief in this misconduct based on reasonable grounds.

(167) However, when the Tribunal analysed the reasonableness of the investigation upon which the respondent held its reasonable belief in the foregoing, the Tribunal found the investigation sufficiently defective to be objectively unreasonable. The investigation was a paper review of highlighted material of the alleged perpetrator of bullying and harassment and it was requested to give Ms Ferro a sense check – not to independently and objectively analyse if there was a case to answer. Any reasonable investigation, would have uncovered that the claimant was not asked about her cover planning work after 20 January. The respondent was entitled to expect the planning documentation on the new format or the cover work (in the old format), however, this, together with a late fit note (produced on 6 February 2019), in the light of what information the respondent had been given via text and what the respondent had been told by Mr Millington, may not even have triggered a formal disciplinary process. Even if a formal disciplinary process was open to be commenced by the respondent, it was outside the range of reasonable responses procedurally, to trigger a process where *dismissal* was contemplated following an equally perverse decision to suspend the claimant from work.

(168) If the Tribunal was wrong in its conclusions, in relation to the decision to dismiss, the Tribunal concluded this was, emphatically, outside the range of reasonable responses. There was no consideration of the length of service, the claimant's clean disciplinary record or any alternative to dismissal. Of the misconduct charges levelled against the claimant, those which the respondent had reasonable grounds to believe were misconduct, did not on any objective analysis entitled the respondent to dismiss the claimant. The respondent did not dismiss the claimant for a pattern of recuring behaviour. These were put as isolated incidents of misconduct in the disciplinary invitation letter. The decision to dismiss did not even come close to being within the range of reasonable responses open to the respondent.

(169) In relation to procedure, the claimant did not receive Mr Howson's investigation report before the disciplinary hearing or the appeal hearing. This might have led to further questions about the nature, quality or independence of the investigation. The receipt of the documentation by the claimant 3 days before the disciplinary hearing was not material in circumstances where the claimant had been through each and every page of the documents (page 444) and did not request further time. The claimant was accompanied by her union representative. Alternatively, this defect was cured on appeal as by then the claimant had the time since the dismissal outcome until the appeal hearing to consider the documents.

<u>2.1.7, 2.1.8, 3.14, 3.1.15, 4.1.15, 4.1.16, 5.3.3 and 5.3.4 – Dismissal and appeal – Direct Discrimination, Discrimination Arising from Disability, Harassment, Victimisation.</u>

(170) In pursuance of the foregoing findings and conclusions, the reason why the claimant was dismissed was not because the claimant was disabled or for any reason related to disability, it was not because of her sickness absence, or her

need for counselling and additional support, or her displays of emotion when at work or her which included sudden tearfulness and distress, or because of the claimant's protected act.

(171) For the avoidance of doubt the claimant's health or related manifestations did not influence any part of the respondent's decisions save in the Tribunal's conclusion any causative link that may exist between the claimant's sickness absence and the alleged bullying and harassment. The protected act had no more than a factual/chronological relevance in this case. The matter was raised but it did not lead to any detriment as a result.

Jurisdiction

(172) The claim form was presented on 29 August 2019. ACAS Early Conciliation took place between 18 June 2019 and 1 August 2019. As such, allegations of discrimination or protected disclosure detriment predating 19 March 2019 were, prima facie out of time.

(173) That, potentially, put a number of the claims out of time unless the allegations could however be considered conduct extending over a period of time under s.123 (3) (a) EqA and S. 48 (3) ERA.

(174) The key alleged decisions, actions and omissions in that period were taken in the main by Mrs Wood and Ms Ferro, whose actions were partially conjoined too and, based on the above findings and analysis, there was a sufficient link between the allegations of a sequence of adverse conduct of Mrs Wood or Ms Ferro from 2 November 2018 to the dismissal and appeal and especially, in the alternative, between the suspension, invitation to disciplinary, dismissal and appeal (8 February 2019 to 7 May 2019) to make it a continuing state of (alleged) discriminatory affairs. However in ***South Western Ambulance NHS Foundation Trust v King 2019 UKEAT 0056***, it was said if any of the constituent acts are found not to be an act of discrimination, then it cannot be part of a continuing act. The EAT said in paragraphs 23, 33 and 37:

"*23. Given that the time limits are such as to create a jurisdictional hurdle for the Claimant, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time.*

33. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and

finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory.

37. That analysis seems to me to be supported by the conclusions reached by the EAT in the Jhuti case where it was held that:

Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes ." (Emphasis added)"

(175) The Tribunal has found the principal reason for the claimant's dismissal on 26 March 2019 to be the bullying and harassment protected disclosure. In addition, the Tribunal has found the claimant's suspension and consequential instruction on 8 February 2019 and the invitation to a disciplinary hearing on 20 February 2019 to be protected disclosure detriments. The Tribunal thus concluded these detriments were part of a course of conduct extending to 26 March 2019 such that those claims were in time.

(176) However as the Tribunal has not found any of the earlier acts (pre-dating 19 March 2019) to be discriminatory at what was a final (substantive) hearing of the issues, the continuing act (in relation to the discrimination claims) was not made out. On that basis, it was not necessary to decide if it is was just and equitable (discrimination) to extend time as there were no discrimination claims proven/made out in respect of which any discretion needed to exercised.

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Employment Judge Khalil

05 May 2021