Case No. 1406135/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs G Adams	AND	The Governing Body of the Crescent Primary School

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT BRISTOL (BY VHS) ON 14 to 17 June and 15 – 18 November 2021

EMPLOYMENT JUDGE **J Bax**
MEMBERS **Mr D Jenkins**
Mr D Stewart

Representation

For the Claimant: **Mrs Adams (in person)**
For the Respondent: **Miss D Gilbert (counsel**

RESERVED JUDGMENT

The judgment of the tribunal is that the Claimant's claims of direct discrimination, discrimination arising from disability, harassment and failures to make reasonable adjustments are dismissed.

REASONS

The claim

1. In this case the Claimant claimed that she had been discriminated against on the grounds of disability. The Respondent denied the claims.

2. On 9 July 2020, Employment Judge Rayner conducted a Preliminary Hearing by video. At that hearing it was determined that the Claimant's claim of unfair dismissal had been presented out of time and it had been reasonably practicable to have presented it in time and it was struck out. It

was also determined that it was just and equitable to extend time in relation to any claim which was extant at the point of termination of employment. Whether earlier acts were conduct extending over a period or a continuing act or whether it was just and equitable to extend time was not considered and that remained an issue for the final hearing. At the hearing the Respondent conceded that the Claimant was disabled at all material times by reason of anxiety and depression. The issues that the Claimant sought to be determined were identified and the parties were invited to provide written submissions on whether permission to amend should be granted. The parties were subsequently provided with a written decision.

Adjustments during the hearing

3. Prior to the start of the hearing discussion took place about adjustments and it was agreed that regular breaks would be taken. During the hearing the Claimant became distressed on a number of occasions at which breaks were taken. The Claimant was also asked during the hearing if she wanted to ask questions about pertinent issues in the case

The issues

4. At the start of the hearing the issues were discussed, it was agreed that they were as set out by Employment Judge Rayner on 9 July 2020, subject to her decision on amendment and therefore some of the issues had been removed. The Claimant brought claims of direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment. It was explained to parties that the Tribunal would only read documents it was directed to and would not read the whole of the bundles. The Claimant's specific allegations were unclear and counsel for the Respondent spent time in cross-examination identifying the specific allegations made by the Claimant in relation to bullying and harassment and 14 specific allegations were identified. In order to assist the Tribunal, it was agreed that a chronology of the allegations would be agreed by the parties which was subsequently provided.

5. At the start of the Claimant's closing submissions, in relation to making reasonable adjustments, she confirmed that only element of the disciplinary policy she alleged was a provision criteria or practice that placed her at a substantial disadvantage was that the Respondent had access to advice from EPS, whereas employees did not. She also said that the policy generally placed her at a substantial disadvantage. We were provided with written submissions by both parties and the Claimant was asked additional questions as to she was putting her claim and what evidence we had been presented with tended to support her contentions.

6. The Claimant also sought disclosure of a medical declaration form and an e-mail from occupational health from the start of her role with the Respondent. The Respondent had undertaken a number of searches for the documents. It was agreed that further enquiries would be made. The Respondent searched for the documents again and also asked occupational health to search for the e-mail. Those searches did not result in such documents being discovered.

Part heard hearing

7. There were technical difficulties during the first part of the hearing and the Claimant became distressed. The Claimant also had difficulty in expressing herself orally. It was therefore necessary to take frequent breaks and the original time estimate was insufficient. It was agreed that the claim would be listed for a further 4 days and in order to assist the Claimant closing submissions could be made in writing.

8. The parties provided a chronology of allegations, however the Claimant sought to add further allegations to it, which had not been previously agreed. The Respondent objected to their inclusion.

Application to amend the claim

9. On 6 September 2021, the Claimant sent an application to amend to the Tribunal. She chased her application on 25 October 2021. Unfortunately, neither piece of correspondence was referred to the Judge due to administrative pressures. The Judge became aware of the application on 11 November 2021 and invited the Respondent to make representations.

10. The amendment application was discussed. The Claimant accepted that Ms Hodgkinson had been released as a witness and decided not to pursue additional allegations against her. She considered that the majority of the other allegations were background and did not seek to include them as separate allegations of discrimination. In relation to two allegations against Ms Mullins on 22 May 2019, accusing her of dishonesty and a lack of integrity and referring to the allegations as gross misconduct, she said that they were allegations of direct discrimination or harassment. She said that when considering the chronology of allegations, she realised that that they had not been included and she better understood the Tribunal process after the last hearing. She had raised the allegations in July 2021 when being involved in the creation of the chronology. The factual allegation was contained in the original grounds of claim. The Respondent opposed the application and effectively said that it was being asked to hit a moving target. It would need to take additional instructions from Ms Mullins, which would take 30 minutes.

11. After applying the principles in Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650, Selkent Bus Company Ltd v Moore [1996] ICR 836, and Vaughan v Modality Partnership UKEAT 0147/20we concluded that the allegation had always been present in the claim form and that this was a question of attaching a legal label to it. If the Claimant was not granted the amendment she would be prevented from relying on a factually referenced allegation in the claim form. The prejudice to the Respondent was that it needed to take some further instructions, however the Claimant understood that her cross-examination of Ms Mullins needed to be concluded within the day and that the application and the Respondent's instructions would eat into that time. The Claimant is a litigant in person and has had difficulty framing her claims. Ms Mullins would have been questioned about it in any event. In the circumstances the allegations could be dealt with fairly within the hearing. The prejudice was greater to the Claimant was greater than that to the Respondent and the application was granted.

The Evidence

12. We heard from the Claimant. We heard from Ms Hodgkinson , Ms Mullins, Mr Wartnaby, Mr Mann, Mr McGrath and Mrs McNamara on behalf of the Respondent.

13. We were also provided with a bundle of documents of 546 pages and a supplemental bundle of 323 pages. Any references in square brackets starting with 'p' are references to the core bundle and those starting with 's' are references to the supplemental bundle.

14. There was a degree of conflict on the evidence.

Facts

15. We found the following facts proven on the balance of probabilities, after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

16. The Claimant commenced her role with the Respondent as a School Business Manager at The Crescent Primary School, Eastleigh on 12 October 2015, her continuous employment started on 8 December 2003 when she started working for Hampshire County Council. When the Claimant started her employment Ms Mullins (previously known as Ms Ahmed) was deputy Headteacher.

17. The Respondent accepts that at all material times the Claimant was disabled by reason of anxiety and depression.

18. The effects of the Claimant's depression and anxiety that she doubted herself and lacked self-confidence. She suffered from low mood and periods of feelings of hopelessness and helplessness. She suffered from sleep deprivation. She had a tendency to become tearful. Her symptoms were exacerbated by stress and when this occurred her feelings of helplessness increased, and she had difficulty in maintaining a proactive approach to personal and professional life. She also had sickness absences from March 2018. Her symptoms were influenced by external factors such as environment and relationships with others. We accepted that some people might perceive the Claimant as emotionally weak.

19. The Claimant accepted that it was a legitimate aim of the Respondent to have proper financial management and it needed to protect public funds.

20. The Respondent's disciplinary policy provided:

(a) 3.2. In practice the Headteacher will have to judge the extent to which they need to have an involvement in carrying out or overseeing the investigation of any disciplinary issue. If this is a significant involvement then they should not normally be involved in decision making at any subsequent hearing. If there is any doubt the Headteacher should discuss with their Chair of Governors and Education Personal Services (EPS).
(b) 3.3 In general the investigation should be undertaken by a senior school manager other than the Headteacher this enabling the Headteacher to conduct the disciplinary hearing and to make decision.
(c) 3.4 The issue of the unsatisfactory performance of an employee should be dealt with through the relevant Capability Procedure. There may be occasions when the distinction is blurred and schools should take advice from EPS in these situations.
(d) 4.2 "No disciplinary action should be taken until the allegations have been as fully investigated as is practicable within a reasonable timescale.
(e) 8.2 "Where a decision to suspend becomes a possibility, a letter should be sent to the employee, requiring them to attend a meeting, alerting them to the possibility of suspension and advising them of their right to be represented."
(f) 8.3. provides that an employee may be suspended if their continued presence at work may be prejudicial to a fair disciplinary investigation.
(g) 8.8.2. "It is important to identify one or more people they are able to communicate with, in order to ensure that contact can be maintained. Ideally this should be agreed with the employee and his/her representative."
(h) 8.8.6 "Where an investigation is likely to involve a lengthy process, it is important that the employee is contacted on a regular basis. The frequency of such contacts will depend on the particular circumstances of the case, but should not normally be at longer intervals than fortnightly and in some instances, contact on a weekly basis may be appropriate…"

(i) There are also other references that if there is doubt as to what to do discussion should take place with EPS.
(j) 14.4.1 A disciplinary hearing will be conducted by a committee of 3 governors appointed by the Governing Body, with EPS acting in an advisory capacity

21. Paragraph 6.3 of the grievance procedure provided: “The Grievance Procedure cannot be used to circumvent the consideration of legitimate management action on matters of indiscipline, attendance, or capability. The employee will not normally be allowed to raise a separate formal grievance related to any action taken, or contemplated under another procedure. Such concerns will usually be managed within the meetings and hearings taking place within these procedures.”

22. The Claimant says that the disciplinary policy did not give her access to EPS. EPS was available to those with a connection to the school and the Claimant was able to seek some advice. She relied upon the e-mail from Mr Bailey, Head of HR, dated 13 June 2018 [p289]. Mr Bailey advised her in relation to the procedures and said that if she had concerns about the investigating officer she should raise them with the school, and it was for the school to determine who the investigation officer was. He said it was not appropriate for him to intervene with the process which was underway as it was the school’s responsibility to manage the process. He further explained on 21 June 2018 [p296] that he or other employees of the council did not have authority to overrule a decision of the school. The Claimant had the option of being accompanied by a trade union representative. The claimant accepted that Mr Bailey was not the appropriate person to investigate her concerns

23. The Claimant’s complaint included that draft minutes of the disciplinary hearing were only sent to the Respondent for checking, prior to being issued. The Claimant accepted that the policy did not cover minutes and she was basing it on normal practice that minutes are circulated to everybody for approval. She accepted that normally they were not given an opportunity to check draft minutes. The Claimant said she was disadvantaged by the minutes not reflecting what was said and not being told that gross misconduct was being considered

24. The Clamant accepted it was unlikely that the Respondent had a policy of not taking into account disability.

25. The Claimant accepted that the Respondent had policies in relation to completing investigations within a reasonable period of time and maintaining communication, but said that it was not applied.

26. The Claimant said that the job description relied upon by the Respondent [s293] was bogus and relied on her observations in her statement of case for the disciplinary hearing [S289]. She also relied upon a role profile for the senior administration manager/bursar [S297] in which it said she was a member of the senior management team. We accepted Ms Hodgkinson's evidence that the senior management team and senior leadership teams were different things. The senior leadership team related to teaching and learning, which the Claimant was not involved with. Ms Mullins said that this was the Job Description on the Claimant's electronic record and in her personnel file. Ms Hodgkinson did not know if she saw it. We were not satisfied that the document had been fabricated and concluded it was more likely that the job description was for the Claimant's role.

27. The Claimant's job description provided that she was directly responsible for strategic and operational management of the school's finances, HR administration and supervision of site management. She was also to produce monthly budget reports highlighting any discrepancies or over/under spends, was responsible for project management and for ensuring the provision of appropriate, accurate and timely verbal and written guidance to the Senior Leadership Team. Under other responsibilities, the Claimant was required to undertake similar duties commensurate with the level of the post as required by the Headteacher.

28. The Claimant said that in her medical declaration form, completed at the start of her role with the Respondent, she had said she suffered from depression, and it had been in her file on the day she went off sick. She also said that an e-mail had been sent to occupational health about it. The Respondent said that there was not such a document on the file and that numerous searches had been undertaken and requests had been made to occupational health for copies of e-mails, however none were present. The Claimant's Equal Opportunities Monitoring form said that she was not disabled. After considering what the Claimant said she told Ms Mullins, Mr Wartnaby and Ms Hodgkinson about her disability we concluded it was unlikely that the Claimant had referred to depression on her medical declaration when she started work at The Crescent school and she was mistaken in this regard.

29. There was a dispute between the Claimant and Ms Mullins as to whether the Claimant had told her on many occasions that she suffered from depression. The Claimant suggested in her evidence that Ms Mullins had told her that she had a close family member who had depression. Ms Mullins denied that she had any family member who had depression and therefore could not have talked about it. We preferred the evidence of Ms Mullins and accepted that the Claimant had not mentioned to her about having depression. We accepted that the first Ms Mullins was aware that the Claimant had depression was when she was signed off sick, whilst Ms

Mullins was on maternity leave. Mr Wartnaby also denied that the Claimant had told him that she had suffered from depression, and we accepted his evidence. The way in which the Claimant presented to Ms Hodgkinson was as a composed, determined, authoritative and communicative. There were occasions when they had difficult conversations about finances that the Claimant would appear tearful. On such occasions the Claimant was offered a break and she was able to compose herself and carry on. The only time that she was distressed was in March 2018and the meeting was stopped and the Claimant was asked to go home. We accepted that the first time Ms Hodgkinson and Ms Mullins were aware of the Claimant's depression was when the fit note dated 14 March 2018 was received by the school.

30. In April 2016 Ms Mullins became headteacher.

31. The review of Claimant's performance by Ms Mullins on 8 July 2016 was that she achieved her expectations. Ms Mullins, however still had concerns about the Claimant, although they had not been sufficient to warrant formal action. The Claimant would refer to Ms Mullins age and said that she was young enough to be her daughter in front of others. We accepted that there had been parental complaints ranging from inaccurate dates to one student not being given medication. Those matters had been discussed with the Claimant by Ms Mullins. The Claimant was also aware that the office needed reorganising and she had been set an objective to create a list of roles and effect a reorganisation. The Claimant had created the list, but not undertaken the reorganisation.

32. We accepted Ms Mullins and Mr Wartnaby's evidence that the Claimant was reluctant to accept negative feedback and became defensive. We accepted that the Claimant generally refused to accept that she had done something wrong and would not accept responsibility for those matters falling within her role and the consequence of errors.

33. In April 2017, the Claimant had projected a carry forward for the financial year 20178/2018 of £1,676. The Claimant was forecasting a budget deficit of £57,750 at the end of 2017/2018 and at the end of 2018/2019 a deficit of £97,526. The school was under the impression that it was struggling financially, A deficit recovery plan was drafted, and a restructure took place resulting in removal of three posts and the reduction of 37 hours per week across 54 support staff. The staff who left did so voluntarily, including one of the two deputy headteachers. We accepted that the restructure was a significant event and that it caused ill feeling within the support staff. In February 2018, the Claimant, in her report to the governors provided a projected carry forward of £83,000.

34. On 15 September 2017, Ms Mullins, went on maternity leave. An interim headteacher, Miss Hodgkinson, took over line management of the Claimant.

