EMPLOYMENT TRIBUNALS

Claimant: **Miss I Khanem**

Respondent: **Berkshire Schools Trust**

Heard at: **Reading Employment Tribunal (Hybrid hearing)**

On: **11th to 13th October 2021 (and on 4th and 5th November 2021 in chambers.)**

Before: **Employment Judge Eeley**
Ms J Stewart
Mr J Appleton (via CVP)

Representation
Claimant: In person
Respondent: Ms A Stroud, counsel

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal fails and is dismissed.

2. The claimant's claim of direct age discrimination (section 13 Equality Act 2010) fails and is dismissed.

3. The claimant's claim of indirect age discrimination (section 19 Equality Act 2010) fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a schoolteacher from 1st September 2014 to 15th May 2019. By a claim form presented on 6th September 2019 the claimant brought claims of unfair dismissal, direct and

indirect age discrimination. The respondent denied the claims and asserted that the claimant had been fairly dismissed by reason of gross misconduct.

2. At the outset of the hearing the Tribunal took time to clarify the basis of the claimant's claims. In particular, we clarified the way that the claimant put her indirect discrimination claim. She accepted that her case was that:

    a) The respondent applied a PCP of dismissing more expensive teachers;
    b) That PCP puts staff with whom the claimant shares the characteristic of age at a particular disadvantage when compared to younger staff;
    c) It puts the claimant at that particular disadvantage; and
    d) The respondent cannot show it to be a proportionate means of achieving a legitimate aim.

    The claimant contends in broad terms that she is more expensive to employ because of her age and that there is a practice deployed in the education sector, and in the respondent's school in particular, of dismissing older, more expensive teachers (often using capability procedures) and then replacing them with younger, less expensive, less experienced teachers. She asserts that this is what happened to her and that it was an act of indirect age discrimination. During the course of the hearing the respondent confirmed that it did not pursue the defence that its actions were a "proportionate means of achieving a legitimate aim".

3. It follows that the claimant's claim of direct discrimination is that the dismissal was an act of direct discrimination. She is asserting that, in dismissing her, the respondent treated her less favourably than it would have treated a younger comparator in comparable circumstances. She asserts that the less favourable treatment was because of her age. The respondent denies the claim and says that the dismissal was on grounds of conduct and in no sense whatsoever connected to age. It does not pursue a 'proportionate means of achieving a legitimate aim' defence.

4. In relation to the unfair dismissal claim the issues to be determined were:
    a) What was the reason for the dismissal? Was it a potentially fair reason?
    b) Did the respondent have a genuine belief that the claimant had committed the alleged misconduct?
    c) If so, was that belief based on reasonable grounds following a reasonable investigation?
    d) Was the decision to dismiss within the so-called range of reasonable responses which a reasonable employer might have adopted?
    e) Was the procedure utilised by the respondent a fair one?

5. The Tribunal was presented with an agreed bundle of documents with some late additions. It ran to 532 pages. We read the relevant pages to which we were referred by the parties. References in square brackets below are references to pages in the bundle unless otherwise indicated. We received

written witness statements and heard oral evidence from the following people:

a) The claimant, Miss Iqbal Khanem;
b) Joss Kitching, Co-Head Teacher;
c) Michaela Singh, Deputy Head Teacher and investigating officer;
d) Hazel Jones, Foundation Governor and chair of the disciplinary hearing;
e) David Locke, Trustee and Non- Executive Director of Trust, chair of appeal Hearing.

We also received oral submissions on behalf of both parties, for which we were grateful.

Findings of Fact

The School

6. The claimant was employed by the respondent to teach at New Christ Church School ("the school.") The school is a primary school and is one of the schools run by the respondent Trust. There are three schools in total which are run by the Trust. The school has academy status.

7. The school is a relatively small school. It has one form entry per year group. During 2018/2019 the school employed 11 teachers and 2 HLTAs (Higher Level Teaching Assistants). The Tribunal heard evidence that the school was financially stable and that the management team at the school prioritised quality of teaching over the relative cost of the teachers that they employed. The evidence was that the respondent found it difficult to recruit and retain good teachers due to the location of the school. The claimant led no evidence to contradict the evidence given by the respondent on these issues and we accept the respondent's evidence in this regard. The claimant gave general evidence about patterns of recruitment and retention within the teaching profession. Her evidence was derived from trade union sources, the TES and from online teachers' chat forums. This evidence indicated, so the claimant said, that there was a pattern of schools dismissing older, more expensive teachers, particularly in academies. This was general evidence which reflected the claimant's own personal opinion. However, it was not sufficiently specific to contradict or outweigh the respondent's evidence about the particular financial situation of this school or its recruitment priorities.

Teachers' pay

8. We heard evidence regarding teachers' pay scales and how teachers would progress through them during the course of their teaching careers. The material facts we find are that newly qualified teachers ("NQTs") would start at the bottom of the main pay scale ("MPS"). They would generally be

expected to go up through that pay scale via increments on an annual basis, absent any particular and substantial reason why the increment should not be awarded in any individual case. There were six levels within the MPS and the net result was that a teacher would generally reach the top of the MPS within five to six years of starting work in the profession as a qualified teacher. This is actually what had happened to the claimant and we find that at the date of dismissal she was engaged at the top level of the MPS. It is likely that she was already at the top of this pay scale when she was first employed by the respondent given her age and the length of her teaching career and associated experience.

9. In addition to the MPS there is an upper pay scale ("UPS"). Teachers do not automatically qualify for remuneration pursuant to the UPS. It is quite feasible that a teacher may remain on the MPS for several years, if not the remainder of their teaching career. Individual teachers are required to make an application to be paid on the UPS. Applications to enter the UPS are generally invited on an annual basis. In order to qualify, a teacher must be an outstanding classroom practitioner and must demonstrate leadership or impact across the whole of the school on a sustained or long-term basis. If he or she is accepted onto the UPS, the teacher may progress through further increments, on average every two years, and thereby receive further increases in pay up to the top of the UPS. The claimant never applied to be paid on the UPS and she therefore remained at the top level of the MPS throughout the period of time with which we are concerned.

10. The net result of the above is that a newly qualified teacher at the beginning of his/her career and straight out of training (i.e. in their early to mid-20s) would, as a general rule, be lower down the MPS than an older, more experienced teacher. However, that pay disparity would close relatively rapidly over time. By his or her late 20s the younger teacher would be likely to have reached the top of the MPS and would potentially be at the same level of pay as the claimant. If the younger teacher then applied successfully for admission to the UPS they could overtake the claimant (the older teacher) in terms of their level of remuneration (and associated cost to the school budget). That gap might then widen further over time as the younger teacher might progress through the increments on the UPS towards the top of the UPS leaving the claimant further behind at the top of the MPS. All of this means that in the early stages of a teacher's career there might well be a correlation between younger teachers and lower pay (assuming the teacher was not a mature entrant to the profession). However, the potentially age-related element of the pay differential would be of declining significance and would generally disappear after 5-6 years. Other factors would then determine the pay differential and these factors would be less related to the number of years of experience in the profession and, therefore, less likely to correlate to age. This means that, whilst there is an age and experience element to teachers' pay, that element of the pay differential usually declines/disappears over time depending on each individual teacher's career choices and career progression.