At this time the school office, run by the Claimant, was disorganised and complaints were being received from parents about messages not being passed on and systems not working properly. During the handover Ms Mullins asked Ms Hodgkinson to re-organise the office and procedures, which was part of the task the Claimant had previously been asked to do. Ms Hodgkinson was also informed that the school had received complaints. Ms Hodgkinson was not told anything about the Claimant being disabled.

35. The Claimant and Ms Hodgkinson had regular meetings, about the school finances. Miss Hodgkinson had concern about the budget because the Claimant had projected a deficit. Ms Hodgkinson asked the Claimant to talk her through the lines of the budget so that she was aware of changes overtime and any areas of overspend. Ms Hodgkinson was aware that the carry forward had only been £1,676, resulting in a limited buffer. When there was an unexpected increase in expenditure or projected values were higher than expected, the Claimant was asked to explain why and how they could ensure the budget would remain on track. They also would have conversations every day and ask each other questions. Ms Hodgkinson would share concerns she had and tired to enable problems to be solved by asking the Claimant for solutions and proffering her own. The Claimant found these conversations difficult. The Claimant was either given time at the meetings to provide answers or asked to investigate and return with an answer.

36. At the end of September 2017, Ms Hodgkinson spoke to the Claimant about her department. There had been complaints by parents about some of the information being shared and inconsistencies between letters and the website. Ms Hodgkinson wanted to find a solution. The Claimant told her that everyone had been working hard, with which Ms Hodgkinson agreed, however she said that they could not continue as they were and they needed to get it right. The difficulty was that one staff member would write a letter and a different one would put it on the website. It was likely that Ms Hodgkinson queried whether this was efficient, but we did not accept that the Claimant was told the team was inefficient. The Claimant was asked to communicate with her team and try and find a solution and that it was not an issue of blame. The Claimant did not need to report back to Ms Hodgkinson. We did not accept that the Claimant broke down in tears at the meeting. At one stage she appeared tearful and was asked if she wanted a break, the Claimant composed herself and carried on. Following this, two staff members approached Ms Hodgkinson because they were concerned, because the Claimant told them Ms Hodgkinson did not think they were working hard and were inefficient. Ms Hodgkinson reassured them and said it was a matter of finding solutions.

37. After discussing the difficulties with the administration at the end of September the problems still remained. In October 2017, Ms Hodgkinson

asked the team, including the Claimant, to keep a tally of what they were doing so that they could try and work out what was going awry. The only member of the team not asked to do this was the member who dealt with attendance, because they did not write letters or deal with telephone calls. We accepted that this was done as an attempt to find a solution to the problems in the team.

38. On 8 October 2017, the Claimant sent an e-mail to Ms Hodgkinson [p233-234] and said that she had only known them 3 weeks and observed that there were new staff and to maximise effectiveness took time. She listed previous steps which had been taken to increase efficiency. She said that comments about the departments work and that they were not efficient was unfair and the requirement for 4 of the 5 staff to complete a daily list of jobs completed was unfair and unjust. The Claimant spoke to Ms Hodgkinson the following day. The Claimant alleged that Ms Hodgkinson said that that ‘the meaning of the word dialogue is a verbal discussion between two people, and she did not regard an e-mail response as appropriate’. Ms Hodgkinson’s evidence was that she had asked to speak to the Claimant and would be happy to discuss what had been said in the e-mail and that the Claimant did not want to, so it was left at that. We preferred the evidence of Ms Hodgkinson and did not accept that that she made reference to the meaning of ‘dialogue’ or that an e-mail response was inappropriate.

39. The site manager was inexperienced and was not performance managing the 6 cleaners. The Claimant line managed the site manager. In the autumn 2017 term, Ms Hodgkinson asked the Claimant to run the performance management meetings for the cleaners, with the site manager in attendance to act as a model for him, with a view to the site manager undertaking them on his own the following year. The Claimant agreed and said she was happy to do this.

40. As headteacher Ms Hodgkinson tried to speak to staff frequently and she gave an example of speaking to the administrator with responsibility for attendance so that she could put welfare measures in place for a child. It was impractical for her to tell the Claimant each time that she wanted to speak to a member of the administrative team. The Claimant accepted that Ms Hodgkinson was entitled to speak to the staff members, but said it was embarrassing when they told her of change she did not know about, however she did not provide an example of this happening. We did not accept that staff members were told about changes in what the team did without the Claimant being present or informed beforehand. We accepted that Ms Hodgkinson regarded business manager in same way as a year leader, in that she also would talk to a teacher without consulting the year leader.

41. The Claimant alleged that on every occasion she met with Ms Hodgkinson her views were dismissed. Ms Hodgkinson was concerned about the state of the school and in meetings tried to find solutions with the Claimant and sought her ideas. We did not accept that the Claimant's views were simply dismissed, Ms Hodgkinson took on board what the Claimant said before making a decision and consulted the Claimant rather than imposing decisions. In cross-examination the Claimant accepted that changes to roles needed to be made and that the changes were not to do with her disability. She also accepted that other people's roles were also changed. The Claimant's complaint was that changes she had made did not have enough time to take effect, however Ms Hodgkinson was concerned that the administrative errors were not being resolved and they needed to be resolved quickly.

42. On 28 November 2017, Miss Hodgkinson met with the Claimant to discuss performance management targets. The school did not have one of its administration assistants between September 2017 and January 2018. Until the new senior administrative assistant started work the Claimant was asked to look at which tasks were essential to have been done in that period and to ensure that they had been carried out. The Claimant was told to leave any tasks which could wait. The Claimant did not express any concern about doing this. Ms Hodgkinson told the Claimant that other duties she had to do would be reduced, and this was implemented. The Claimant was also asked to take responsibility for all ordering, invoicing and petty cash processes; the Claimant did not want to do the ordering. This was because she had been unable to explain why there had been overspending. The Claimant was asked to do this so that she had a better understanding of how the finances were working and so that she could ensure that the budget was not overspent. Ms Hodgkinson could not risk any overspending due to the current understanding of the financial situation. To compensate for the additional work the Claimant's administrative duties were reduced, such as writing the newsletter, non-financial letters, writing letters to parents and taking administrative phone calls.

43. Part of the Claimant's role was to identify and address training needs in her team [S291]. The claimant was asked to train the new Senior Administration Assistant (Admissions and Attendance) on 1 December 2017. She was also asked to train the new Senior Administration Assistant (finance) when they started in January 2018.

44. In the run up to Christmas 2017 the staff were putting on a pantomime for the children. Ms Hodgkinson told the staff in a staff meeting that everyone was invited to take part, but that she did not want people to overwhelmed and if they wanted a speaking part to let her know. She also said there were some non-speaking parts such as footmen or mice. The Claimant had not attended the meeting and Ms Hodgkinson approached her separately and repeated

what she had said at the staff meeting. Mr Wartnaby witnessed Ms Hodgkinson speak to other members of staff and that she had said that if the staff member did not want a speaking part they could do a non-speaking role such as a mouse. We preferred Ms Hodgkinson's account. The Claimant was asked if she wanted to be in the pantomime and that if she did not want a speaking part she could have a non-speaking role such as a mouse.

45. On 4 January 2018, Ms Hodgkinson explained to a new starter that there would be a meeting for all of the administration team at which new duties would be outlined. Ms Hodgkinson wanted to welcome the staff back and welcome two new members of staff at a short meeting in which she would reiterate expectations and the roles. The Claimant was not going to be included because Ms Hodgkinson knew that she was unhappy about the new member of the team completing administration tasks. Ms Hodgkinson thought it would be better to meet the Claimant separately afterwards. The Claimant overheard that the administration staff would have a meeting and spoke to Ms Hodgkinson. During the discussion the Claimant was told that she was not part of the senior leadership team. The senior leadership team was part of teaching and learning, which was attended by the head teacher, deputy head teacher and year group leaders. The Claimant accepted in evidence that she was not part of the team and said that she meant senior management team, that was inconsistent with documents prepared at the time and we did not accept that she was told she was not part of the senior management team . The Claimant was told on several occasions that she was welcome to come to senior leadership team meetings, but should let the head teacher know in advance in case confidential matters needed to be discussed. The Claimant became upset and was asked if she wanted to talk or leave the discussion, but she said she did not want to.

46. Miss Hodgkinson also set up weekly meetings with the administration team on Monday mornings. The Claimant did not work on Mondays. Ms Hodgkinson wanted to start the week well and the purpose was to reiterate what needed to be done and encourage them for the week ahead.

47. On 9 January 2018, Ms Hodgkinson told the Claimant that she did not need to attend governors resource management meetings. The Claimant was invited to all meetings at which there was a financial element. At the meetings staff who had attended would be asked to speak at the beginning so that they were then able to leave. This was to try and maximise staff wellbeing, so that they did not need to attend unnecessary meetings. The Claimant agreed in cross-examination that she was not excluded from the meetings. Mrs McNamara subsequently suggested to Ms Hodgkinson that the Claimant was asked to attend the first 10 minutes of the meetings and the suggestion was accepted.

48. The Claimant had previously been on the list of those to receive the minutes, however Ms Hodgkinson was unaware of this. Minutes of meetings were published on the website; however, they were not always done straight away. Ms Hodgkinson tried to inform the Claimant as to what had happened in the meetings. On one occasion the Claimant had not been told that staff would show her their driving licenses in order to satisfy regulations. A staff member approached the Claimant, and the Claimant was embarrassed because she was unaware of the decision. She said in evidence that the harassment came due to the lack of communication and Ms Hodgkinson would not have started these things if she did not have depression or depressive symptoms.

49. The Claimant had been asked to upload the policy, which she did. She did not realise that it needed to be uploaded in two places. Ms Hodgkinson asked the Claimant again to upload the policy, the Claimant doubted herself and said she would on her return from running an errand. On her return she saw that the policy had been uploaded, but was unaware of the second location. Ms Hodgkinson sent the Claimant an e-mail on 1 March 2018 [p242] informing her that as of the night before the safeguarding policy on the website, under the safeguarding tab, was still the old version. She said "If we do not meet statutory requirements the judgment will be changed to INADEQUATE when it goes to quality assurance. It is essential this is changed immediately – please ensure that it is done. It would be devastating for the school and the community if the judgment did not reflect all the hard work, achievements and success everyone has worked so hard to make possible. If you cannot do this please inform us immediately."

50. We concluded that there had been a misunderstanding between Ms Hodgkinson and the Claimant. The e-mail had been written in such terms because Ms Hodgkinson was concerned that the Claimant did not understand the importance of the need to change the document. Ms Hodgkinson wanted to ensure that it was done immediately and if the Claimant could not do it to her know. Ms Hodgkinson was concerned that Ofsted would check and that its judgment on the school would change.

51. Due to budgetary restrictions, the Claimant had been told that she was not authorised to make curriculum purchases without approaching Ms Hodgkinson. A colleague had approached the Claimant about a repair to a laptop and she had said that she could not authorise the repair and to go to Ms Hodgkinson. Ms Hodgkinson sent the Claimant an e-mail saying she was not happy with the reply. On 13 March 2018 the Claimant and Ms Hodgkinson were due to have a meeting about the budget, at which Mr Wartnaby was in attendance. At the start of the meeting Ms Hodgkinson explained that the laptop repair was not a curriculum matter and that it had elongated the process and she was not happy. The Claimant told Ms Hodgkinson that she had been told she could not authorise payment, to which Ms Hodgkinson said she did not, to which the claimant retorted 'yes you did'. We accepted that Ms

Hodgkinson was annoyed but we did not accept that she was angry, hostile or threatening. At this time Mr Wartnaby was looking for the e-mail on his I-pad and the Claimant asked if he was taking notes, which he denied. The meeting then moved onto the budget. The Claimant said that she had incorrectly reported to the governors about carry forwards. The Claimant was asked as to how it had happened and told that it was unacceptable. The Claimant then became upset. Ms Hodgkinson asked if she was OK, but the Claimant continued to be distressed and she was asked if she needed to go home. Ms Hodgkinson later checked whether the Claimant was safe to drive home.

52. The Claimant alleged that the meeting was hostile, which we rejected. Ms Hodgkinson wanted to find out what happened and challenged the Claimant's recollection. The Claimant became upset after discussion started about the budget and at this stage Mr Wartnaby became concerned for her welfare due to the way she had responded when Ms Hodgkinson disagreed and the extent to which she had become upset.

53. Mr Wartnaby was interested in becoming a headteacher. Ms Hodgkinson asked the Claimant if she was happy that he attended meetings with her in order to develop potential headship and the Claimant agreed. This was because a head would often have meetings with a leader of finance. We accepted Mr Wartnaby's evidence that the purpose was for him to shadow so he could learn about the operation of the school and finances. He also attended as a shadow to other meetings involving year group leaders, assistant head teachers and general teachers.

54. On 14 March 2018, the Claimant started a period of sick leave. The fit note recorded it was for depression and acute stress reaction and signed her off for a month. There was no indication as to how long she had had depression.

55. Ms Hodgkinson made a referral to occupational health the same day. In the referral was a reference to long term sickness absence. The Claimant told Mr Wartnaby that she was not well enough to come to work and that she was going to the doctors to get a medical. Ms Hodgkinson thought that there was potential that the Claimant was going to be off sick for a long time and that occupational health should be alerted to the possibility and we accepted that evidence.

56. On 19 March 2018, Miss Hodgkinson wrote to the Claimant [p247] confirming details about employee support. She was told that Ms Hodgkinson would need to monitor and review her situation in line with the medical advice the Claimant was being given. The Claimant was asked how she wanted to maintain contact. She was also asked for the passwords for preparing the budget. [p247] In evidence the Claimant said that Ms Hodgkinson knew that she was perpetrating harassment against her, and the letter was insensitive.

Ms Hodgkinson said that she did not think that there was any connection between the Claimant's sickness absence and her. We accepted that there was nothing to indicate to Ms Hodgkinson that the cause of the problem was her and we preferred her evidence on this point.

57. The Claimant requested that Mr Wartnaby was her point of contact. He immediately became the point of contact and weekly contact was maintained.

58. During the Claimant's absence Ms Hodgkinson became aware that the school's administration team was not equipped to handle the end of year financial arrangements. After obtaining governor approval she obtained assistance from the Education Finance Service ("EFS") at Hampshire County Council. EFS identified that invoices had not been paid, some staff had not been paid, there were school lunch money deficits and swimming pool sessions which had not been booked. EFS also identified that the actual carry forward should have been £166,000 rather than the projected carry forward of £83,000 the Claimant gave in February 2018, and that there was also an additional £120,000 available due to over-budgeting. Ms Hodgkinson was told by EFS that if she wanted to understand what had happened she would need to obtain an audit as they could not assist further.

59. The Claimant accepted in cross-examination that it was appropriate to investigate, but said it should not have been under the disciplinary policy and it was a capability issue and it was due to being overworked and that she was not as robust.