The applicable policies and procedures

11. The Department for Education's statutory guidance for schools and colleges: "Keeping children safe in education" states [130]:
"Safeguarding and promoting the welfare of children is everyone's responsibility. Everyone who comes into contact with children and their families has a role to play. In order to fulfil this responsibility effectively, all practitioners should make sure their approach is child-centred. This means that they should consider, at all times, what is in the best interests of the child.…
Safeguarding and promoting the welfare of children is defined for the purposes of this guidance as:
    - *protecting children from maltreatment*
    - *preventing impairment of children's health or development*
    - *ensuring that children grow up in circumstances consistent with the provision of safe and effective care*
    - *taking action to enable all children to have the best outcomes…:"*

    The same guidance document goes on to state at paragraph 46:
"Neglect: the persistent failure to meet a child's basic physical and/or psychological needs, likely to result in serious impairment of the child's health or development.… Neglect may involve a parent or carer failing to provide adequate food, clothing and shelter (including exclusion from home or abandonment); protect a child from physical and emotional harm or danger; ensure adequate supervision (including the use of inadequate caregivers); or ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs."

12. The school itself has a Safeguarding and Child Protection Policy [87]. This document states that:
"We recognise that children have a right to feel secure and cannot learn effectively unless they do so. Parents, carers and other people can harm children either by direct acts or failure to provide proper care or both. Children may suffer neglect, emotional, physical or sexual abuse or a combination of such types of abuse. All children have a right to be protected from abuse."
The aims of the policy include establishing a safe environment in which children can learn and develop.

    The definition section of the document [98] defines safeguarding and promoting the welfare of children as referring to:
"the process of protecting children from abuse or neglect, preventing the impairment of health or development, ensuring that children grow up in circumstances consistent with the provision of safe and effective care and taking action to enable all children to have the best outcomes."

    Neglect is defined as:
"the persistent failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development.… Failing to protect a child from physical and emotional harm or danger; failure to ensure adequate supervision, including the use of inadequate caregivers; or the failure to ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs."

Emotional abuse is defined as:
"the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child's emotional development. It may involve conveying to children that they are worthless or unloved, inadequate or valued only insofar as they meet the needs of another person. It may include not giving the child opportunities to express their views, deliberately silencing them or "making fun" of what they say or how they communicate. It may feature age or developmentally inappropriate expectations being imposed on children. These may include interactions that are beyond a child's developmental capability, as well as over protection and limitation of exploration and learning, or preventing the child participating in normal social interaction… Some level of emotional abuse is involved in all types of maltreatment of a child, although it may occur alone."

13. The school's "Single Equality and Community Cohesion Policy" states in its introduction that: *"We will ensure that every pupil irrespective of race, disability, gender, religion and belief or sexual orientation is able to achieve to their full potential and that strategies are in place to tackle underachievement. We will ensure that every pupil has access to the necessary support required to enable them to achieve their highest potential. We will ensure that the school's procedures for disciplining pupils and managing behaviour are fair, effective and equitable."* The school's vision and values are that: *"each child has the right to access a rich, broad, balanced and differentiated curriculum which is matched to pupil's ages, abilities, interests, aptitudes and special needs. All children are welcomed into our school and we are recognised for our inclusive ethos. We aim to achieve our vision by:…*
    - *Providing excellent, enjoyable teaching and learning opportunities for all children to achieve their highest standard and optimum future prospects.*
    - *Recognising and valuing everyone's unique and positive contribution to the school community.*
    - *Providing an open and strong home/school partnership where challenges are faced and solved.*
    - *Promoting and valuing self-worth and self-discipline, good behaviour and co-operation.…*
    - *Recognising that everyone has rights and responsibilities."*

    Under the heading "The Race Duty and Community Cohesion" the policy continues: "*We are committed to promoting good race relations between persons of different racial groups and avoiding racial discrimination, whether direct or indirect. The school will actively promote race equality, oppose racism in all its forms and foster positive attitudes, respect, equality and partnership as we work with pupils, parents and the wider community. We will achieve these by*
    - *…*
    - *Respecting and valuing linguistic, cultural and religious diversity in the (wider) community*
    - *…*
    - *Ensuring that an inclusive ethos is established and maintained*
    - *…*
    - *Acknowledging the existence of racism and being proactive in tackling and eliminating racial discrimination.*
    - *Making the school a place where everyone, irrespective of their race, colour, ethnic or national origin or their citizenship, feels welcome and valued."*

Under the heading "Sexual Orientation" the policy continues: *"Our school recognises the need to protect staff and pupils from unlawful discrimination and harassment on grounds of sexual orientation as required by the Equality Act (Sexual Orientation) Regulations 2007. We are committed to taking a proactive approach to preventing all forms of homophobia within the school and will assess the impact of our policies, functions and procedures on promoting sexual orientation equality as part of the Equality Impact Assessment process."*

It states further in relation to the Anti Bullying and Discrimination Policy Framework: *"Our school states clearly that all forms of bullying and discrimination are unacceptable and will not be tolerated. We have set out the measures that our school will take to address bullying and discriminatory incidents in our Anti-Bullying Policy."*…

Regarding roles and responsibilities it has this to say: *"Promoting equality and raising the achievement of minority pupils is the responsibility of the whole school staff, including support staff and the governors."*

14. The school has a disciplinary policy [60] which sets out some general principles and indicates that suspension pending a disciplinary process is not, in itself, a disciplinary sanction. It also sets out the various stages of the school's formal disciplinary process. Stage 1 allows an allegation to be put to an employee in order to obtain their response. The investigation takes place at stage 2 when the relevant witnesses and the employee are interviewed. Stage 3 consists of the disciplinary hearing where the employee has the right to be accompanied and to state their case. At this stage the disciplinary panel reach a decision and decide what, if any, disciplinary sanction is appropriate. The options available are to dismiss the case, give a first, second or final written warning or to dismiss. The outcome is to be confirmed in writing. The employee has a right of appeal (stage 4). The appeal is a review rather than a rehearing and the employee may appeal about procedure, the decision or the penalty applied. The appeal panel will decide whether to uphold or not uphold the appeal, in full or in part. If the appeal is fully or partially successful the outcome will also state whether the disciplinary sanction is overturned and whether a different sanction is substituted.

15. The disciplinary process sets out examples of misconduct. It is stated that the majority of cases involving misconduct will not normally warrant dismissal without previous warnings unless there are persistent acts of misconduct following other warnings. The procedure also sets out examples of gross misconduct which may lead to suspension from work and summary dismissal.

16. The staff code of conduct is found at page 86 of the bundle it includes references to respect and inclusion and states that staff will be accountable for their actions and treat others with respect and courtesy, maintaining their professionalism. It goes on to say that staff will maintain respect for confidentiality and sensitivity and respect the environment of the staffroom as a place to relax and socialise.