60. On 11 April 2018, Occupational Health provided a report in which was recorded that there had been a breakdown in relationship between management and the Claimant and that it would be helpful for a meeting prior to her return to work. It was suggested that a date was agreed for the Claimant to attend to discuss the issues and if it was not successful mediation could be offered. It stated that there was not an underlying health problem.

61. On 10 May 2018, the Claimant's GP wrote a statement of fitness to work and said that stress had been triggered by a breakdown of the relationship with the headteacher, which needed to be addressed prior to her return to work with a suitable supportive plan to ensure the working environment was not detrimental to mental health. She was signed off work for a further month.[p257] The sickness absence was extended in June to July 2018.

62. On 11 May 2018, the Claimant was invited to attend a meeting with Ms House and Ms Hodgkinson to discuss her absence, sick note and recently arising issues [p258].

63. On 14 May 2018, Miss Hodgkinson received an e-mail from Ms House, senior HR advisor at Hampshire County Council [p259]. Ms House said that the

issues raised could be considered gross incompetence/capability or gross misconduct and that she thought that gross misconduct was potentially the easier route to go down, but after the meeting could decide which route to take. She also said that the purpose of the meeting would be to discuss the Claimant's concerns and then put forward to her the allegations, which she could take away and respond to and then hold a separate meeting to discuss the allegations.

64. On 18 May 2018, the Claimant attended a meeting with Miss Hodgkinson. No notes were taken. The Claimant's evidence was that she wanted to return to work and there was no real discussion and the meeting was quickly hijacked to give her the disciplinary letter. Miss Hodgkinson's evidence was that the C had every opportunity to discuss her concerns and that they had an open discussion about them and her difficulties at work. The Claimant then said that she wanted to return to work and was fit to do so but needed to be supported. The Claimant was asked if there was anything else she wanted to discuss. After that she was given an envelope containing a letter about the investigation . We preferred the evidence of Ms Hodgkinson.

65. Following the meeting the Claimant was given a letter written by Miss Hodgkinson [p260-264]. Miss Hodgkinson told the Claimant that she had started an internal investigation. She was informed that a disciplinary investigation would be carried out in relation to 39 matters. Details were given about the allegations. The Claimant was invited to an investigatory meeting on 25 May 2018 and was told that after the meeting a decision would be taken as to whether the Claimant would be referred to a governors hearing at either dismissal or less than dismissal level and whether she should be suspended.

66. The allegations included that the Claimant had been asked where some cameras were and had said that she did not know and 12 of them were found under her desk. The Claimant was asked for a response. The Claimant interpreted this as an allegation of theft. The Claimant was also asked for a response to issues relating to petty cash because it had not been reconciled, but there was not an allegation of theft.

67. The Claimant said in her evidence that she believed that the investigation was instigated because of her GP note dated 10 May 2018 and that it was instigated because she was lacking in confidence and Ms Hodgkinson used her illness to bring forward the allegations. We accepted Ms Hodgkinson's evidence that she was concerned about the financial management of the school and had taken advice. She then considered that it was appropriate to investigate. She was unaware of the Claimant's grievance against her and had no other concern about the Claimant, other than she was unwell. The Claimant had not raised a grievance when Ms Hodgkinson became investigating officer. The Claimant was told that reason why the disciplinary

policy had been used was because she had many years of experience and training.

68. On 18 May 2018, the Claimant's GP signed her off work with depression and anxiety for a month.

69. Between 22 and 25 May 2018 Hampshire County Council at the request of the Respondent undertook a full audit of the school's finances. This followed a governors meeting at which the audit was approved. When the audit took place, the office was in a disorganised state.

70. On 24 May 2018 the Claimant raised a grievance in a letter to Mr Wartnaby [p270-271], which was subsequently passed to Mr McGrath, chair of governors.

71. On 7 June 2018, Mr McGrath wrote to the Claimant. He said that he reviewed the e-mail of 2 March 2018 and could not see anything in it to suggest it was a grievance. We accepted his evidence that it came across as a response to a management concern and an explanation of position. He also said that the Grievance procedure provided that it could not be used to circumvent the consideration of legitimate management action and that an employee will not normally be allowed to raise a separate formal grievance in relation to any action taken or contemplated under another procedure. He said that the concerns would be investigated as part of the investigation.

72. Mr McGrath spoke to Mr Wartnaby and was assured that he had not seen any bullying in the meetings he attended involving the Claimant and Ms Hodgkinson. He was not concerned about impartiality because the Claimant could present evidence and if necessary the decision reviewed. He was also aware that Ms Mullins was due to return to work in the near future. After taking advice from EPS Mr McGrath concluded that Ms Hodgkinson was impartial and should continue the investigation. Mr McGrath wrote to the Claimant on 13 June 2018 and said that Ms Hodgkinson would remain as investigating officer. He considered the head teacher as the most appropriate person give the complexity and seriousness of the allegations and that it reflected the line management position in the school. The Claimant was informed that she would not be the decision maker and if the investigation was ongoing when Ms Mullins returned, she would take over the investigation. The Claimant, when giving evidence, said that she was disadvantaged by Ms Hodgkinson investigating and instigating disciplinary action because she had bullied and harassed her and suggested that another leader could have investigated, e.g. the deputy head. The Claimant said that she had reached the point where she was depressed and Ms Hodgkinson appointing herself exacerbated her feelings. We accepted that realistically the only person in the school who could investigate was the head teacher because the deputy head was the Claimant's point of contact. The processes were not separated because Mr

McGrath considered they were intertwined and that to separate them would cause further delay. After consulting with EPS Mr McGrath decided for the grievance to be included in the investigation.

73. On 15 June 2018, Miss Hodgkinson informed the Claimant that the internal audit was awaited. It was appreciated it was a difficult time for the Claimant and she was reminded of the support services provided by Hampshire County Council [A291].

74. On 20 June 2018, the Claimant wrote to Mr McGrath and said that she was not trying to circumvent the procedure and that the decision ratified an investigating officer who was not impartial. She considered that she had been the victim of workplace bullying. She did not suggest that the bullying occurred due to her depression.

75. On 18 July 2018, the Claimant was informed by Mr McGrath that Ms Mullins had returned to work and was taking over the investigation from Ms Hodgkinson. The Claimant was told that Ms Mullins could investigate the points she had raised in recent correspondence [p302]. On 31 August 2018, Ms Hodgkinson left the Respondent's school because Ms Mullins had returned from maternity leave.

76. On 17 September 2018, the Claimant's GP wrote to Ms Mullins explaining that the Claimant was finding it difficult to make progress from a mental health perspective and she was finding a lack of communication and delays distressing. Ms Mullins was asked to give the Claimant an update on the likely timescale. It was observed that following resolution of the disciplinary proceedings she was hopeful the Claimant would begin to recover from this episode of depression.

77. The audit report into the school finances was received on 20 September 2018 [S79-125]. It concluded that no assurance could be placed on the effectiveness on the school's framework of risk management, control and governance. It also found a number of irregularities in the school finances, which were the Claimant's responsibility.

78. On 26 September 2018, the Claimant was informed by Ms Mullins, that she taken over the investigation and provided a copy of the Internal Audit. Occupational health had recommended that the Claimant could respond to written questions, and therefore she was provided with copies of invoices listed as not paid and asked if she wanted to revise her statement or provide a further statement. Ms Mullins had examined the allegations and where she was unable to find corroborative evidence had withdrawn a number of them. The remaining allegations were set out in the letter [p306-309].

79. The Claimant said in evidence that Ms Mullins should have stopped the investigation because she knew she was depressed. The Claimant said that the motivation was that she was emotionally weak and a soft target. However, the Claimant also said, that nothing arising from her disability caused Ms Mullins to carry on, but her responses were not given weight and the allegations were reduced because they were incorrect, rather than because she had low mood. We accepted Ms Mullins' evidence that she reviewed all of the documentation on taking over the investigation and considered that for some of the allegations there was evidence that they might be made out and on the basis of that evidence decided that the investigation should continue. Ms Mullins denied that the process was used to remove the Claimant because she knew the effect of the disability on the Claimant or that it was done to exacerbate that condition.

80. On 22 October 2018The Claimant provided a response to the allegations [p311-317] and a statement about what she said occurred with Ms Hodgkinson [p319]. She also provided a response to the audit report on 25 October 2018 [p323].

81. On 31 October 2018, the Claimant was certified as 'may be fit to return to work' with a supportive environment, gradual return and responsive to mental health needs. In early November 2018, Ms Mullins referred her to occupational health and chased it again on 13 November. Ms Mullins wanted to know whether the Claimant was fit enough to attend a meeting.

82. The Occupational Health report dated 16 November 2018 said that the Claimant had reported she was able to attend a meeting and requested it was off site and her partner accompanied her. It was advised that the meeting was arranged as soon as possible.

83. Ms Mullins sought advice from EPS, because she was concerned about the Claimant returning to whilst her investigation was ongoing. On 10 December 2018, Ms Mullins wrote to the Claimant and said that she wanted to give her an opportunity to attend an investigation meeting now she was fit to return to work and asked if she would like to do so.

84. On 11 December 2018, the Claimant was suspended and was told that it was to preserve the integrity of the investigation. The Claimant was informed that it was precautionary and not punitive, and she would be paid full pay. She was told that if she needed to make contact with anyone at the school she should contact Mr Wartnaby. The Claimant was not invited to a meeting to discuss it. We accepted Ms Mullins evidence that she did not want to jeopardise the investigation by the Claimant returning to work.

85. On 19 December 2018, Occupational Health said there was no change in the Claimant's health status, because the cause originating in April had not been

resolved. The report said that it was trusted that any return to work would be discussed before taking place and a phased return initiated.

86. On 20 December 2018, the Claimant was invited to attend an investigatory meeting on 30 January 2019 [p350]. The Claimant was informed what the allegations were and that she could be accompanied by a union representative or a colleague, but as a special accommodation, her partner could accompany her. The Claimant did not want to attend Hampshire House due to past experiences and Ms Mullins rearranged the location to the Castle, Winchester.

87. On 30 January 2019, the Claimant attended the investigatory meeting with her partner as companion. The Claimant had been provided with a list of questions which she was asked about in the meeting. She was asked questions about how she saw her role, training needs, the reduction of her hours, changes to the roles of admin staff, the induction of new starters. The Claimant raised that she was no longer part of SLT and had been told not to attend governors' meetings and was then asked to attend the first 10 minutes. She was also asked questions about the allegations. Some of the questions asked related to the Claimant's grievance, however Ms Mullins did not ask many questions because she had been provided with the Claimant's correspondence setting out how she felt. The Claimant also asked a number of questions. The meeting room had to be vacated and the Claimant left a piece of paper with 5 outstanding questions she wanted answers to. Ms Mullins considered that the questions were loaded, such as 'why was I set up to fail?' she discussed them with her adviser and did not reply.

88. As part of the investigation Ms Mullins considered the Internal Audit Report, various financial documents and the Claimant's job description which was on her file. We accepted Ms Mullins evidence that she thought this was the Claimant's job description.

89. Ms Mullins looked into the Claimant's allegations as part of her investigation because they seemed inextricably linked. Ms Mullins spoke to the chair of governors, the deputy head teacher, senior administration offices and members of the admin team and reviewed the e-mails given to her. Ms Mullins spoke to Ms Hodgkinson about the allegations against her, as raised in the Claimant's grievance and on 3 April 2019 Ms Hodgkinson produced a short statement which was included in the later investigation report [p386]. There were no notes of an interview with Ms Hodgkinson. Ms Mullins gave evidence that she spoke to colleagues of the Claimant about the matter raised in her grievance, but they had not witness anything. There were not any notes of the interviews with the Claimant's colleagues. Ms Mullins spoke to Mr Wartnaby, and we accepted that he was asked about the Claimant's relationship with Ms Hodgkinson and if he had seen the claimant being upset, Mr Wartnaby told her that it was not until the Claimant went off sick

that he had seen her being upset. He had said that the relationship was professional and sometimes the Claimant struggled to answer questions and she was asked to find out the answer and come back to Ms Hodgkinson with the answer. He had not considered there had been an increase in workload and that the senior leadership team meetings had been about teaching and learning, which was not the Claimant's role. He provided Ms Mullins with all of the correspondent and e-mails he had with the Claimant.

90. Ms Mullins did not find any corroborating evidence of bullying and considered that she had done all that was required in relation to the grievance. She considered the allegations against the Claimant and removed any which were opinion based and decided to proceed with those which were objectively evidence based. Ms Mullins considered whether the allegations should be dealt with as performance issues. She considered the Claimant's considerable experience in working in similar roles since 2003 and that she should have been fully competent and that the shortcomings were so many and serious that misconduct procedures were warranted.

91. On 5 April 2019, the Claimant was informed that Ms Mullins had recommended that the case proceeded to a disciplinary hearing, to be heard by a panel of governors. She said she wanted to give as much notice as possible and the dates of 9 and 10 May were being looked at,. The Clamant was told she would receive a formal invitation and the documentation it was recommended that a disciplinary hearing was convened [p387]. Ms Mullins did this to give the Claimant as much notice as possible about the potential date. She was trying to update the Claimant where possible and was aware that the length of the process was causing the Claimant distress. She had concluded her investigation at this time, but could not recall whether the bundle of documents had been completed.

92. On 23 April 2019, Ms Mullins wrote to the Claimant stating that the previous letter was to update her and that on her return from the Easter break she would send the documentation and provide formal confirmation of the hearing.

93. On 26 April 2019 (this was incorrectly dated 26 May), Ms Mullins invited the Claimant to attend a disciplinary hearing on 9 and 10 May 2019 [p377-380]. The letter referred to misconduct and that potential outcomes could be from no case to answer to dismissal. The hearing would be heard by a Governors panel. We accepted that only a Governors panel could dismiss an employee. The letter set of the allegations and attached the investigation report [p355 to 412].

94. The investigation report detailed the findings of the investigation. It detailed that the internal audit had been undertaken by the local authority at a cost of £4,500 to the school. Specifically the following paragraphs were highlighted

from the audit report: “The overall opinion of this review based on the audit evidence obtained, is that no assurance can be placed on the effectiveness of the framework of risk management, control and governance designed to support the achievement of management objectives” and that the ‘no assurance’ in the report meant that “Fundamental weakness identified in the framework of internal control or the framework is ineffective or absent with significant risks to the achievement of system objectives”. Ms Mullins accepted in cross-examination that ultimately the leadership and governance for the school were responsible for no assurance, however she considered that the Claimant was responsible for the situation and relied on the evidence she had found. We accepted that the situation was linked to the Claimant’s role and that the Claimant had been responsible for the strategic and operation management of the school finances, HR administration and site management within the school, and that robust internal financial control was included in her job description. These aspects were identified in the report. The report had 30 appendices, including the internal audit report, invoices, the Claimant’s job description, correspondence and balance reports. The allegations were set out and under each allegation there was a summary of the evidence and reference to where the document was contained in the appendices. It was stated that no evidence had been found to substantiate the Claimant’s allegations that Ms Hodgkinson had bullied and harassed her. The report identified that the Claimant felt her workload was more than could be completed within 4 days.

95. The Claimant challenged some of the allegations in cross-examination: (a) In relation to allegation 6 (failing to ensure payment schedules were enforced resulting in residential payments not being processed) Ms Mullins agreed that the Claimant had said she was overworked. (b) In relation to allegation 11 (failing to ensure that petty cash was reconciled) the Claimant said that the allegation was correct, but she had used an alternative system and rather than there being a £300 cost implication to the school it was £37 when the bank records and her records were compared. Ms Mullins was unaware of the other system the Claimant had been using and maintained that the petty cash had not been reconciled.

96. We accepted Ms Mullins’ evidence that she was influenced by the evidence that had been obtained as part of the internal audit and her investigation, when deciding to recommend a disciplinary hearing and the allegations put forward. The Claimant suggested to Ms Mullins that she had conducted a flawed investigation to exacerbate her condition to make her withdraw, which was denied.

97. Delays were caused in the investigation by availability of staff, taking advice from occupational health, and extensions requested by the Claimant. The Claimant complained of delay between 25 June 2018 and 21 September 2018, however the internal audit report was not received until 20 September

2018, which the Claimant was then given an opportunity to comment on. The Claimant complained of delay between 29 October 2018 and 21 December 2018 and 7 to 25 January 2018, during which time she provided 2 statements to Ms Mullins which needed to be considered. She also accepted that it would have been reasonable for Ms Mullins to take advice. The Claimant found the delay between mid November and being invited to a meeting particularly difficult.

98. On 1 May 2019 the Claimant sought a postponement of the hearing, so she could have additional time to prepare, which was agreed, and it was rearranged to 22 May 2019.

99. The Claimant provided a statement from Lorraine Smith, headteacher from a previous school the Claimant worked at, and an e-mail from Mr Kindon, school governor, to Ms Mullins and she provided them to the disciplinary panel. Ms Smith [S127-128] provided a character reference and provided her opinion that the appropriate policy would be the capability policy. Mr Kindon [S129-131, who was an accountant, said that he thought the budget was prudent, but also said with the benefit of hindsight the staff restructure may not have been necessary, but with the deficit and forecast made it appeared it was required.

100. The Claimant attended the disciplinary hearing, with her partner as companion. The hearing was chaired by Ms McNamara, Vice-Chair of Governors and an accountant. The panel fully read the bundle of documents before the hearing, including the documents provided by the Claimant about her grievance. They heard from Ms Jerams who conducted the internal audit, who was questioned by the panel, the Claimant's partner and the management team.

101. Ms Mullins took the panel through the allegations. She asked the governors to bear in mind the examples of gross misconduct in the disciplinary procedure and listed some. This was done in case the panel thought they might be relevant. Ms Mullins also drew the panel's attention to the staff code of conduct and that "staff are expected to demonstrate the highest standards of personal and professional conduct and behaviour and consistently act with honesty and integrity. Ms Mullins did not allege that the Claimant was dishonest or lacking in integrity. The Claimant and the panel questioned Ms Mullins. The Claimant's companion, Mr Neathey, presented her evidence. The Claimant was also questioned by Ms Mullins and the panel. Management and the Claimant's companion summed up their respective cases.

102. At the hearing, the Claimant said that the capability process should have been used and was concerned about the length of time the process took. The Claimant drew the panel's attention to her scrutiny of the

governors' minutes of meetings [s301-304] and referred to items 9 and 11 on 10 January 2018, in which Ms Hodgkinson had suggested that a meeting with the Claimant would be arranged and that a meeting in person would give more opportunity for clarity. And that Ms Hodgkinson suggested that stationary ordering was done centrally by the finance manager and one large order was done in June/July for the year and then additional spending could be monitored and recommended that the governing body asked more questions on ordering so figures in the budget were less inclined to change. In cross examination, the Claimant suggested that this Ms Hodgkinson trying to discredit her, Mrs McNamara disagreed and we accepted her evidence in that regard.

103. The Claimant also raised that the minutes of 22 January 2019 recorded that in relation to the internal audit report, governors were asked to submit questions in advance to ensure governors remained untainted ahead of the panel hearing. Ms Mullins said she advised governors that there was a disciplinary investigation, and it should have read investigation not hearing.

104. On 10 June 2019, the disciplinary committee sent the Claimant the outcome of the disciplinary hearing [p486-496]. It was concluded that the budgeting, internal financial controls and accounting were the Claimant's responsibility as confirmed in her Job Description. We accepted Mrs McNamara's evidence that they had considered the points that the Claimant raised including that she had presented an alternative, that was not titled business manager. They concluded that the Job Description had been on the Claimant's file, there was not any substantiating evidence that showed it was bogus and they preferred the management's case that it was the Claimant's job description. It was concluded that 5 allegations had been misconduct, 10 allegations gross misconduct and the remainder were unsubstantiated. The panel concluded that it was a disciplinary matter because it related to non-compliance and negligence in her role as business manager. They rejected that it was due to a lack of skill, ability or training.

105. The outcome did not address the grievance, we accepted the evidence of Ms McNamara that they thought it had been viewed correctly by Ms Mullins and that they did not need to address it. The panel was aware that the Claimant had asked for her grievance to be dealt with separately but considered it was appropriate to combine it with the investigation. The panel considered that there could be criticism of Ms Hodgkinson continuing as investigating officer, but considered it had been remedied when Ms Mullins took over and that she had reviewed the allegations and changed them where appropriate.

106. It was concluded that the Audit report had shown a number of areas which had not been realistically or adequately budgeted. There was a large surplus which could have been used for children and it was considered

negligent. The Claimant was required to supervise and was responsible for day to day financial administration, the Claimant was required to show the highest standards of personal and professional conduct and it was considered the failure to provide a correct budget was misconduct. It was also considered that the failure to budget correctly had resulted in a restructure, which might not have been necessary, and children had not benefitted from the funds, and it was concluded it was negligent and misconduct.

107. The panel took into account that the Claimant was saying that she was overworked. It was considered that the allegation that the Claimant had failed to ensure payment schedules were enforced resulting in residential payments not being made was gross negligence and a failure to meet the schools' standards. They concluded that there was no evidence of process being in place for money received or reminders for parents/carers when money was due, and it had resulted in a monetary loss. We accepted that it was considered that the school was losing money and it ended up with a lot of arrears. This had only come to light because of the audit.

108. The panel considered that the failure to reconcile the petty cash was gross negligence. The audit report conformed it had not been reconciled since 2015 and it was part of the claimant's role. It had caused a loss to the school.

109. The Claimant failing to oversee and ensure the collection of dinner money was considered to be gross negligence and therefore gross misconduct. It was found that there was no system in place for ensuring dinner money balances were capped at an appropriate amount. The investigation report that there were parents/carers in substantial debt to the school and those debts had been written off. We accepted that the panel considered it fell within the remit of the Claimant's role and there was no evidence to refute the allegation and there were no controls in place. We accepted that the panel took into account that the team was shorthanded and had two new employees.

110. In terms of failing to ensure or oversee the processing of existing staff on SAP, the Claimant was responsible for the budget and HR processes within the school. There was a delay in setting up new starters on the payroll system and as a consequence the school incurred emergency payment charges. It was also considered that the Claimant had falsified a record of absence which had not been authorised by the headteacher. It was considered that this had been a breach of the code of conduct and was gross negligence and therefore gross misconduct.

111. In terms of failing to ensure/oversee claim forms for additional hours were appropriately authorised, the panel concluded that by the Claimant's

own admission she had signed timesheets event though they had not been authorised and submitted them without authorisation, which was a serious breach of the school's code of conduct and financial policy. It was concluded it was serious negligence and gross misconduct.

112. In relation to unpaid invoices the school had to pay late payment interest charges and had received a solicitor's letter. It was considered to be gross negligence. The panel had taken into account the Claimant's explanations, but they did not cover all of the invoices. It was concluded it was bringing the school into disrepute. This was considered to be gross misconduct.

113. In relation to removal of personnel files from the site, the Claimant admitted it and said it was a lapse of judgment. It was considered to be very serious because sensitive and confidential information had been removed and the Claimant's partner had returned it in an open shopping bag. It was considered to be a breach of the school's code of conduct and data protection policy and was gross misconduct.

114. In terms of the lack of pre-employment checks for new starters the Claimant had said that they were all present before she went off sick, however the audit found that they were not. DBS certificates had been found in files and a copy of a driving licence had been left insecurely in the office. The Claimant said it was unlikely because checks had to be made for the Ofsted inspection. This had been taken into account, but it was concluded that the Claimant had not done the checks for all files. It was considered to be gross negligence, a breach of the school code and a breach of the data protection policy and therefore gross misconduct.

115. The panel took into account that the Claimant said her sickness absence was due to the breakdown of her relationship with Ms Hodgkinson and not the work, but concluded the allegations related to before and during her time at the school. It was concluded that the appropriate sanction should be summary dismissal. We accepted Mrs McNamara's evidence that the subject matter of the allegations had occurred before the Claimant's sickness absence. Mrs McNamara's evidence was that the reason for the decision was there were so many proven allegations they could not see any other conclusion and the financial and data protection issues were too great. The Claimant cross-examined Mrs McNamara on the basis that she was perceived to be emotionally weak, however Mrs McNamara denied any knowledge of this, and we accepted that evidence. When giving evidence, the Claimant suggested that the decision was influenced by her sick leave absences.

116. On 23 June 2019 the Claimant appealed against the decision to dismiss her. She said that the first she was aware of the allegations of gross

misconduct was at the disciplinary hearing. She challenged the findings of gross misconduct and misconduct and suggested that there had been disability discrimination.

117. An appeal was scheduled for 17 and 18 July 2019, however the Claimant was unable to attend due to an issue within her family. Attempts were made to find alternative dates, but due to a lack of availability of panel members and the Claimant being on holiday in September it was not scheduled until 15 and 22 October 2019.

118. On 15 and 22 October 2019, the appeal hearing took place, and which was chaired by Mr Mann. The Claimant was represented by her partner, Mr Neathey. The appeal panel read all of the documents in the appeal bundle. The Claimant was invited to make her submission. She set out her concerns about delay and described the circumstances of the alleged bullying, referred to her medical records. She made submissions in relation the allegations found to be gross misconduct and referred to evidence she considered supported her position. She referred to Mr Kindon's email in which he considered her budget was prudent and called Ms Smith, a former headteacher of a different school. Ms Smith confirmed she was there as a character witness. Management asked questions of the Claimant, as did the panel. On 22 October 2019, the management of the school presented its case. Mr Wayman, who was on the panel for the disciplinary hearing also gave evidence as to the decision reached, during which he said that it was not clear that the Claimant's e-mail on 2 March 2018 was a grievance [s253]. Mr Neathey and the Claimant asked questions of management and the panel also asked questions. The Claimant and management summed up their cases.

119. Following the hearing the panel obtained some further information from Mr McGrath in relation to the actions taken in respect of the grievance. Mr McGrath responded by enclosing correspondence and said he understood that Ms Mullins was considering it as part of her investigation.

120. The Claimant was sent the appeal outcome on 12 November 2019 which upheld the decision to dismiss [p519-526] .The panel took into account the evidence of Ms Smith and Mr Kindon. The panel considered that the correct process had been followed and the investigation had been carried out by two headteachers. They considered the evidence that had been given at the earlier disciplinary hearing. It was concluded that the interim head's approach was proper. We were satisfied that the appeal panel considered all of the evidence presented to it.

121. In relation to payment schedules, the panel took into account that the Claimant said that she had been overworked and that she had not monitored all payments, however considered that it was her responsibility to monitor

and make payments and that given that it was in the Claimant's job description and her senior role considered it was in the remit of gross misconduct.

122. When giving evidence Mr Mann could not remember the rationale for upholding the allegation of gross misconduct for failing to reconcile the petty cash

123. In relation to the dinner money debts, it was taken into account that the Claimant was saying she was overworked, however the unpaid money was significant, and the school had wanted the dinner money issues wrapped up before the end of the academic year and it was a significant sum that needed chasing. It was considered there was no reason why the parents could not be contacted for payment of the outstanding money. The Claimant had not delegated the task and it was considered that it was a decision by the Claimant not to move forward. It was considered to be a breach of school policy and procedure and sufficient to amount to gross misconduct.

124. In relation to payment of invoices, the panel was not satisfied of the Claimant's assurances that she thought they had been paid and confirmed the original decision.

125. In relation to taking home confidential information it was considered that taking personnel files home went against the code and the Claimant did not have permission to do so. It was considered very serious and gross misconduct due to the sensitivity of the documents .

126. The appeal panel concluded that although there was a potential cause of concern about Ms Hodgkinson continuing as investigating officer, it was remedied by Ms Mullins taking over, which led to some allegations being removed and then continued with investigation.

127. The panel considered the Claimant's disability and concluded that Ms Hodgkinson had not known of the Claimant's disability until after she had gone off sick and therefore there had not been a failure to make reasonable adjustments. It was concluded that the dismissal resulted from the Claimant's errors and omissions and was not related to disability and considered that a non-disabled person would have been treated in the same way. We accepted Mr Mann's evidence that they had acknowledged the Claimant had been on sick leave, but considered that the short comings had arisen before that sick leave started. We accepted that the panel was influenced by the evidence presented to it. We accepted Mr Mann's evidence that he accepted that a person undergoing scrutiny can suffer from low mood, self doubt, feel hopeless and have fragile personal confidence. He did not consider that they influenced the disciplinary process and gave evidence that they did not influence their decision. It was concluded that the

Claimant had not raised a grievance until after the start of the disciplinary process and it had been reasonable to combine the processes. It was also considered that it had been correct to use the disciplinary procedure due to the Claimant's experience and the high level of competence expected. It was acknowledged that the delay had a detrimental effect on the Claimant, but concluded it had been unavoidable.

Time

128. The Claimant's son in law was diagnosed with cancer in late June/early July 2019 and her daughter was in the latter stages of pregnancy. She was looking after her eldest grandson and was spending 10 days at a time doing so. The Claimant's nephew was also diagnosed with cancer at a similar time. She thought that she had to wait until the appeal was over before bringing her claim. The Claimant had been in contact with Unison in January 2018. She e-mailed Unison in March 2018, but they did not respond. She spoke to the union again when she had a hearing, but they did not mention anything about discrimination and were not helpful. The Claimant also sought advice from solicitors in 2019 and they helped with her letter of appeal. Her solicitors first contacted the Respondent in April 2019. On 20 June 2018, the Claimant informed Mr McGrath that she had contacted ACAS to update them and made reference to the Employment Tribunal. On 23 June 2018, the Claimant informed Mr Wartnaby that her partner had engaged a specialist employment solicitor. The Claimant said that she did not know that she could bring a claim for disability discrimination.