17. The school has a behaviour policy dating to 2018. Under the heading "Restorative Practice" it states:

"*We believe that implementing the principles of restorative practice helps us to focus on building better relationships with each other, taking the time to ensure that every member of our school community feels listened to, valued and respected."*

Under the heading "Modelling Positive Behaviours" the policy continues: "*Good discipline is the shared responsibility of ALL staff, irrespective of their role. We know that if we expect the children to behave well, the adults in the school must model good behaviour themselves. We therefore strive to avoid:*

- *Humiliation-it breeds resentment*
- *Shouting-it diminishes us and encourages children to shout back*
- *Overreacting-the problem will grow*
- *Blanket punishments-this is unfair on those who were not involved*
- *Harsh sarcasm-it does not model the respectful behaviours we ask of children*
- *Using learning as a punishment (e.g.-extra handwriting or no PE)."*

Under the heading "The Golden Rules" it states: *"The school's Golden Rules (Appendix 1) are on display in each classroom and in prominent places around the school building. Pupils who follow those rules have their actions acknowledged and rewarded through individual class reward systems. Those who choose not to follow the rules need to know that their actions will not be ignored. Consequences of inappropriate choices will be discussed and decided upon with the pupil and the consequences enforced."*

18. At page 112 of the bundle under the heading "Adult Responsibilities" it is stated *"All behaviours that require the consequence of a blue, yellow or red card (see Appendix 2) are logged in class files by the adult who has dealt with the incident. These logs are then regularly monitored by the school's SLT for patterns of behaviour and incidents over time, and then further action/support can be taken."*

19. Under the heading "The Restorative Approach - Dealing With Inappropriate Behaviour" it states: *"Incidences of negative behaviour are dealt with in a fair, respectful and appropriate way, with the key focus on individuals taking responsibility for their behaviour, repairing any harm done, rebuilding and restoring relationships.…"* It continues on page 114 *"Using a Restorative Approach does not mean that children avoid the consequences of inappropriate behaviour. However, it is important that they should be involved in a Restorative conversation and be an active part of deciding upon any consequences, ensuring that they are constructive and allow the child to learn from what has happened, as opposed to a sanction being imposed where the child sees themselves as a victim of punishment.… It is also important that the approach is adapted to ensure that it is suitable for the age and level of understanding of the pupils involved… Every child should know that they are a loved and valued member of our school community. This means that when children return to class after a period of "time out", an internal or external exclusion, they need to know that this represents a fresh start. All staff are responsible for ensuring that they are welcomed back in a positive and affirming manner. Reminders of past negative behaviour should be avoided and staff should endeavour to focus on positive future behaviours and instead."* The

document goes on to set out at various appendices the Golden Rules and to provide templates for risk reflection sheets, amended for Key Stage I and Key Stage 2 as appropriate. Appendix 4 gives extra class guidance. Importantly, at page 122 it is stated that, "*The behaviour logs will be checked regularly to identify patterns in behaviour so that ultimately we can put in place all that is needed to enable the child to be successful with regulating own behaviour."* Appendix 6 sets out the card system. Stage 2 is the stage at which a blue card is issued and the sanction applied can be sending the child to another teacher for a specific time period. On return to the classroom the child is to be welcomed back and have it explained to them that it is a fresh start.

The claimant's employment

20. The claimant started working at the school in February 2014 as a supply teacher. She was working as a PPA cover teacher for the other teachers at the school and took their classes whilst they had 'non-contact time' to do their planning and preparation. She successfully applied for a teaching vacancy at the school and was employed directly by the school from September 2014. In the Summer 2015 the claimant's role was made permanent. In September 2016 the claimant was no longer doing PPA cover and was given her own class. At the time of the claimant's dismissal she was teaching a year 1 class (children aged 5-6).

21. In November 2016 an allegation was made that the claimant had made a child get changed into different clothes in front of the rest of the class. There were several complaints made about her manner with the children. It was said that she was sarcastic and very negative and rude. The claimant was taken through a disciplinary process which culminated in her being given a 6-month verbal warning [163]. (This warning had expired by the time the disciplinary matters rose which later culminated in her dismissal). A referral to the Local Authority Designated Officer ("LADO") was also made at this time, although no copy of the document was available in the tribunal bundle ("The 1st LADO referral"). We accept that LADO referrals are necessary in order to raise concerns about adults working with children when it is alleged that a person has behaved in a way which indicates that they may pose a risk of harm to children. Based on the allegations the headteachers at the respondent considered that it was a necessary step in relation to the claimant at this point in time.

22. It appears that at some time in 2017/2018 concerns were raised about the claimant's teaching. As a result, a performance support programme was put in place to support the claimant. The documents setting out the planned programme were in the hearing bundle [144, 146]. The programme was put in place for the Summer term of 2018 and seems to have started around 9th April 2018. The programme continued into the Autumn term of 2018 and thus into the start of a new school year [148, 149]. It appears that the reason for the support programme was that a number of concerns were raised over

a period of time in relation to consistent poor pupil outcomes, poor teaching performance noted during teaching observations, poor behaviour of students in class and serious concerns regarding the quality of the students' work. The support programme involved allocating additional support to the claimant and monitoring some lessons in order to support her development and encourage improvement. This was set up by the previous headteacher Ms Doberska and was in line with the school's Capability Policy. The support programme was still ongoing at the time the disciplinary allegations arose which later culminated in the claimant's dismissal.

23. As part of the support programme Joss Kitching and Alison Crookes (the other Co-Headteacher) undertook a team-teaching session with the claimant. This involved monitoring one of the claimant's lessons. Following the monitoring session Joss Kitching provided feedback to Alison to help her support the claimant's improvement. Joss Kitching repeatedly noted, across a number of lessons, that the claimant's behaviour management was negative and that she was not praising the students for positive behaviours [167-170].

24. On 24 September 2018 there was a "blink inspection". This was a whole school review of teaching and learning carried out routinely by the Trust and the Local Authority School Improvement Officers. It occurred three times a year. It involved a 20-minute-long inspection of one of the claimant's lessons by independent inspectors. The inspectors had no prior knowledge of the claimant. The inspectors deemed the claimant's lesson inadequate and both inspectors raised a safeguarding concern based on neglect. They noted that there was a new starter (child) who was crying loudly and uncontrollably during the session and the claimant had not moved to comfort her at any point [154 to 155].The claimant is recorded as commenting that the first time she had known she had a new child was at 8.30am and that the child did not speak English and was not coping.

25. Additionally, as part of the support programme Alison Crookes met with the claimant to reflect on the team teach sessions with Joss Kitching and on the blink inspection and to discuss any concerns or recommendations made. Joss Kitching had given a number of practical recommendations as to how the lesson could be improved and details of these were discussed between Alison Crookes and the claimant [154-162].

26. The claimant's explanation of her actions in relation to this incident (both to the respondent and to this Tribunal) was that she had been paying some attention to the child in question in the minutes immediately prior to the observation. She had only just moved away from said child at the point in time when the observation began. However, we note that even if this is accurate it means that she had left the child crying for at least 20 minutes (the length of the lesson observation). This was a considerable period of time given the young age of the child in question. Certainly, the inspectors felt that it was a safeguarding issue.

27. On Wednesday 26th September 2018 there was a further incident in one of the claimant's classes. A child soiled himself. The child did not say anything but a smell could be detected. Upon identifying the issue the claimant asked the child to change into his PE kit. He left the room but did not get changed. The claimant and the TA only realised that he had not changed clothes when a lunchtime lady checked on him again and the office staff helped to clean him up. The consequence was that the child was left in the soiled clothes for at least 45 minutes after the problem was identified. The assertion on behalf of the respondent was that, as the teacher with responsibility for this class, it was the claimant's responsibility to check that the child had cleaned himself and supervise or arrange supervision for the cleaning up process. She had failed to do this. This was considered a safeguarding issue and accordingly (as part of the support programme) Alison Crooks suggested expanding the claimant's targets to include following school procedures in caring for younger children and discussed the required improvements with the claimant [163-166].