The law

129. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA. The Claimant alleged direct discrimination, discrimination arising from a disability, harassment and a failure by the respondent to comply with its duty to make adjustments.

130. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.

131. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA 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. Under section 15(20, this

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.

132. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

133. The definition of harassment is found in section 26 of the EqA. 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, and humiliating or offensive environment for B.

134. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

Direct Discrimination

135. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

136. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) 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.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

137. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

138. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others because of her disability.

139. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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 the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong [2005] IRLR 258 CA was also approved by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi

[2019] EWCA Civ 18. The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

140. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

141. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

142. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

143. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

144. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons

being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

145. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

146. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

147. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM). In Shamoon-v-Royal Ulster Constabulary [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

148. We reminded ourselves of Sedley LJ's well-known judgment in the case of Anya-v-University of Oxford [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

149. The reason must be that of the individual perpetrator of the alleged act of discrimination, or of the individual decision-maker of the allegedly discriminatory decision. Unwittingly acting on the basis of someone else's tainted decision will generally not be sufficient (CLFIS (UK) Ltd v Reynolds

[2015] EWCA Civ 439). In Royal Mail Group Ltd v Jhuti [2019] UKSC 55 that position was qualified at paragraph 62: "… if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason".

Discrimination arising from disability

150. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

151. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

152. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or

unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

153. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Justification

154. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

155. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3) (see also Hampson v Department of Education and Science [1989] ICR 179. Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

156. The test of proportionality is an objective one.

157. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 151:
"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at para 165, to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80:
"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

158. At paragraph 24 Lady Hale said

"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

159. Pill LJ's comments in Hardy & Hansons plc v Lax [2005] IRLR 726 in relation to the Sex Discrimination Act 1975 at paragraph 32 also provide assistance in that the statute:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of

proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…"

And further at paragraph 33

"The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

160. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section (*Buchanan-v-Commissioner of Police for the Metropolis* UKEAT/0112/16).

161. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence), but the tribunal must make its own assessment on the basis of the evidence then before it.

Reasonable adjustments

162. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant

before considering whether any proposed adjustment is reasonable.

163. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

164. In the context of defining a PCP, a 'practice' has been said to imply that an element of repetition was involved (*Nottingham City Transport-v-Harvey* [2013] Eq LR 4 and *Fox-v-British Airways* [2014] UKEAT/0315/14/RN).

165. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal held.

"*35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application…."*

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for

the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

166. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

167. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Harassment

168. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

169. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

170. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Knowledge of disability/substantial disadvantage

171. In relation to reasonable adjustments Schedule 8 EqA provides:

20. Lack of knowledge of disability, etc.
(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

172. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:
(i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
(ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)
It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

173. we also had regard to the EHRC Code of practice on employment paragraph 6, relating to the duty to make reasonable adjustments (2011), in particular paragraph 6.19:

"*6.19.* ***[Sch 8, para 20(1)(b)]*** *For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This*

is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."#

174. In relation to discrimination arising from disability s. 15 (2) provides: *"Subsection (1) not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*"

175. In the case of direct disability discrimination, the Respondent also has to have had actual or constructive knowledge of the Claimant's disability before a claim under s. 13 can succeed (*Morgan-v-Armadillo Managed Services Ltd* [2012] UKEAT/057/12/RN).

176. Ignorance itself is not a defence under these sections. We had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, had to consider whether, in light of Gallop-v-Newport City Council [2014] IRLR 211 and Donelien-v-Liberata UK Ltd [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew, and we had in mind Lady Smith's Judgment in the case of Alam-v-Department for Work and Pensions [2009] UKEAT/0242/09, paragraphs 15 – 20.

177. Under s. 15, a respondent cannot claim ignorance in respect of the causal link between the 'something arising' and the disability and benefit from the defence (*City of York Council-v-Grosset* [2018] EWCA Civ 1105). The defence relates to the Claimant's possession of the disability, not other elements of the test and an employer cannot, for example, readily claim ignorance of the fact that the Claimant's actions had arisen in consequence of his disability.

Time

178. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

179. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);
c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

180. In a claim under s.20, time starts to run for the purposes of s.123 of the Act from the date upon which an employee should reasonably have expected an employer to have made the adjustments contended for (*Matuszowicz-v-Kingston upon Hull City Council* [2005] IRLR 288 and *Abertawe Bro Morgannwg University Local Health Board-v-Morgan* [2018] EWCA 640), which may not have been the same date as the date upon which the duty to make the adjustments first arose. Time does not start to run, however, in a case in which a respondent agreed to keep the question of adjustments open and/or under review (*Job Centre Plus-v-Jamil* UKEAT/0097/13)

181. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require

exceptional circumstances: it requires that an extension of time should be just and equitable - *Pathan v South London Islamic Centre EAT 0312/13*.

182. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

183. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

184. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case.

185. In *Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

186. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: *Pathan v South London Islamic Centre EAT 0312/13* and also *Szmidt v AC Produce Imports Ltd* UKEAT 0291/14.

187. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

Conclusions

Knowledge of disability

188. We concluded that the Claimant was mistaken in her recollection that she had said in a medical declaration form to the Respondent that she had depression. We also accepted the evidence of Ms Mullins, Ms Hodgkinson and Mr Wartnaby that the Claimant had not told them she had depression. It was significant that the Claimant alleged that Ms Mullins told her that she had a close family member who suffered with depression, however Ms Mullins was adamant that she had no such family member. The first time that Ms Hodgkinson and therefore the Respondent became aware that the Claimant suffered from depression was on receipt of the fit note dated 14 March 2018. Up to the meeting in March 2018, the Claimant had presented as composed, determined and communicative, although she appeared tearful in some conversations the Claimant had not become very upset until March 2018.

189. The sick note followed shortly after the meeting, however it did not refer to any long term depressive problem. The Claimant was signed off for a month and we accepted the Respondent's submission that at this stage the Respondent could not be aware that the Claimant had a long term condition. The Respondent arranged for an occupational health report which was received on 11 April 2018 and was therefore making enquiries as to the Claimant's health, but the report said that there was not an underlying condition, which was likely to have been based on what the Claimant had said. At this stage there was still not an indication that the Claimant had a long term condition, and it was within the period of the first sick note. The sick note on 10 May 2018, signed the Claimant off for a further month and it was two months after the Claimant had initially gone off sick. It said that the Claimant might be fit for work but the relationship with the headteacher

needed to be addressed. On 18 May 2018, the Claimant said that she wanted to return to work, there was no evidence that Ms Hodgkinson was informed about the Claimant's medical history. After the meeting she was signed off sick for a further month with depression and anxiety which would have been an absence of four months at the end of that period. When the Claimant did not say she was ready to return at four months this should have started to trigger a question in the mind of the Respondent that there might be a serious problem.

190. The letter from the Claimant's GP on 17 September 2018, referred to the Claimant finding it difficult to make progress, she was receiving treatment and made reference to recovering from this episode of depression. This was suggestive that there might have been previous episodes and that there could have been a longstanding condition. The Respondent should have made further enquires at this stage as to the nature of the condition from the Claimant's GP and occupational health. We rejected the Respondent's submission that it would have been reasonable to conclude that the Claimant could not have a long term condition at this stage on the basis it could not anticipate the investigation would take a further 6 months. They were on notice that there appeared to be a serious issue and it was not an isolated episode of depression. The Respondent could have obtained further information within a short period, and it ought to have known that the Claimant was disabled from late September 2018.

What arose from the Claimant's disability?

191. The effects of the Claimant's depression and anxiety were that she doubted herself and lacked self-confidence. She suffered from low mood and periods of feelings of hopelessness and helplessness. She suffered from sleep deprivation. She had a tendency to become tearful. Her symptoms were exacerbated by stress and when this occurred her feelings of helplessness increased, and she had difficulty in maintaining a proactive approach to personal and professional life. She had sickness absences from March 2018. Her symptoms were influenced by external factors such as environment and relationships with others. Some people might perceive the Claimant as emotionally weak.

General points

192. It was significant that in the events it was not alleged, and there was no evidence of, that Ms Hodgkinson, or any other witness made comments that could be inferred to be a discriminatory, derogatory or an untoward reference to disability or depression. There was no evidence that there was ever a remark which could be inferred as relating to the things arising from the Claimant's disability. The Claimant based her claim on that Ms Hodgkinson had a propensity to bully, however there was no evidence to

support such an assertion and we rejected it. The Claimant based much of her claim on an assertion that Ms Hodgkinson or Ms Mullins knew of the effects of her disability and how she could use them so that they could engineer the Claimant's removal or that the Claimant would resign, and she relied on the events to demonstrate it. However, the belief of a person, and we accept that the Claimant genuinely held that belief, is not the same thing as evidence that something has occurred. It was significant that Ms Hodgkinson was interim headteacher when there were concerns about the school finances, a restructure of staff had occurred, which had caused ill feeling and the administrative office was disorganised, in a state of disarray and complaints were being made by parents. It was also significant that Ms Hodgkinson had no knowledge about the Claimant's depression until March 2018. We accepted that Ms Hodgkinson wanted to ensure that the finances were in order and monitored to avoid further problems and that it was important for the administrative team to become more organised and to remove and avoid mistakes and that this was the underlying motivation for the subsequent events. The Claimant was also presenting as robust until the meeting in March 2018. The matters which required discussion with Ms Hodgkinson were challenging and we accepted that Ms Hodgkinson discussed them in a professional manner and was not angry or hostile. We accepted that it would be reasonable for discussions to take place about the finances, particularly in the light of the deficit and restructure, and that the administration team had problems and there was a need to stop complaints being made. We rejected the submission that Ms Hodgkinson or Ms Mullins was using their knowledge of the effects Claimant's disability as a means to exacerbate her condition or to cause her removal or as the motivation for the events that occurred. We reached this conclusion after considering all the allegations which we have set out below.

The specific allegations

<u>On 9 October 2017 Following the Claimant's e-mail dated 8 October 2017, Ms. Hodgkinson called Mrs. Adams into her office, told her the meaning of the word dialogue was a verbal discussion between two people and said she did not regard an e-mail response as appropriate.</u>

193. This was an allegation of direct discrimination and discrimination arising from disability. The Respondent did not have knowledge of the Claimant's disability at the time of the allegation. It was also said to be an allegation of harassment. We were not satisfied that Ms Hodgkinson told the Claimant that the meaning of the word dialogue was a discussion between two people or that she regarded an e-mail response as appropriate. As such the factual basis of allegation was not established. Accordingly, the Claimant was unable to establish primary facts that the treatment was less favourable or unfavourable or that it was unwanted. Accordingly, this allegation was dismissed.

<u>From 9 October 2017 Ms. Hodgkinson required four out of the five administrative staff, including Mrs. Adams, to note every single task they undertook. This undermined Mrs. Adams.</u>

194. This was an allegation of direct discrimination, discrimination arising from disability and harassment. In relation to harassment this formed part of allegation 6.1.1 that she was systematically undermined. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

195. In any event Ms Hodgkinson did ask the Claimant and three of her colleagues to keep a tally of what they were doing so that they could work out what was going awry. This was against a background of a disorganised office and team and that the Respondent was in receipt of parental complaints. The issue related to conflicting and incorrect information being provided to parents. The only member of the team not asked to do it was a member who did not write letters or answer telephone calls. The Claimant considered that it was unreasonable because she was the team leader and that it was undermining her.

196. In any event, the Claimant did not adduce any evidence that a non-disabled comparator would have been treated differently. Her claim was based on assertion that Ms Hodgkinson was using effects of her disability to force the Claimant to leave. The background to the state of the school office was significant. Ms Hodgkinson had previously asked the Claimant to find solutions, but the situation had not been remedied. The Claimant and her colleagues were asked to keep a tally so that what was being done could be understood. The Claimant failed to adduce any primary facts that a non-disabled person would have been treated more favourably. In any event the reason behind the instruction was to find out what was going awry. It was important that the school office functioned properly and that complaints were stopped. We accepted that this was the sole reason why Ms Hodgkinson asked for the tally to be kept. The Claimant was involved in the processes within the office and therefore it was important that she was included in the tally, otherwise a key link would not be analysed.

197. In circumstances where there are complaints and there is an inconsistency of information being provided, it would be reasonable for an employer to try and ascertain what the cause was in order to remedy the situation. To ask employees who are involved in that process to keep a tally of what they are doing is not unreasonable and is not something which is adverse and was not unfavourable treatment. Further for the reasons set out above the Claimant failed to prove primary facts that the requirement was caused by something arising from her disability.

198. The requirement to keep a tally was unwanted by the Claimant, in that she did not want to do it. The allegation of harassment was put in the basis that it was undermining her. The Claimant was involved in the processes in the office and mistakes were being made, however it was not clear how they were occurring. All the people involved in that process were asked to keep a tally of what they were doing in order to find out how the mistakes were occurring, which had been explained. We did not accept that the general enquiry undermined the Claimant. In any event there was no suggestion of any disability related remarks or comments, the Claimant was presenting to Ms Hodgkinson in a robust way and mistakes were being made and inconsistent information was being provided to parents. Other than the Claimant's assertion that Ms Hodgkinson was using aspects of her disability, which we rejected, there was no evidence which tended to suggest that the requirement had any relation to disability and the Claimant failed to prove primary facts that it was related. In any event the reason for the requirement was to understand what was going wrong and we accepted that was the sole reason of Ms Hodgkinson.

199. In the circumstances we would not have found that it had the purpose of violating the Claimant's dignity or caused the prohibited environment. We also would not have found that it reasonably had that effect on the Claimant. Although she felt that she was being undermined a reasonable employee would have understood that the cause of the inconsistencies and mistakes needed to be identified and that therefore it needed to be understood what was happening and who was doing what before a solution could be found.

200. This allegation was therefore dismissed.

<u>In the 2017 Autumn and Spring 2018 terms Ms. Hodgkinson repeatedly met with members of administrative staff individually without Mrs. Adams knowledge or prior consultation. This undermined Mrs. Adams.</u>

201. This was an allegation of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed. The allegation of harassment was put on the basis that it systematically undermined the Claimant

202. Ms Hodgkinson accepted that she spoke to staff members frequently and that she did not always speak to the Claimant first, however she also did this with teachers and did not speak to their year leaders first. The Claimant also accepted that Ms Hodgkinson was entitled to speak to the staff members. She was unable to provide any examples when the staff members

on her team were told about a change without her also being told. Taking into account the general matters outlined above we would not have been satisfied that Claimant adduced primary facts that a non-disabled comparator would have been treated any differently. In any event it was impractical for the Claimant, who was busy, to be consulted each time Ms Hodgkinson wanted to speak to a staff member. We accepted that the times Ms Hodgkinson did this was because she required specific information and we would have been satisfied that the Claimant's disability in no way influenced her decision and the claim of direct discrimination would have failed.

203. Further in the circumstances we would not have been satisfied that Ms Hodgkinson having discussions with members of staff was adverse to the Claimant. If a member of staff could provide an answer without the need to ask the Claimant it would be a reasonable request. It would have been unfavourable to interrupt the Claimant to ask if a staff member could be spoken to. With the lack of examples, we were unable to conclude that there was any unfavourable conduct. For the reasons outline above other than a general assertion that Ms Hodgkinson was using her knowledge of the Claimant to target her, which we rejected, the Claimant failed to prove primary facts that it occurred due to something arising from her disability. In any event we would have been satisfied that the reason for doing so was to easily obtain information and that it no way was influenced by the things arising from the Claimant's disability.

204. In relation to the harassment claim. It was unwanted for Ms Hodgkinson to speak to the Claimant's colleagues. The discussions were in the context of a busy office and that the headteacher was hands on and spoke to many people and from time to time required information. The Claimant was unable to provide any examples of when her team were told things she was not aware of and we did not accept that the discussions undermined the Claimant, however she might have perceived it. Other than the Claimant's general assertion as to the reason, the lack of knowledge of disability by Ms Hodgkinson and the way in which the Claimant presented herself and that Ms Hodgkinson had the right to speak to the staff members, the Claimant failed to prove primary facts from which we could conclude that this occurred for a reason related to disability. Further we were satisfied that the sole reasons were to obtain information in a busy office and that it was impractical to ask the Claimant every time Ms Hodgkinson wanted to speak to a staff member and that it was in no way related to disability.

205. These claims were therefore dismissed.

<u>In the 2017 Autumn term Ms. Hodgkinson told Mrs. Adams she was to carry out performance management of additional staff: six cleaners and the Site Assistant.</u>

<u>This grossly overworked her and changed her role without notice or consultation and without issuing a new job description.</u>

206. This was an allegation of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed. The harassment allegation was based upon paragraphs 6.1.4 (grossly overworking the Claimant) and 6.1.12 (significantly changing her role with notice or consultation)

207. The Claimant was the site manager’s line manager, and he was not experienced and was not performance managing the cleaners. As line manager the Claimant was required to supervise and assist him. The Claimant agreed and was happy to run the meetings, with the line manager in attendance, to act as a model for him, with a view to him doing them on his own the following year. Under the Claimant’s job description, she was required to undertake similar duties commensurate to her post. We did not accept that this was an introduction of a new task, the Claimant already being the site manager’s line manager. The Claimant was happy to undertake the meetings, which she would not have been if it was making her gross overworked. We did not accept that this overworked the Claimant to a significant extent, such that it could be described as being gross.

208. It was significant that the Claimant agreed to the task and said she was happy to do it. The Claimant had not adduced any primary facts that tended to show that a non-disabled comparator would not have been asked to do this or that it would have been less favourable treatment. In any event we would have been satisfied that the reason why she was asked to do so was that she was the line manager of the site manager and disability in no way influenced the decision.

209. For the same reasons the treatment was not adverse, the Claimant being happy to undertake the task. Similarly other than the general assertion the Claimant had not proved primary facts that the this occurred due to something arising from her disability. We would have accepted that the reason she was asked to do it was because she was the relevant line manager and that she did it because she was happy to do so.

210. In relation to harassment, we did not accept that it was unwanted conduct. The Claimant was happy to undertake the meetings. As such the claim of harassment failed. Further the Claimant had not adduced primary facts that it related to disability, other than her general assertion which we rejected.

211. The claim was therefore dismissed.

<u>In the 2017 Autumn and Spring 2018 terms Ms. Hodgkinson dismissed Mrs. Adams views and experience when making operational changes to staff roles.</u>

212. This was a claim of direct discrimination, discrimination arising from disability and harassment. In relation to the harassment, it was set out in paragraph 6.1.8 of the list of issues.

213. We found as a fact that the Claimant's views were not dismissed when making operational changes. Ms Hodgkinson discussed the situation with the Claimant and asked for her suggestions for solutions. Ms Hodgkinson was consulting the Claimant rather than imposing solutions. She was also given opportunities to try and resolve matters within the team herself before Ms Hodgkinson intervened. The Claimant's suggestions were considered before decisions were taken.

214. The allegations of direct discrimination, discrimination arising from disability and harassment therefore failed.

<u>On 28 November 2017Ms. Hodgkinson informed Mrs. Adams she would be tasked with the entirety of the procurement and petty cash processes and that she would be covering the role of Senior Administrative Assistant (Finance) until the replacement joined. This increased Mrs. Adams workload and she had no support and changed her role without notice or consultation and without issuing a new job description.</u>

215. This was an allegation of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed. The harassment was alleged to be grossly overworking her and significantly changing her role without notice or consultation or issuing a new job description or other paperwork.

216. The Claimant's job description provided that she was required to undertake similar duties commensurate to her post. The school was missing a finance assistant during the term and the Claimant was asked to look at the essential tasks which needed to be done and ensure they were carried out and was specifically told to leave all other tasks. The Claimant did not express any concern about this because she was told that other duties she had to do would be reduced. The Claimant had also been unable to explain why there had been overspending and was asked to take over ordering and petty cash. We accepted this was done so that the Claimant had a better

understanding of how the finances were working. We also accepted that Ms Hodgkinson could not risk an overspend due to the state of the finances.

217. The Claimant had responsibility for the preparation of the budget and the daily management of the finances. It made sense that the Claimant would take responsibility for the essential finance assistant roles in the short term. This was not a case of the Claimant's tasks being simply increased, other tasks were reallocated to other staff members in order to reduce her workload and counter the increase. We did not accept that this meant that the Claimant was grossly overworked.

218. Other than the Claimant's general assertion, which we rejected, she did not adduce primary facts which tended to show that a non-disabled comparator would have been treated differently. We accepted that the reason for the request to take over the essential assistant functions, was because a member of the team was missing, and the Claimant had overall responsibility for finance and it would have been in keeping with her skill set. The work needed to be done and a person was missing. We would have been satisfied that the Claimant being disabled played no part in the decision. Further we would have been satisfied that the reason the Claimant was asked to take over ordering and petty case was that she was unbale to explain why there had been overspending and this would have enabled her to understand where the expenses were coming from and maintain a closer eye on the finances. We were satisfied that the Claimant's disability in no way influenced the decision.

219. For the same reasons the Claimant failed to adduce primary facts that something arising from her disability was the cause of the treatment.

220. We accepted that a change of the Claimant's duties was unwanted. However, it was important to bear in mind that the office was a person short and there were serious concerns about the finances. The only matter the Claimant suggested was evidence that it was related to her disability was the general assertion about Ms Hodgkinson using aspects of her disability to force her to leave, which we rejected. The Claimant failed to prove primary facts that tended to show that it was related to her disability. In any event we were satisfied that the Claimant was the best person placed to take over essential finance assistant duties and that there was a need for the Claimant to properly understand where the overspending was coming from. The Claimant was presenting as robust to Ms Hodgkinson and other aspects of what she was required to do were removed to counter the increase. We were satisfied that the reason for the treatment was to ensure that essential tasks were being performed and the finances were understood. We were satisfied that the Claimant's disability in no way influenced Ms Hodgkinson and it was unrelated to disability and therefore the claim failed.

On 1 December 2017 Mrs. Adams was required to train the new Senior Administrative Assistant (Admissions and Attendance). On 4 January 2018 Mrs. Adams was required to train the new Senior Administrative Assistant (Finance). This increased Mrs. Adams workload and she had no support.

221. These were allegations of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed. The harassment was alleged to be grossly overworking her and significantly changing her role without notice or consultation or issuing a new job description or other paperwork.

222. The Claimant's role included identifying and addressing training needs for her staff, which this fell within. Accordingly, it was not something new to her role and always had been part of it. Further other aspects of the Claimant's role had been reduced in order to compensate for increases in other areas. The purpose of the new staff was to alleviate the administrative burden. There was no evidence as to how much additional time this took, and we were not satisfied that this grossly overworked the Claimant.

223. As such the Claimant would have been unable to establish that a non-disabled comparator would not have had to do this or that it was adverse treatment accordingly the direct discrimination and discrimination arising from disability claims would have failed in any event.

224. We also did not accept that it was unwanted conduct. This formed part of the Claimant's job description and she was required to train her staff and was not something new. Further other than the Claimant's general assertion, which we rejected, the Claimant failed to prove primary facts tending to show that it was related to disability. We were also satisfied that the new staff needed to be trained and that it formed part of the Claimant's role to train them. They would need to be trained so that they could work efficiently within the team, and we were satisfied that this was the sole reason for the requirement and it was unrelated to disability.

In December 2017 Ms. Hodgkinson suggested Mrs. Adams could be a mouse in the school pantomime.

225. This was an allegation of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

226. Ms Hodgkinson asked the Claimant if she wanted to be in the pantomime and said if she did not want to have a speaking part she could have a non-speaking role such as a mouse. The same suggestion was made to all staff. The Claimant's factual allegation was not proved, it was not a case of Ms Hodgkinson suggesting that the Claimant should be a mouse in the pantomime and the claim failed.

227. In any event, the Claimant said it was unwanted conduct. We accepted that the reference to a mouse could be a reference to someone who was timid and that the Claimant might have interpreted this as a reference to her confidence. However, that was not the way in which the Claimant was presenting to Ms Hodgkinson at the time. Other than that, the Claimant only relied upon her general assertion, which we rejected. The Claimant had not proved some primary facts which could tend to show that what was said was related to disability and it was significant that the same thing was said to all staff. We were satisfied that Ms Hodgkinson used the same phrase to all staff and that her intention was to provide an example of a non-speaking part. There was no suggestion of any reference to disability or characteristics of the Claimant, and we were satisfied that the Respondent had proved it was unrelated to disability.

228. We were also satisfied that Ms Hodgkinson was trying to find out who wanted a speaking role and that it did not have the purpose of violating the Claimant's dignity or creating the prohibited environment. The Claimant might have felt that it was humiliating, however it was not reasonable for it to have had that effect. The context was important in that she was asked if she wanted to be in the pantomime and whether she wanted a speaking part and if not a suggestion was made as to a non-speaking role. What was said was clear and a reasonable person, by the use of the words 'such as' would not have interpreted it as having that effect.

229. Accordingly, the claim was dismissed.

On 4 January 2019 Ms. Hodgkinson told Mrs. Adams she was not a member of the Senior Leadership Team. This devalued Mrs. Adams' role. Ms. Hodgkinson relieved Mrs. Adams of some of her duties without explaining to staff that she had done so because Mrs. Adams had too much to do.

230. This was an allegation of direct discrimination, discrimination arising from disability and harassment. In terms of harassment this was set out at paragraphs 6.1.2 (excluding the Claimant from the senior management team) and 6.1.6 (devaluing her role). Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

231. The Claimant was never part of the senior leadership team as it related to teaching and learning. Accordingly what Ms Hodgkinson said was factually correct and therefore the Clamant failed to prove the factual basis of the allegation and therefore the claims of harassment, discrimination arising from disability and harassment could not succeed and were dismissed. There was no evidence that the Claimant was excluded from the senior management team and the factual basis of allegation was not proven.

232. In relation to relieving her of duties without explaining to staff that it was because she had too much to do, this was not put to Ms Hodgkinson by the Claimant. In the Claimant's closing submissions, she said that in the meeting she had been asked why she was upset in front of the other staff members, however her note [p235-236] said that it was a private meeting in Ms Hodgkinson's office and the submission was not consistent with the evidence she had presented and cast doubt on the reliability of her account. We were not satisfied that Ms Hodgkinson did not tell the other staff that some of the Claimant's role was being re-allocated because there was too much for her to do. Accordingly, the Claimant failed to prove the factual allegation and the claims failed.

On 9 January 2018, Ms. Hodgkinson told Mrs. Adams she was not required to attend Governors' Resource Committee meetings. Mrs. Adams was no longer included on the list of recipients of minutes of those meetings.– Through the intervention of the Chair of the Committee, Mrs. Adams was later allowed to continue attending Governors' Resources Committee meetings although she was required to leave as soon as she had delivered her report. However, Ms. Hodgkinson did not communicate information pertinent to Mrs. Adams' role, discussed after she had left the meetings. The effect of Ms. Hodgkinson's lack of communication caused Mrs. Adams embarrassment and humiliation.

233. These were allegations of direct discrimination, discrimination arising from disability and harassment. In terms of harassment these allegations were set out at paragraphs 6.1.9 and 6.1.10 of the list of issues. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

234. The Claimant was told on 9 January 2018, that she did not need to attend the Governor's Resource Committee meetings and the Claimant accepted that she was not excluded from attending the meetings. The Claimant was invited to all meetings where there was a financial element to be discussed. The meetings were lengthy.

235. There was no evidence as to whether a non-disabled employee would have been treated differently. We had rejected the Claimant's general assertion as to why it occurred. Other staff were also allowed to attend the meetings, but they also were not required to attend them. The Claimant failed to adduce primary facts that tended to show a non-disabled comparator would have been treated more favourably. Other staff were treated in the same way in that if they were not needed for the meeting they did not have to attend. We accepted Ms Hodgkinson's evidence that she had in mind staff wellbeing and did not want them to feel that they had to attend unnecessary meetings. Accordingly, the claim of direct discrimination would have failed in any event.

236. A reasonable employee would not have considered that this was an adverse request. They were invited to meetings at which their input was required and informed that unless something touched upon their area they did not have to attend. Further for the same reasons as outlined above the Claimant failed to prove primary facts that it was influenced by something arising from her disability. In any event we were satisfied that Ms Hodgkinson was letting staff know that they did not need to attend unnecessary meetings and the things arising from the Claimant's disability had no influence upon her.

237. In relation to harassment, the Claimant considered that it was unwanted and wanted to be part of the meetings. Other than the Claimant's general assertion, which we rejected, there was nothing in what had been said that could be related to disability. Ms Hodgkinson was unaware that the Claimant was disabled at this time. The Claimant was also presenting to Ms Hodgkinson as robust. We were not satisfied that the Claimant had adduced primary facts that it was related to disability.

238. Further Ms Hodgkinson told staff so that they did not need to attend unnecessary meetings in order to maximise wellbeing. We also accepted that the Claimant was not included on the distribution of minutes because Ms Hodgkinson was unaware that she had been before. The minutes were published on the school website in any event.

239. We accepted the reasons given by Ms Hodgkinson and were satisfied that it was not done with the purpose of creating the prohibited environment. We did not accept that it would reasonably have the prohibited effect either. The Claimant was invited to meetings at which she needed to provide information and was told that otherwise she did not need to attend, that was different to being told that she should not attend. The Claimant knew that she was not excluded and could attend if she wanted to. In the circumstances it was not reasonable for it to have the effect and the claim was dismissed.