28. The explanation that the claimant gave to the Tribunal about her handling of the incident where the child had soiled himself was that she could not address it and ensure that the child got changed and was cleaned up whilst she was alone for safeguarding reasons. She said that it was not possible to take someone else with her to do it. This explanation/justification was contradicted by the evidence of Michaela Singh. She indicated that the correct procedure was for a teacher or a TA to take the child to a cubicle and stand on the other side of the door and talk them through the process of getting clean and getting changed. If, for some reason (such as the child's age or understanding levels) this did not work, then the staff member should call someone to assist them for safeguarding purposes (a TA, office staff etc). That second adult could therefore be present for safeguarding purposes whilst the first adult physically assisted the child to get cleaned and changed. This Tribunal accepts that Michaela Singh's description of the correct approach and procedure was an accurate one which reflected the approach that the claimant and her colleagues should have adopted in such a case. By failing to deal with the issue because of alleged safeguarding concerns the claimant had effectively raised a further safeguarding concern as the soiled child had been left unsupervised and in a soiled state for a significant period of time. We do not accept that this alleged concern (as articulated by the claimant) was a credible justification for her inaction, particularly as it came from an experienced teacher. Such a teacher would surely know the correct way to go about resolving such a problem, particularly as this was unlikely to be the first time such an issue would have arisen in the circumstances given the age group the claimant was teaching.

29. The consequence of the two incidents detailed above (the "crying child" and the "soiled child") was that a further LADO referral was made on 1st October 2018 on the basis that these two incidents raised safeguarding concerns [166] ("The 2nd LADO referral"). There was also an intention to discuss the issues further with the claimant as part of the capability process which was already in place and ongoing at that time. Alison Crookes

suggested expanding the claimant's targets to include following school procedures and caring for younger children and discussed the improvements required with the claimant.

30. Another apparent concern which arose at about this time related to the content of the parents' meeting reports which the claimant prepared. Joss Kitching felt that these were lacking in detail and the comments were also very negative and lacking any constructive content. It was felt that the method adopted by the claimant for completing these was against school policy [171-199].

31. On 14th November 2018 a parent came to the school gates to inform Michaela Singh (Deputy Headteacher) that their child had wet themselves the day before (i.e. on 13th November) during class and had come home having not been changed. The child had told the parent that the claimant had not allowed them to go to the toilet during her lesson and that was why they had wet themselves.

32. On 16th November 2018 Michaela Singh went to ask the claimant about the incident. The initial record of her response [218] indicates that she did not recall the child (hereafter "Child A") asking and felt that *"this would be another thing to hold against her."* Ms Singh is recorded as explaining that she was just trying to establish what had happened (if anything) and there were no accusations. The claimant was again recorded as saying she could not recall but that it *"has been a difficult time".* The respondent suggested that the claimant had become angry and defensive when questioned about the incident.

33. After this exchange the claimant's Teaching Assistant ("GK") reported a further incident which was said to have happened later that same day. He reported that on the morning of 16th November the claimant had questioned Child A in a confrontational and unfriendly manner about whether she had asked anyone to use the toilet on 14th November and why she had told her parents that she had. GK reported that he felt the child was clearly scared and he (GK) felt upset by the incident. In his opinion, this had been an abuse of power. GK claimed that later that day the child in question had been excluded from an entire "golden time" session and had visibly been crying and was extremely upset. His initial written report [220] was that:

> *"On Friday 16th November at about 8:40 am Miss Khanem asked me if I had known anything about A being wet in the school week and if I had let her go to the toilet if she had asked me. I answered that I always allow pupils in class to use the toilet if needed. After the children were in class I gave a prize to A as a reward for completing her sticker chart from the previous week. While she was getting her reward, class teacher came up and stood behind A and in an unfriendly and confrontational manner asked her if she had asked anyone if she needed the toilet in the week in regards to going home wet. A was clearly scared about answering but she answered*

regardless with a "no I didn't." Teacher then said "why did you go home and tell your dad that she wasn't allowed to go to the toilet?" In my opinion this was an abuse of power getting her to change her mind. This upset me to see this and after lunch at about 2ish I returned to class to get things for interventions. It was golden time and A was sat next to the teacher's desk on the floor and had been crying as her eyes were red and swollen, she looked very sad. There may have been a good reason for her to be out on her own at that time but A has never in all the time I have known her to be rude or do anything to warrant such punishment, it seems too much of a coincidence to me."

34. The claimant says that she was suffering with ill health at around this time. There were two issues. One was a gynaecological condition. The second was a concern that she might have some form of cancer. The evidence before us suggests that in early November 2018 the claimant knew that she needed a scan. The scan took place on 21st November. A subsequent biopsy result [274] indicated no malignancy and therefore no cancer. The result of the biopsy was dated 11 January 2019. We accept that the claimant was somewhat preoccupied with health concerns, specifically the cancer scare, in the weeks leading up to the scan in November. The cancer scare was effectively over by the second week in January 2019 and so would not explain the claimant's conduct thereafter. We accept that the claimant may well have been somewhat preoccupied during the time when the disciplinary incidents occurred. The real question to which we will return in our conclusions is the extent to which these health concerns could be considered to be a justification or mitigation for her actions in the disciplinary case. What weight was the respondent entitled or required to place on this proffered mitigation?

35. Joss Kitching was advised by the Trust to refer these November incidents involving child A to LADO ("The 3rd LADO referral") [525]. We accept that LADO referrals are only made when necessary and are therefore rare. Joss Kitching felt that it was significant that this was the second referral to LADO in respect of the claimant in the space of one school term and the third in two years.

36. The 3rd LADO referral covered: the incident where the claimant had allegedly prevented the child from using the toilet (leading to her wetting herself); the way in which the claimant had challenged child A in class after her parents made the report; and the way child A was excluded from Golden Time. The referral document also set out a summary of the previous concerns which had led to the 1st and 2nd LADO referrals in the history section of the form. The 3rd LADO referral was completed by Joss Kitching and is dated 17th November 2018.

37. We accept that, upon receiving the referral, the LADO advised the Trust that, due to the severity of the incidents and the breach of safeguarding these allegations should be dealt with through the Trust's disciplinary policy. The reason apparently given by the LADO for this recommendation was that

if the allegation was proven to have happened it was serious given that the child could be at risk of emotional harm.

38. We pause to note that the concept of 'safeguarding' goes beyond the prevention of physical or sexual harm to children. It includes emotional harm. That is the context in which the respondent had to operate its disciplinary process. The claimant's evidence suggested to us (and probably to the respondent as well) that the claimant's notion of safeguarding is of a narrower scope and focuses more on physical or sexual harms or abuse. However, that is not the context in which the respondent was operating or in which it had to operate its disciplinary process. This Tribunal is cognisant of the responsibilities placed on all schools and all school staff to take appropriate safeguarding steps in relation to emotional as well as physical harm. In acting reasonably, the respondent also had to follow the recommendations of the LADO. Otherwise, there would be little point in having LADO referrals. The recommendations cannot just be ignored at the school's discretion. In those circumstances the respondent had been directed towards looking at the claimant's conduct through the disciplinary process. This Tribunal cannot substitute its own view for that of the LADO or the school when considering what constitutes a safeguarding issue.

39. The evidence before this Tribunal included the various policy/procedural documents dealing with safeguarding issues. These documents provide the regulatory context in which the management of the school was operating. It is therefore relevant to include the text of some of the relevant policy documents within these reasons. We have done this in the policy documents section above.

40. Having heard the claimant's representations to us it is apparent that she would like us to substitute our own view as to what, in reality, constitutes a safeguarding issue. We do not feel able to do that. We have to look at the regulatory framework within which both parties were operating at the relevant time. The Department for Education's "Keeping children safe in education" is statutory guidance for schools and colleges. Schools must have regard to it when carrying out their duties to safeguard and promote the welfare of children. It clearly refers to the emotional as well as the physical needs of the child in a safeguarding context.