240. Mrs McNamara did suggest that the Claimant attended the first 10 minutes of meetings, however it was not suggested that this was adverse, less favourable nor unwanted conduct and therefore claims in relation to this could not succeed.

241. The Claimant provided one example when she had not been told of something agreed at a meeting in relation to being shown driving licences. We accepted that Ms Hodgkinson tried to inform the Claimant as to what happened in the meetings, however on this occasion had not done so before a member of staff approached the Claimant. We accepted that this was inadvertent and was not Ms Hodgkinson withholding the information from the Claimant. We accepted that the Claimant was embarrassed because she did not know and the failure to tell her was unwanted

242. The Claimant relied upon her general allegation as to Ms Hodgkinson's motivation, which we rejected. The Claimant could not point to anything else that tended to show that it related to effects of her disability and Ms Hodgkinson was unaware that she was disabled. The Claimant failed to prove primary facts that it was related to her disability. We were satisfied that the reason was because Ms Hodgkinson had not managed to speak to the Claimant on this single occasion and that it was unrelated to the Claimant's disability.

<u>On 1 March 2018, Ms. Hodgkinson e-mailed Mrs. Adams about uploading the most recent safeguarding policy to the school's website. The inference was that if the school's judgment was changed it would be Mrs. Adams' fault.</u>

243. These were allegations of direct discrimination, discrimination arising from disability and harassment. In terms of harassment this was alleged to be criticising and humiliating the Claimant under paragraph 6.1.3 in the list of issues. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

244. The Claimant had been asked to upload the policy and she thought she had done so, but was unaware it needed to be uploaded in 2 places. When Ms Hodgkinson had asked her to do it for a second time, the Claimant checked and thought she had done what was required. The e-mail told the Claimant that the old version was still under the safeguarding tab and was asked to make sure it was done. The Claimant was told if she could not do it to let them know immediately. She was also told of the consequences to the school if it was not done.

245. The Claimant did not adduce evidence, other than her general assertion which we rejected, that a non-disabled employee would have been

treated any differently and she would not have discharged the initial burden of proof. In any event we were satisfied that Ms Hodgkinson was concerned that it had not been done and was unaware that the Claimant had uploaded in one place and was unaware of the other. Ms Hodgkinson was concerned that Ofsted would change the rating of the school and was emphasising the importance of making the change. We were satisfied that the neither the Claimant's disability or anything arising from it influenced Ms Hodgkinson and therefore the claims of direct discrimination and discrimination arising from disability would have failed in any event.

246. We accepted that the e-mail was unwanted for the Claimant. The only matter to which she could point towards it being that it related to disability was her general assertion about Ms Hodgkinson. There was no reference to disability expressly or by implication. It was a serious matter that needed to be updated and had consequences if it had not been. We were satisfied that any employee in the same situation would have received the e-mail. The Claimant failed to prove primary facts which tended to suggest that the sending of the e-mail was related to disability and we were satisfied that it did not, and the claim was dismissed.

247. We accepted that the intention behind the e-mail was to ensure that the policy was uploaded, and it was not for the purpose of creating the prohibited effect. If the e-mail had related to disability we would have been satisfied that the Claimant felt humiliated and it was reasonable it would have that effect, given that she believed she had done what she had been asked to do.

From 2 March 2018, The Respondent failed to investigate Mrs. Adams' grievance.

248. This was an allegation of discrimination arising from disability.

249. Mr McGrath followed the policy in that where the complaint related to an action started under a different procedure that it would usually be managed within that procedure. The events alleged by the Claimant and the subject matter of the disciplinary investigation were intertwined and it was a reasonable management decision to combine the two. Ms Mullins investigated the Claimant's grievance to some extent, although she did not ask her further questions. We accepted that Ms Mullins spoke to Ms Hodgkinson and Mr Wartnaby and concluded that there was no evidence of bullying by Ms Hodgkinson. The grievance was therefore investigated. The outcome of the investigation was poorly communicated to the Claimant and involved a very short passage in the investigation report and the evidence obtained was not detailed, but it was still investigated and therefore the unfavourable treatment alleged did not occur.

250. In any event the Claimant said in closing submissions that the failure to investigate was not caused by something arising from her disability in the same way that emotive language had been used by Ms Mullins at the disciplinary hearing. We rejected the Claimant's general suggestion that aspects of her disability were being used against her to force her to leave. The Claimant failed to adduce primary facts that tended to show that Ms Mullins was influenced by one or more of the things arising from her disability. In any event we were satisfied that Ms Mullins thought that she had done what she was required to under the policy and the effects of the Claimant's disability had no influence on her.

251. This claim was therefore dismissed.

On 13 March Ms. Hodgkinson called Mrs. Adams into a meeting to discuss Mrs. Adams' reply to Brian Jukes e-mail. Ms. Hodgkinson was hostile and angry during this meeting.

252. These were allegations of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

253. On 13 March 2018, the Claimant and Ms Hodgkinson were due to have a meeting about the budget. The Clamant had been previously told that she could not make curriculum purchases without approaching Ms Hodgkinson. When a staff member asked for a repair to his laptop to be authorised the Claimant said that she could not do it and Ms Hodgkinson e-mailed her and said she was not happy with the response. At the start of the meeting Ms Hodgkinson explained why it was not a curriculum matter and there was a dispute as to whether the Clamant had been told that she could not authorise such payments. We accepted that Ms Hodgkinson was annoyed by what had happened, but she was not angry, hostile or threatening to the Claimant as demonstrated by moving onto the budget. Ms Hodgkinson asked the Claimant how the error with the carry forward had come about in the budget and the Claimant became distressed.

254. It was reasonable for Ms Hodgkinson to discuss whether the authorisation fell within a curriculum purchase and to discuss why the error had been made with the carry forward in the budget. We were not satisfied on the balance of probabilities that the Ms Hodgkinson was angry or hostile in the meeting and that the Claimant became upset because she was being asked about why her budget was incorrect.

255. There was nothing said in the meeting which was a reference, express or implied, to disability or an effect of the Claimant's disability. Ms

Hodgkinson did not know that the Claimant was disabled. Until the meeting the Claimant had not broken down and become distressed and this occurred at the end. We rejected the Claimant's general proposition as to why Ms Hodgkinson acted as she did for the reasons already stated. The Claimant did not adduce any evidence that tended to show a non-disabled comparator would have been treated any differently and did not adduce evidence that tended to show that it was caused by something arising from her disability. In any event we accepted that Ms Hodgkinson was trying to understand why Mr Jenkins' request had not been granted and why the error had occurred in the budget and that neither the Claimant's disability nor any of the things arising had any influence.

256. We accepted that the challenges to the Claimant were unwanted. However, the Claimant until that meeting had been presenting in a robust manner, a mistake in the budget had occurred for which the Claimant was responsible. Other than the Claimant's general assertion, which we did not accept there was no evidence which tended to suggest that the incident was related to the Claimant's disability, and we were not satisfied that it did, and the claim failed.

<u>Ms. Hodgkinson always had Mr. Wartnaby with her in meetings with Mrs. Adams. This was intimidation.</u>

257. These were allegations of direct discrimination, discrimination arising from disability and harassment. Ms Hodgkinson and the Respondent did not have actual or constructive knowledge that the Claimant was disabled at the time of the allegation, accordingly the claims of direct discrimination and discrimination arising from disability failed.

258. At the start of Ms Hodgkinson's tenure, she had asked the Claimant if she was happy for Mr Wartnaby to attend meetings with her in order for him to develop and observe with a view to one day becoming a head teacher. The Claimant agreed to his attendance. We accepted that Mr Wartnaby attended meetings on a similar basis with other members of staff. Further the Claimant subsequently asked for Mr Wartnaby to be her point of contact, which suggests that she was not intimidated by him. We were not satisfied that the Claimant established that this was intimidation.

259. For the same reasons as outlined above the Claimant would have failed to prove primary facts in relation to the claims of direct discrimination and discrimination arising from disability.

260. In relation to harassment the Claimant also failed to prove that this unwanted conduct. She gave her consent and understood the reason why and did not retract it.

261. In any event there was nothing suggested in any of the meetings which could be construed as a discriminatory comment or one which referenced depression or symptoms of depression in an untoward or derogatory fashion. Mr Wartnaby was attending for his personal development. We rejected the Claimant's general contention for the reasons outlined earlier. The Claimant did not adduce primary facts which tended to suggest that his attendance was related to disability. We were satisfied the sole reason for his attendance was as a learning aid and his development with a view to becoming a head teacher and it was unrelated to disability.

262. Accordingly for the same reasons we would not have been satisfied that the purpose was to create the prohibited effects. Further we were not satisfied that it had that effect on the Claimant. She had consented to his attendance and wanted him to be her point of contact, which would not be the case if she was intimidated. Further there was never a suggestion that he did anything untoward in the meetings.

On 18 July 2018 Ms. Hodgkinson instigated disciplinary action against Mrs. Adams (investigation) when she was on sick leave. Ms. Hodgkinson appointed herself as the investigating officer.

263. These were allegations of direct discrimination and discrimination arising from disability. At the time of the allegation Ms Hodgkinson did not know and could reasonably be expected to know that the Claimant was disabled and accordingly she did not have the requisite knowledge. The claims were therefore dismissed.

On 18 May 2018 Ms. Hodgkinson accused Mrs. Adams of theft.

264. This was an allegation of harassment.

265. Ms Hodgkinson did not allege in the letter containing the allegations that the Claimant had committed theft. There had been reference to where some cameras were and not all of them had been found, however there was no suggestion that the Claimant had taken them. Similarly, there was a request to explain why the petty cash had not been reconciled, but no suggestion that the Claimant had taken the money. The Claimant's interpretation that there was an allegation of theft was unreasonable. The Claimant failed to prove the factual basis of the allegation and it was dismissed.

At the same time holding her responsible for issues which inevitably arose as a result of those actions.

266. The was an allegation of harassment. It was based on being held responsible for the matters subject to the later investigation on the basis that

Ms Hodgkinson's treatment of the Claimant had caused them. For the reasons set out above we were not satisfied that Ms Hodgkinson treated the Claimant poorly, undermined her or grossly overworked and accordingly the factual basis of the allegation was not proven by the Claimant. There were errors occurring before the start of Ms Hodgkinson's role at the school and there was a need to ensure that the budget was closely monitored and the problems within the administration team were resolved in order to prevent complaints. The Claimant was requested to undertaken reasonable management instructions. We accepted that it would be unwanted for there to be an investigation into the matters alleged against the Claimant.

267. Other than the Claimant's general assertion that Ms Hodgkinson was focusing on effects of her disability, which we rejected, there was no evidence in terms of comments relating to disability or depression. The Claimant was given time to find answers when she did not know them, and adjustments were made to her duties to take into account new or increased tasks. Ms Hodgkinson had no knowledge that the Claimant was disabled at the relevant times and until the meeting in March 2018, she was presenting as robust. The Claimant failed to adduce primary facts which tended to suggest that holding her responsible for work she had done was related to disability. In any event we were satisfied that the reason for instigating the investigation was that Ms Hodgkinson was concerned about the information she was given by EFS. The allegations were serious and were matters which any reasonable employer would have investigated. We would have been satisfied that disability had no influence in the decision and it was in no way related to disability.

268. The claim was therefore dismissed.

<u>On 11 December 2018 the Respondent suspended Mrs. Adams</u>

269. This was an allegation of discrimination arising from disability.

270. We accepted that a reasonable employee would consider being suspended to their disadvantage because they are prevented from being able to go to work. We accepted that the Claimant thought this.

271. The Claimant said that it was caused by the things arising from her disability were being used by Ms Mullins to try and exacerbate her condition and cause her to leave, however this was a general assertion and although the Claimant might subsequently have believed it, it is not evidence. Ms Mullins was investigating serious allegations and had withdrawn some already because she did not think that they could be maintained. There was no evidence that Ms Mullins had made any derogatory remarks or comments that related to depression or the effects. The allegations involved alleged financial misconduct and the Claimant's role was heavily involved in the

finances of the school. The Claimant failed to show which events tended to support her general assertion. We were not satisfied that the Claimant had proved primary facts from which we could conclude that the things arising from her disability had any influence on the decision to suspend.

272. In any event we accepted Ms Mullins evidence that the reason was because she was concerned to do otherwise could jeopardise the investigation. This was reasonable given that the allegations involved finance and the Claimant's role was heavily involved in the finances. We were satisfied that the effects had no influence in the decision to suspend the Claimant and the reason was to protect the integrity of the investigation.

273. The claim was therefore dismissed.

<u>On 5 April 2019 the Respondent subjected Mrs. Adams to disciplinary action/disciplined the Claimant.</u>

274. On 5 April 2019, the Claimant was informed that Ms Mullins had recommended she faced disciplinary action. We accepted that the Claimant considered this was adverse and a reasonable employee would also think this.

275. The Claimant said that it was caused by the things arising from her disability were being used by Ms Mullins to try and exacerbate her condition and cause her to leave. Ms Mullins had considered all of the evidence, including that provided by the Claimant, withdrawn some of the allegations and looked into the Claimant's grievance. there had not been any suggestion of disability or depression related comments. The Claimant's sickness absence was not part of the allegations. The Claimant had difficulty in explaining why the things arising from her disability were the cause. It was notable that the Claimant did not suggest that her ability to work to a sufficient standard was affected. The allegations related to incidents which took place prior to the Claimant becoming unwell. The Claimant failed to adduce primary facts which tended to show that she was required to attend a disciplinary hearing was influenced by the things arising from her disability.

276. In any event we were satisfied that the influence for Ms Mullins was that the evidence she had considered tended, to show that misconduct had occurred and that the allegations were serious and numerous. An employer faced with such allegations could reasonably recommend that a hearing took place. We accepted that the effects of the Claimant's illness had no influence on her decision and that it was solely based on the evidence obtained.

<u>On 22 May 2019, at the start of the disciplinary hearing, Miss Mullins repeatedly accused Mrs. Adams of dishonesty and a lack of integrity. From the start of the</u>

disciplinary hearing, Miss Mullins referred to the allegations as constituting gross misconduct and repeated this throughout her statement of case. At all times previously, the allegations were referred to as constituting misconduct.

277. These were allegations of direct discrimination and harassment

278. When Ms Mullins was addressing the panel she drew its attention to the staff code of conduct and that staff are expected to act with honesty and integrity. Ms Mullins did not accuse the Claimant that she was dishonest or lacked integrity and the factual basis of this allegation was not proved.

279. In the letter inviting the Claimant to the disciplinary hearing she was informed that all sanctions including dismissal could be considered. The Claimant cross examined the Respondent's witnesses on the basis that for a first offence dismissal could only be for gross misconduct. Ms Mullins referred the panel to the examples of gross misconduct in the disciplinary procedure in her address. We accepted that the word 'gross' had not been used before.

280. The Claimant said that it was caused by the things arising from her disability were being used by Ms Mullins to try and exacerbate her condition and cause her to leave, which was a general assertion. There was never a suggestion of derogatory language, Ms Mullins had included the Claimant's explanations in her report and had informed the Claimant that there was a risk of dismissal. The allegations were considered to be serious. The Claimant failed to prove primary facts that tended to suggest that a non-disabled person would have been treated differently. In any event the respondent proved that the reason it was mentioned was because dismissal was being considered and the panel should be aware of things which could give rise to gross misconduct. We accepted that there was no ulterior motive and that it was for a non-discriminatory reason.

281. We accepted that it was unwanted that reference was made to gross misconduct. However, for the same reasons the Claimant failed to prove primary facts that tended to show it was related to disability. It was said in the context of a disciplinary hearing at which dismissal could be an outcome and involving serious allegations. We were satisfied that it was unrelated to disability.

282. This claim was therefore dismissed.

On 10 June 2019, the Respondent dismissed Mrs. Adams.

283. This was an allegation of discrimination arising from disability. We accepted that dismissal was some thing adverse and was therefore unfavourable treatment.

284. The panel read all documents before starting the hearing. They had the benefit of hearing from witnesses and asked questions. The Claimant and her companion were also able to question the witnesses. We accepted that they considered the evidence put forward by the Claimant, including the statement from Ms Smith and the e-mails from Mr Kindon. They considered whether the Claimant's job description was genuine. The allegations were considered and although many were upheld some were found not to be substantiated, supporting that they were properly considering the allegations. The reasons for the decision were set out in the outcome letter. After considering all of the evidence they concluded that the Claimant had been gross negligent in relation a number of financial matters which had caused the school losses. They also concluded that the Claimant had been in breach of the data protection policy to a level considered to be gross misconduct. The hearing took place over two days and the Claimant was able to set out her case. When making closing submissions the Claimant said that she did not think that her dismissal was influenced by anything arising from her disability. She said that the decision had an effect on her confidence and self-esteem, and she considered that she had been used as a scapegoat, but that was unrelated to her disability. The panel was faced with many allegations of a serious nature, which caused the school losses and would have caused it to be held in a poor light by others. There was not any evidence tending to show that the Claimant's dismissal was influenced by the things arising from her disability and the Claimant failed to discharge the primary burden of proof.

285. In any event we were satisfied that the reason for the dismissal was the weight of evidence against the Claimant and that the effects of her disability had no influence on the decision to dismiss her.

286. This allegation was therefore dismissed.

<u>Between 18 May 2018 and 15 November 2019, there were repeated, protracted delays in the disciplinary process.</u>

287. This was an allegation of discrimination arising from disability. We accepted that the process was lengthy, however the Respondent did not have constructive knowledge of the Claimant's disability until September 2018.

288. The audit report was not received until 20 September 2018. Ms Mullins provided a copy of the report to the Claimant on 26 September 2018, after having considered the evidence she had at that stage and reviewing the allegations. It was a reasonable period of time to consider that report. The Claimant provided her responses on 22 and 26 October 2018, which Ms Mullins had to consider. After the Claimant's fit note indicated that she could

be fit to return an occupational health report was sought and received on 16 November 2018, following which Ms Mullins took advice. There was a short delay before Ms Mullins asked whether the Claimant wanted to attend an investigatory meeting on 10 December 2018. A further occupational health report was received on 19 December 2018 about the Claimant's health, and she was invited to attend an investigatory meeting on 30 January 2019. Ms Mullins then considered the evidence given by the Claimant, spoke to witnesses and further reviewed the allegations. The Claimant was informed that it was recommended that the case proceeded to a disciplinary hearing on 5 April, about 2 months after the investigation meeting and gave her advance notice of the potential hearing dates. On 26 April 2019, the Claimant was formally invited to attend the hearing on 9 and 10 May 2019. The Claimant sought more time to prepare, which was granted, and the Claimant attended the hearing on 22 and 23 May. The Claimant was sent the outcome on 10 June 2019. The Claimant appealed against the decision on 23 June 2019 and an appeal was scheduled for 17 and 18 July 2019. The Claimant was unable to attend and due to the lack of available of panel members and the Claimant it was not possible to reschedule it until 15 and 22 October 2019. The outcome was sent on 12 November 2019. We accepted that there was a considerable amount of information to consider and many allegations and that it was necessary to convene meetings when all could attend. The process took a long time which was something adverse, however the reasons behind it were reasonable.

289. The Claimant suggested that Ms Hodgkinson, and Ms Mullins had been influenced by the EPS advisers, however this was not explored with either of them in cross-examination. The Claimant also said that they both knew which buttons they had to push to exacerbate her symptoms and this formed part of her general assertion which we rejected. During the process the Respondent was seeking advice from occupational health and EPS as to the Claimant's fitness to attend. She was allowed to provide information in written form and be accompanied by her partner rather than a union representative or colleague and when she requested more time she was given it. The Claimant failed to adduce primary facts that the effects of her disability had any influence on the length of the process.

290. In any event we accepted that Ms Mullins had a significant amount of work to do in the investigation, in an amongst her other responsibilities as headteacher. She sought advice at many stages and when it came to arranging hearings there was a need to find dates when all panel members, witnesses and parties could attend. We were satisfied that Ms Mullins was trying to proceed with the process as quickly as possible and when the Claimant asked for more time, she was given it. In the circumstances the amount of time taken was not unreasonable and we were satisfied that the things arising from the Claimant's disability had no influence in the time taken for the process to be concluded.

On 12 November 2019 Mrs. Adams' appeal against dismissal was dismissed.

291. This was an allegation of discrimination arising from disability and we accepted that the dismissal of an appeal was something adverse and unfavourable treatment.

292. At the appeal evidence was heard from witnesses, including Ms Smith. All of the documentation and evidence was considered by the panel. The hearing took place over 2 days, and we accepted that the Claimant had a full opportunity to make her case. The panel considered the allegations and concluded that 7 were gross misconduct, demonstrating that they had fully reviewed all of the evidence. In closing submissions, when asked what tended to show that the decision was due to something arising from her disability, the Claimant said that she had been confusing cause and effect, which was similar to what she said about the original decision to dismiss. It was suggested that there was a failure to do checks and balances and effectively to carry out further investigation, however the panel did ask Mr McGrath some questions after the hearing, but was otherwise satisfied that it had received all of the evidence it required. The Claimant did not suggest what further evidence there could be that might assist. There was no suggestion of improper comments that could be considered to relate to disability or depression. The Claimant failed to adduce primary facts that tended to suggest that the effects of her disability had any influence on the decision to dismiss the appeal.

Failed to take into account the Claimant's sickness record when deciding on sanction

293. This was an allegation of discrimination arising from disability. Both panels considered the medical evidence provided by the Claimant and took it into account when deciding on sanction. We accepted that the allegations took place in time before the Claimant's sickness absences. It was taken into account, but because the events occurred before the absence it was still deemed that dismissal was the appropriate sanction. Accordingly, this was not unfavourable treatment, and the claim was dismissed.

Reasonable Adjustments

Did the Respondents generally apply a provision, criteria and/or practice namely that the investigator, disciplinary panel and appeal panel had access to advice from EPS"?

294. Under the disciplinary policy the investigator and panels were provided access to and were recommended to take advice from EPS. The Claimant was not provided that same access at the hearings.

Did the PCP put the Claimant at a substantial disadvantage in comparison to with persons who are not disabled?

295. The Claimant did not cross-examine the Respondent's witnesses in relation to this issue. In closing submissions, the Claimant explained that the disadvantage was that there was not a level playing field with management so that she did not have the same access to the advice and accepted that this was equally applicable to all employees. The Respondent submitted that the Claimant needed to show substantial disadvantage compared to those who were not disabled, but she was asserting that anyone was disadvantaged and therefore the claim could not succeed. Further it did not create a disadvantage because it was important that management were correctly advised on the process. Further EPS were employed by the school and therefore would not be independent in giving advice to the Claimant and therefore even if the Claimant did have access it would not alleviate the disadvantage. We accepted that the Claimant would find the process more difficult due to the nature of her disability, however she had access to her trade union, was accompanied at hearings by her partner and was able to take legal advice. We accepted the Respondent's submission that the HR services were funded by the Respondent and that advice would not be independent, it was significant that the Claimant was not prevented from taking advice of her own and that it was to her benefit that advice on process was received by the Respondent. There was no evidence that EPS were involved in making the decision. We were not satisfied that there was a disadvantage to the Claimant. However, even if there was a disadvantage all employees were faced with the same situation and on the Claimant's submission the disadvantage was equally applicable. Accordingly, the Claimant failed to establish that she was put to a substantial disadvantage compared to non-disabled employees.

296. Even if the Claimant had been put to a substantial disadvantage it would not have been a reasonable adjustment to provide her access to EPS advice. EPS was funded by the Respondent to provide it with advice. There would be a conflict of interest for EPS to give advice both to an employee and employer in relation to the disciplinary process. The function of EPS was to advise the Respondent as to the process and procedures rather than the decision it should take. The Claimant had access to advice of her own. There was no evidence as to how that conflict of interest could be removed. It would not be reasonable to expect the Respondent to provide the Claimant with access to its adviser to advise on the process it was already receiving advice on.

Did the Respondents generally apply a provision, criteria and/or practice namely that it had a disciplinary policy

297. The Respondent had a disciplinary policy. The Claimant had identified in her witness statement a number of elements that she said were policies, however accepted in cross-examination that they were not provisions, criteria or practices, apart from in relation to EPS.

<u>Did the PCP put the Claimant at a substantial disadvantage in comparison to with persons who are not disabled?</u>

298. The Claimant was signed off work with depression and deemed not fit to attend, she had been taking medication and was therefore not as mentally robust as non-disabled people. We accepted that she would have found it more difficult to cope with the process than a non-disabled person and that the effect was more than minor or trivial.

<u>Did the Respondents not know, or could they not be reasonably expected to know that the Claimant was likely to be placed at such a disadvantage?</u>

299. The Respondents had been told that the Claimant's GP on 17 September 2018 that she was struggling with her symptoms of depression and was finding lack of communication and long delays distressing. The Respondent was therefore aware that Claimant was finding it difficult to cope

<u>Did the Respondents take such steps as were reasonable to avoid the disadvantage?</u>

300. An adjustment not only has to be reasonable, but it must operate so to avoid the disadvantage of the PCP.

301. The Respondent adjusted the normal process by permitting the Claimant to attend meetings with her partner, rather than a colleague or union representative. She was also permitted to provide written representations at first instance, until she was well enough to attend an investigation meeting. When the Claimant requested additional time to respond, those requests were granted. The Claimant's request to change venues and hearing times were also granted.

302. The Claimant suggested that dealing with the process more quickly would have been a reasonable adjustment. For the reasons set out above the time taken to conduct the process from the time the Respondent had constructive knowledge of the Claimant' disability was reasonable. The investigation was complex, the Claimant's responses needed to be properly considered in the light of other evidence obtained, advice needed to be sought and this was against the background of Ms Mullins having her other headteacher responsibilities. The reviews resulted in the number of allegations being reduced. There were also the logistical issues of ensuring all those relevant for hearings could attend. It was in the interests of both

parties for there to be a full investigation, rather than shortcuts being taken. We accepted that if the process had been shorter it would have assisted the Claimant and reduced the impact of the process on her, however due to the nature of the allegations and the number and severity it was not reasonably practicable to shorten the process. In the circumstances of the case the Respondent conducted the process within a reasonable period of time, and it would not have been a reasonable adjustment to shorten it.

303. The Claimant submitted that dealing with her grievance under a separate process would have assisted because she might not have been subjected to disciplinary proceedings. The Claimant was faced with serious allegations, the origin of which stemmed from the budgets which had been in place before Ms Hodgkinson became the interim headteacher. Ms Hodgkinson was acting reasonably in trying to ascertain financial information and trying to find out what was happening within the Administration team and trying to find solutions. The grievance was raised after Ms Hodgkinson started her investigation and related to the work that the Claimant was carrying out. The matters were intertwined and to separate them would be extremely difficult. Ms Mullins investigated what the Claimant had alleged with Ms Hodgkinson and Mr Wartnaby and concluded that there was not evidence of bullying or harassment. The Claimant's grievance was investigated and dealt with by Ms Mullins, however her conclusion was not to the Claimant's liking. We were not satisfied that separating the procedures would have removed any of the disadvantage, the Claimant would still have needed to have been investigated in relation to disciplinary allegations and it would have increased the time the whole process took. It was notable that the basis for the allegations was supported by the Internal Audit Report, which included not only matters relating to the budget, but financial irregularity. The Claimant would need to provide explanations in relation to those matters irrespective of the outcome of a separate grievance process. In the circumstances dealing with the grievance under a separate process would not have removed the disadvantage and could have increased it. This was therefore not a reasonable adjustment.

304. The Claimant was sent letters informing her of updates with what was happening with the investigation. Ms Mullins updated the Claimant that there would be a disciplinary hearing before the dates had been confirmed in order to pre-warn her and she was updated as to when she would receive documentation. The Claimant also had weekly contact with Mr Wartnaby. The Claimant did not suggest what additional communication was required in relation to the disciplinary policy. The Claimant was kept informed of the developments. We were not satisfied that an adjustment to the policy about communication would have ameliorated the disadvantage experienced by the Claimant, after the Respondent had constructive knowledge of her disability.

305. The Claimant suggested that assisting her to return to work on shorter hours would have been a reasonable adjustment. After the Claimant was fit to return to work, she was suspended, which prevented her return to work. It therefore would not have been reasonable for the Claimant to return on shorter hours, and it was not a reasonable adjustment.

306. The Claimant also suggested mediation might have assisted to repair the working relationship. The Respondent did not have constructive knowledge of the Claimant’s disability until after Ms Hodgkinson had left the school and the duty to make adjustments had not arisen at that stage. In any event we accepted the Respondent’s submission that mediation would not be a practical adjustment to the disciplinary policy. If disciplinary allegations are made, they have to be investigated, particularly if serious. The allegations would still be present even if a mediation took place and this would not have been a reasonable adjustment.

307. In the circumstances the Respondent adjusted the policy as set out above. It was not possible to reduce the effect of the disciplinary policy on the Claimant’s disadvantage to zero, because disciplinary proceedings will always be stressful for an employee. The steps taken by the Respondent were reasonable in the circumstances and we did not consider that more could have been reasonably done. As such we were not satisfied that there was a failure to make reasonable adjustments and the claim was dismissed.

Conclusion

308. As such it was unnecessary to consider whether the claims were in time or whether time should be extended, or the defence of justification. Accordingly, the claims of direct discrimination, discrimination arising from disability. Harassment and failing to make reasonable adjustments were dismissed.

Employment Judge J Bax
Dated: 30 November 2021

Judgment sent to parties: 16 December 2021

FOR THE TRIBUNAL OFFICE