41. The Tribunal heard evidence (and finds) that "Golden Time" is a free play time for the children which lasts around an hour. Whilst one consequence of misbehaviour by a child may be the removal of some Golden Time, the child should not lose all of their Golden Time. Further, the adult in question should explain to the child why their Golden Time is being reduced so that the child understands the consequences of their actions. It is only if the child has this understanding that the reduction in Golden Time will have the desired effect in improving behaviour.

Disciplinary process: Stage 1

42. The claimant was invited to a stage 1 allegations meeting. Joss Kitching was the designated officer. (This was because Alison Crookes was carrying out the capability procedure with the claimant. She was therefore kept out of the disciplinary procedure.) The letter inviting the claimant to the meeting [224] explained the purpose of the meeting and enclosed a copy of the respondent's disciplinary procedure. The letter summarised the allegations against the claimant relating to Child A and indicated that the allegations could amount to gross misconduct but that at this stage they were simply meeting with her to understand her response.

43. The Stage 1 meeting with the claimant was held on 27th November 2018. Present at the meeting were Joss Kitching, Kirsty Bennett (HR adviser), the claimant, the claimant's trade union representative Michael Sadler and Julie Cameron who attended as notetaker. The purpose of the meeting was to discuss the allegations and to give the claimant an opportunity to respond to them. It would provide the claimant's first response to the allegations.

44. At this first meeting the claimant's response included the following:

"*I don't recall the child asking to go to the loo; they would have been allowed to go as Yr1. She goes to Apollo after school club every day so could have asked them if she needed to go as the toilets are just near the hall. Apparently her mother has told the Reception teacher that the child must go to the loo at the end of the school day before going to the club. We had been in the other hall rehearsing the Nativity all afternoon; my TA doesn't recall a child asking to go to the loo either. The child is attention seeking and in my opinion this is another example of that."*

"They have to be allowed to go [to the toilet] *as they are Yr1. Child's step sister says she has tantrums and is attention seeking. I asked the child and she denied asking me. In my opinion she's attention seeking."*

"Golden time wasn't related to the loo incident. I came into the classroom as it was being covered by HLTA…and she was ignoring the adult in class, she has done this several times in the past, for example on line she doesn't stop talking to the child next to her. Other children say she is mean to them, they say she tells them to shut up. It is constant, since the start of term. She wasn't the only one to miss golden time."

"She may have missed all of it [Golden Time] *as I had no TA in class and I may have forgotten that she was sitting out. ..Re being red eyed; she cries as soon as I try to explain anything to her….I have done positive praise, used cards etc but nothing was working so she needs to lose golden time."*

When the claimant was asked what she thought intimidating "looks like" she responded: *"When I speak to them I go down to their level, I don't stand over them. I use my normal voice not a different voice. I don't remember the words I used to ask her about telling her parents."*

When asked why she asked Child A the question she responded:
"*I asked her because I was confused and wanted to know why she went home and lied about asking to go to the loo. Her step-siblings say she is attention seeking, she has tantrums at home, and she is often late because of this."*

She went on to say: *"I never noticed that she was wet; we had been rehearsing the play in the hall. Wetting does happen in Yr1 which is why you let them go to loo at that age."*

Disciplinary process: Stage 2

45. As a result of the meeting it was felt that the claimant's explanations were insufficient and therefore it was deemed necessary to commission a full disciplinary investigation. The respondent took advice from HR and assigned Michaela Singh as investigation manager. The initial allegations to consider were:

- A child in the class had been denied access to the toilet and as a result had wet herself ("Allegation A")
- The claimant had been acting in an intimidating way towards the same child while questioning them about the incident ("Allegation B")
- The same child was denied golden time and observed to be red eyed ("Allegation C")

Whilst the investigation was underway another two allegations were raised which were also investigated. Following the witness interviews where these allegations were raised Michaela Singh consulted with an HR adviser as to the correct course of action. It was discussed with Joss Kitching who requested that Michaela Singh include this as part of her investigation. The further two allegations were:

- The claimant's management of children not being in line with behaviour management policy ("Allegation D")
- The use of discriminatory language with colleagues ("Allegation E")

Allegations D and E only arose during the course of the investigation- they were not part of the original allegations to be looked into. It was a reasonable approach to add these to the disciplinary investigation once they arose. The respondent could not reasonably be expected to close its eyes to the issues once they had been drawn to its attention. The claimant was given ample opportunity to respond to the extra charges.

46. After reviewing the documentation Michaela Singh identified the relevant people who she thought it would be helpful to meet. The individuals who she spoke to were:
    - The class TA- "GK"

- Child A's father.
- PPA cover teacher Mrs Sahadev
- Sports cover teacher Mrs Cooper
- Year 1 class teacher Mrs Osborne
- EYFS class teacher Miss Elliott
- Class teacher Miss Bird
- TA Miss K Singh

The claimant was also interviewed for a second time (Stage 2 of the procedure). The notes of the interviews were added as appendices to the investigation report and the substance of the evidence was summarised within the body of the report itself.

47. One of the witnesses identified who needed to be interviewed was Keeleigh Singh. She is one of Michaela Singh's relatives. As a result of this family relationship Michaela Singh recognised that there was a potential conflict of interest. Therefore, after consultation with the HR manager, Michaela Singh asked the SENCO at the school to carry out this particular interview in Michaela's place. The SENCO was chosen for this task due to her seniority, her expertise in safeguarding issues and her impartiality due to a lack of involvement in the remainder of the disciplinary process. In passing we note that we consider that the school dealt with this potential conflict of interest adequately by getting someone else to do this particular interview. There was no reasonable requirement to get an external independent investigator involved. In addition, during the course of the Tribunal proceedings the claimant asserted that there was a personal relationship between GK and Keeleigh Singh which negatively impacted upon the reliability and integrity of their evidence to the investigation. We have considered the representations made in this regard and have concluded that there was nothing in this relationship which adversely affected the reliability of their evidence to the respondent during the investigation. They had a friendly professional relationship but there was nothing more significant which could undermine their evidence. It is also notable that in any event GK and Keeleigh Singh were not the only source of the evidence and allegations against the claimant. They are corroborated by other sources of evidence (see below). This further suggests that there was no reason for the respondent to disregard their evidence.

48. The claimant attended a stage 2 interview herself and notes were taken of what she said [284].

49. Following completion of the investigation Ms Singh compiled a full report including copies of all the relevant documentation. The report as a whole set out the details of the evidence collated [370-388]. Her summary conclusions in relation to each of the allegations were as follows [385]:
    a) Allegation A: Whilst it may have been unintentional, on balance of probabilities it seems likely that the request to use the toilet had been denied and Child A had wet herself. A's clothing confirmed that there had been an accident at some point during the day. Child A was able

to say who and when she had asked to go to the toilet. This did not appear to be made up. The claimant had confirmed that Child A was in her group. The claimant and the TA confirmed that on some occasions children are denied permission when they first ask to go. The claimant said her own medical condition had undermined her ability to remember events. As a result she might not be able to remember refusing Child A permission. The claimant said that Child A does not frequently or repeatedly ask to go and has never before or since had a problem asking to go to the toilet.

b) Allegation B: On balance of probabilities it is likely that the claimant acted in a way which was, to the observer, intimidating towards the child. The claimant's first response to hearing of the allegation about the toilet was to say "*Well that will be another thing to be used against me."* She then denied that Child A had asked her and accused the child of being an attention seeker. Her sole purpose in talking to Child A that morning was to find out why she was a "blatant liar" and find out her motivation for lying. It was concluded that the accusation of lying because the claimant could not remember the incident and the statements that the claimant made about child A revealed the intent and the feelings of contempt the claimant had towards the child at this point. Ms Singh concluded that this came above the need to safeguard children and demonstrated not only a failing of teacher standards but, more importantly, misconduct that could significantly impact upon the emotional wellbeing of the individual.

c) Allegation C: On balance of probability it was concluded that the removal of Child A's entire Golden Time session was for a reason other than those indicated (failure to hand in homework and being on red/amber on the chart). The removal of the Golden Time supported the previous allegation of intimidation as it appeared that the claimant had purposely denied Golden Time as punishment for the allegation she had not been allowed to go to the toilet. Child A had not been reported to have been late with homework and the behaviour logs, reflection records and interviews with staff who had worked with Child A that week show that there were no reported behaviour concerns that week or at any time in the past. The claimant had admitted that she might have forgotten child A and as a result Child A may have missed the entire Golden Time session. Ms Singh concluded that this loss of Golden Time would have further intimidated and humiliated Child A. Ms Singh concluded that the claimant had failed to safeguard Child A in respect of her emotional needs. She concluded that whilst Child A might be able to 'turn on the tears easily' (as the claimant alleged) for her to be red eyed and puffy faced she must have been crying for a considerable period of time. Ms Singh noted that if standard practice is to remove only 5 minutes (maximum 10) coupled with the fact that Child A was sitting close to the claimant's desk and the common practice of talking through with children the behaviour which has led them to be sat out,

then it calls into question the claimant's ability to safeguard children if a child could be 'missed' and not noticed for an entire session. She concluded that this would constitute negligent behaviour. She felt that although there were three separate allegations they were intrinsically linked and together they built a picture of intimidating and bullying behaviour and significant failings in terms of safeguarding and neglectful behaviour. The fact that Child A went on to wet herself after being refused permission to go to the toilet could have happened to any teacher, however unfortunately. The claimant's resulting actions highlighted her failure to safeguard children in her care and were a serious breach of the teacher standards, code of conduct, and the school's safeguarding policy and the statutory guidance on 'keeping children safe in education' in Ms Singh's view. She noted that this was the third safeguarding concern that had been raised inside one term and the second which related to a child soiling themselves. Ms Singh felt that there was no adequate reason for the claimant to question the child the following morning and no evidence to support the fact that the later punishment of removing the entirety of Golden Time was justified.

d) Ms Singh concluded that there was a disciplinary 'case to answer' regarding allegations A, B and C. She considered that they could fall within the examples of misconduct and gross misconduct and set out the relevant paragraphs within the disciplinary procedure. She also referred to the other school policies relevant to the allegations.

e) Allegation D: On balance of probabilities Ms Singh was of the view that the claimant appeared to be in breach of the behaviour policy and acted in a way which contravened school policies and procedures and was below expected teacher standards. She even noted that the claimant had put forward incident records including an entry for a day when the claimant was not even in school. This raised the question whether the claimant could be seen as falsifying documents. She felt that the omissions from the class behaviour log could have a significant impact on the health and safety of all within the classroom and could potentially endanger people or property. There is a statutory duty to keep children safe and the claimant was failing to keep Child H safe as well as the other pupils in the class. Furthermore she felt that as a result of the way in which individuals had been treated with regard to isolation, being sent out without explanation, being shouted at, being told off for seeking assurance from the TA and being managed in a negative way it could be argued that these children were being subjected to emotional abuse or neglect and that needs were not being met so that there was a failure by the claimant to safeguard individuals. Of additional concern was the denial of fair and equal access for some children to the curriculum. This indicated the potential for these children to be failed by their teacher. Ms Singh found that there was also a case to answer against this allegation that behaviour management strategies used

were not in line with school policy or procedure and that the claimant's actions could constitute misconduct or gross misconduct under the disciplinary procedure. In addition there were alleged breaches of other relevant school policies and procedures which were identified by Ms Singh.

f) Allegation E: Ms Singh concluded on the balance of probabilities that the evidence collected in statements from various members of staff suggested that the claimant had acted in a way that was racist, homophobic and derogatory. She felt that the claimant's answers to questions throughout the process had showed a lack of thought and consideration towards others. There was no remorse for any of the phrases that she had admitted to using and no consideration of how the language could impact on other parties hearing it. Ms Singh felt that the individual racist and homophobic comments were not, as the claimant suggested, "light-hearted banter" and that they had no place in the workplace. Some of those interviewed had suggested that the language had been used specifically to cause discomfort and embarrassment to other members of staff. Where this had been used there was an imbalance of power. Ms Singh felt that if this was the case it further strengthened the allegation not only of intimidation but the potential for this to be viewed as bullying behaviour not only of children but of adults as well. The conclusion of the report was that there was a case to answer against the allegations of discriminatory, derogatory, racist and homophobic language being used to reference others in the school. It was felt that these actions could constitute misconduct or gross misconduct under the school's disciplinary procedure and reference was made to other relevant school policies and procedures.

50. We find that given the evidence she had obtained during her investigation it was a reasonable step for Ms Singh to say that this case merited progression to a disciplinary hearing at stage 3. It was reasonable to conclude that there was a disciplinary case to answer.

Disciplinary: Stage 3

51. The investigation report was sent to Joss Kitching on 1st May 2019. Based on the investigation evidence the claimant was invited to a disciplinary hearing [391-392]. It was intended that the hearing would take place on 15th May 2019. The claimant was reminded of her entitlement to be accompanied by a trade union representative or another representative of her choice. She was informed of the identities of the panel members. She was told that Kirsty Bennett from HR would be present to advise the panel and that Natasha Kirby would take the minutes. The letter set out the allegations that were to be considered at paragraphs A to E. It was noted that the allegations raised serious concerns about the claimant's adherence to school policies including safeguarding, behaviour policy, the single equality and community cohesion policy, and the code of conduct, as well

as her professional practices as set out in the teacher standards. It was alleged that the claimant may have failed to have the welfare and well-being of children at the centre of her behaviour. She was informed that she was potentially in breach of the disciplinary procedure including:

a) wilful inefficiency or neglect of duties and responsibilities
b) wilful and irresponsible actions or omissions which would endanger people or property
c) acts of professional negligence or grossly inadequate standards of work due to negligent neglect or wilful failure to perform
d) serious failure to discharge obligations in accordance with statute or contract of employment
e) serious or deliberate failure to comply with the school's code of conduct
f) persistent and wilful refusal to carry out a reasonable management instructions
g) serious or persistent acts of discrimination or harassment against employees, clients or members of the public.

She was also warned that she needed to be aware that the panel could find that some or all of the allegations amounted to gross misconduct and could therefore make a decision to summarily dismiss her from employment with the Trust. A copy of the investigation report was enclosed. She was given details of the procedure she would need to use to call any witnesses. She was forewarned of the Trust's obligation to refer the matter to the DBS in the event of her dismissal. She was asked to confirm her attendance as soon as possible along with the names of anyone attending with her.

52. The investigation report found that there was a case to answer in accordance with the disciplinary policy and Joss Kitching convened the panel for a disciplinary hearing made up of governors and trustees. Joss Kitching had no further involvement in the process until she attended the disciplinary hearing on 15th May 2019 with Alison Crooks and Michaela Singh, the investigating officer.

53. The claimant could not attend the scheduled meeting due to ill health. She decided that her trade union representative should attend on her behalf. There was no request for postponement or adjournment of the meeting to a date where she would be able to attend. Instead, the claimant drafted a statement to be presented to the disciplinary panel in her absence [393-396].

54. The material parts of the claimant's statement were that:

i. She felt that she was the subject of a character assassination with regards to her behaviour towards the children, parents and staff. She felt that the allegations were malicious and derogatory and she categorically refuted the accusations made against her in the report. She felt that she was the subject of a witch-hunt
ii. During the autumn term she was suffering from various medical issues and may have been preoccupied, a little distracted and worried at this time. She asserted that this was a factor in events which occurred at that time.

iii. In relation to allegation A she asserted that there was a discrepancy as to the time of the alleged incident (was it morning or afternoon?)

iv. She repeated her assertion that Child A had tantrums, always made the family late, and had previously hurt other children and then denied doing it when questioned by an adult.

v. She denied speaking to Child A in an intimidating way. She asserted that she often goes down to the child's level when speaking to them on a one-to-one basis.

vi. In relation to allegation D (concerning Child H) she asserted that Child H would often hurt other children whilst sitting at a table with them. Various children had told her that they had been punched/slapped/kicked by him at some point. She asserted that for the safety and welfare of those children she had moved Child H to a separate table by himself. She said that when the senior leadership team asked her to stop doing this she did so.

vii. She clarified that there was an incorrect point in her previous response where she is supposed to have said that she does not use the whole school behaviour log. She clarified that she used to the whole school behaviour log in addition to a class book which she used as an aide memoir for her own purposes and when writing reports.

viii. In relation to allegation E she asserted that allegations made by the class TA were fabrications, untruths and lies.

ix. In the claimant's opinion allegations involving Child A and Child H were not examples of gross misconduct. Rather they were every day issues and situations which occur in schools nationwide regularly and have to be dealt with in context. She made the point that she was not physically hurting children; was not sexually abusing children and concluded that those are acts of gross misconduct.

x. She could not understand how the allegations had reached disciplinary level and felt that they had been exaggerated and blown out of all proportion.

xi. She asserted that correct procedures had not been followed for the investigation. She said that an independent person should have been brought in to take undertake the investigation as the Deputy Head was not unbiased or independent because of her close personal relationship with the class TA.

55. The disciplinary hearing took place on 15th May 2019 in the claimant's absence. Her trade union representative appeared on her behalf. The co-head teachers prepared a statement and presented it at the hearing [405-406]. They contended that the allegations constituted grossly inadequate professional conduct and contravened the following school policies: code of conduct; behaviour policy; safeguarding policy. They also argued that the allegations contravened the statutory "keeping children safe in education" guidance. The head teachers answered questions during the meeting. The claimant's preprepared statement was read out to the panel. The head teachers answered questions in relation to the issues raised by the claimant in her statement. Notes were taken of the meeting [397-404].

56. Joss Kitching and Alison were not involved in the decision-making process. The panel convened separately to make its decision.

57. After the deliberations the panel reconvened the meeting and informed those present of the outcome. The panel decided unanimously that four out of the five allegations constituted gross misconduct. They also considered that dismissal was the appropriate sanction in all circumstances. The outcome of the disciplinary hearing was confirmed in writing by letter dated 21st May 2019 [408]. The findings in relation to each allegation were set out within the letter. All of the factual allegations were upheld. The panel categorised allegation A as an allegation of misconduct and allegations B-E as allegations of gross misconduct. They concluded that the appropriate sanction was summary dismissal. The claimant's right of appeal was confirmed within the letter. The claimant was told that because of a decision to dismiss the claimant from regulated activity due to harm or the risk of harm to children there was now a duty on the respondent to refer the matter to the Disclosure and Barring Service. The DBS would review the case and decide whether or not the claimant should be barred from teaching.

The appeal

58. The claimant appealed the decision to dismiss her. She submitted written grounds of appeal [428-436]. She raised the following points on appeal:
    a. The disciplinary procedure was a smokescreen for the real reason for her dismissal-the cost of her salary. She asserted that teachers over 50 are targeted for capability once an academy has taken over a school, as has happened here. She asserted that by dismissing her, the school would save a great deal of money by not having to pay her salary. She referred to an advert for an NQT placed on Reading Council's website on 14 May 2019-the day before the hearing.
    b. She asserted that, given the timing of the advert (amongst other things), there was only ever going to be one outcome from the disciplinary hearing- her dismissal.
    c. In relation to allegation A she pointed out that the timing of the incident had changed from afternoon to morning. She referred to her illness during the Autumn term and the fact that she was undergoing a cancer scare at the time. She reflected on the lack of concern or compassion from the Senior Leadership Team.
    d. She asserted that the evidence about "previous concerns" about her lack of care referred to a child who had started school in September and did not have school uniform and found it very unsettling. The claimant said that she had been comforting her prior to the SLT coming into the classroom. She knows of another child in year two who was left to cry and the LADO was not called on this occasion. She feels that she was subjected to double standards with the LADO being called immediately when the allegation related to her rather than another member of staff.

e. In relation to allegation B the claimant asserted that the witness had at first corroborated her account of both incidents but had subsequently changed his mind when questioned by the SLT. She asserted that this showed he was not a reliable witness.
f. She stated that she always crouches down or sits with the children when speaking to them on a one-to-one basis as she is aware that they are still so young.
g. She repeated her allegations that the child's elder sister alleged she was always throwing tantrums wanting attention and making them late for school.
h. She denied treating the child without dignity or respect.
i. She asserted that she had never been accused of failing to meet teacher standards in her 20 years of teaching up until her arrival at the respondent's school.
j. In relation to allegation C the claimant alleged that she had not made Child A miss Golden Time because of the previous incident. She asserted that Child A had been chatting in assembly, talking over adults and had been unkind to other children that week. The PPA teacher had moved Child A's name down the board due to constant chatting. She then denied this happening in the report. The claimant asserted that she had explained to Child A, as she explains to all children who miss five minutes of their Golden Time, why she was missing it.
k. She says that some children do cry when they miss Golden Time as they see it unfair and their friends are playing and they are not
l. The claimant asserted that Child A was often late for school.
m. She noted that the comment "you may have forgotten about her" infers lack of concern about the child. The claimant asserted that she had often had children sent to her classroom by their class teacher only for them to be forgotten about by said class teacher. She concludes from this that this is not a cause for concern, it is what happens when you have a class of 30 children in your care. She alleges that any teacher would confirm this.
n. She maintained that the accusation that she did not keep the class log was false. She asserted that she keeps the behaviour log which is kept as an aide memoir (and is in addition to the class log) to assist her in helping in writing reports and at parents evenings.
o. She denied the assertion that there was no attempt to have a restorative conversation with the child. She asserts that the TA would not have been in the classroom at that time. She refers to the TA as an unreliable witness.
p. In relation to Child H she reasserted that he often hurt other children and she had spoken to his mother about this and agreed that he would sit separately until it ceased. She confirmed that she felt she had to ensure the safety of other children. She asserted that H's name appeared frequently in the class log for incidents occurring in the playground at lunchtime and at break time. Her position was that the two "safeguarding" issues occur regularly in schools and had been used and escalated as a tool to dismiss the claimant.

q. The claimant alleged that GK is alcohol dependent and suffered with depression; has thought about suicide on numerous occasions and says that it is only his feelings for Keeleigh Singh which have prevented him from doing this. She asserted that this is common knowledge amongst the staff at the school and she was at a loss as to how this person was deemed a reliable and credible witness. She asserted that he had been exploited by management because of his personal vulnerabilities and fragile mental state. She felt that he had been coerced into lying. She made further allegations that he has used inappropriate and obscene language in her presence.
r. She also asserted that in the staffroom she has heard other members of staff using foul and abusive language, sexual innuendo and no disciplinary procedures have ever been brought against them
s. The claimant attacked the credibility of Keeleigh Singh and Kamal Sahadev. She asserted that they had lied about her.
t. She reasserted her allegation that there was a close personal relationship between GK and the Deputy Head and she asserted that the allegations were the product of a conspiracy.

59. Letters were sent to the claimant on 5th and 10th June to acknowledge receipt of her appeal and she was invited to a disciplinary appeal hearing. The hearing was originally scheduled to take place on 14 June 2019 in person but was rescheduled at the claimant's request and went ahead on 25th June 2019 instead. It was attended by the claimant, Mr Locke and the appeal panel, Hazel Jones and Angie Morrish (née Kay) who represented on behalf of the disciplinary hearing panel and Amanda Lawrence attending on behalf of the respondent's HR service. The claimant was informed of her right to be accompanied by a trade union representative and therefore her representative Dick Holligan from The Voice trade union attended too.

60. The chair of the appeal panel received the investigation report, the disciplinary hearing notes, the claimant's appeal letter and the supporting statements that she had submitted. He reviewed the papers and the process and policy documents.

61. During the hearing the claimant and her representative were invited to present their points of appeal. The claimant read and expanded on the statement of her appeal points. Hazel Jones was then asked to present the findings of the disciplinary hearing and the process followed by the panel. Questions were asked and answered by the claimant and those presenting on behalf of the disciplinary panel. Finally, both parties were given the opportunity to summarise their points during the hearing. Hearing notes were prepared [437-441].

62. Mr Locke wrote to the claimant on 2nd July and informed her of the decision of the panel that her appeal had been unsuccessful and set out the panel's reasons for this [442-443]. He also informed her that one of the reasons for her dismissal was the risk of harm to children. He confirmed that the respondent had to refer the matter to the Disclosure and Barring Service.

The Law

Unfair dismissal

63. The applicable provision of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

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

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

64. In line with the Employment Rights Act it is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' (Abernethy v Mott, Hay and Anderson 1974 ICR 323).Thereafter the burden of proof is neutral as to the fairness of the dismissal (Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).

65. In a conduct dismissal case the questions to be addressed by the Tribunal are:

a. Did the respondent have a genuine belief that the claimant was guilty of the alleged conduct?
b. Did the respondent carry out a reasonable investigation into the allegations of misconduct?
c. Following the investigation, did the respondent have reasonable grounds or evidence for concluding that the claimant had committed the alleged misconduct?
d. Did the respondent follow a fair procedure in relation to the disciplinary allegation? If there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the Acas Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did

not affect the end result. However, any compensation is likely to be substantially reduced (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL)

e. Did the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might have adopted?

(See British Home Stores Ltd v Burchell 1980 ICR 303, EAT)

66. In considering the so-called 'band of reasonable responses' the Tribunal must not substitute its own view for that of the reasonable employer (Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA). As stated in the Jones case:

'*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
(1)the starting point should always be the words of [S.98(4)] themselves;
(2)in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;
(3)in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
(4)in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
(5)the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

67. The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal. (J Sainsbury plc v Hitt 2003 ICR 111, CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA.)

68. The reasonableness test is based on the facts or beliefs known to the employer at the time of the dismissal. A dismissal will not be made reasonable by events which occur after the dismissal has taken place (W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.)

69. As a matter of contract law gross misconduct may result in summary dismissal (i.e. dismissal without notice). However, it is not necessary for a tribunal to decide whether misconduct amounts to gross misconduct before it can come to a decision as to whether dismissal for that misconduct was unfair within the meaning of the Employment Rights Act 1996 provisions. Unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief, whereas gross misconduct is a contractual concept dependent on a finding of fact about what happened

(West v Percy Community Centre EAT 0101/15). A claim of unfair dismissal requires the application of the statutory tests at section 98.

70. In the event that a claimant establishes that he or she has been unfairly dismissed the question of remedy will arise. In most cases the issue is one of compensation rather than reinstatement or re-engagement. The Tribunal will then consider what loss the claimant had sustained in consequence of the alleged dismissal. The Tribunal will then consider making a basic and/or a compensatory award (s118 ERA 1996). The Tribunal will consider whether the claimant has taken reasonable steps to mitigate her loss in determining the period of loss to be compensated.

Direct discrimination

71. Section 13 Equality Act 2010 states:

(1) 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.

The respondent in this case does not assert a 'proportionate means of achieving a legitimate aim' defence as provided for by s13(2).

72. Section 23 of the Equality Act 2010 provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

73. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)

74. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In Nagarajan v London Regional Transport 1999 ICR 877, HL Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a* significant influence *on the outcome, discrimination is made out'."*

75. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

Indirect discrimination

76. Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
    (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
    (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
    (c) It puts, or would put, B at that disadvantage, and
    (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

…

77. The law of indirect discrimination attempts to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic (Baroness Hale Chief Constable of West Yorkshire Police and another V Homer 2012 ICR 704 SC).

78. All four conditions in section 19 (2) must be met before a successful claim for indirect discrimination can be established. That is to say, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

79. The key element in indirect discrimination is the causal link between the PCP and the particular disadvantage suffered by the group and the individual. *"Sometimes, perhaps usually, the reason [why the PCP results in the disadvantage] will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage… Indirect discrimination assumes equality of treatment- the PCP is applied indiscriminately to all- but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot." (*Essop and ors v Home Office (UK Border Agency) and another 2017 ICR 640, per Baroness Hale) Implying a 'reason why' question into section 19 would undermine the protection afforded by that provision and could result in the continuation of discrimination.

80. As explained in Essop the salient features of indirect discrimination are:

(1) There is no express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
(2) While direct discrimination expressly requires a causal link between the less favourable treatment and a protected characteristic, indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
(3) The reasons why one group may find it harder to comply with the PCP than others are many and various. The reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). Both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.
(4) There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.
(5) It is commonplace for the disparate impact or particular disadvantage, to be established on the basis of statistical evidence.

(6) It is always open to a respondent to show that its PCP is justified.

Accordingly, there is no need to prove the reason why the PCP in question puts or would put the effective group at a particular disadvantage. What is required is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual.

81. The first step in an indirect discrimination claim is the identification of the PCP. The EHRC Employment Code 2011 confirms that the term "provision, criterion or practice" is capable of covering a wide range of conduct, noting: "the phrase… Is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions" (paragraph 4.5). It also states that a provision criterion or practice may include decisions to do something in the future- such as a policy or criterion that has not yet been applied- as well as a 'one-off' or discretionary decision.

82. Case law has indicated that the concept of a "practice" suggests some degree of repetition. "*It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability… Indeed if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply….A one-off application of the respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least."* (per HHJ Langstaff (President) Nottingham City Transport Ltd V Harvey EAT 0032/12). Further *"…it is hard to see how an individual dismissal could, of itself, be a policy or a criterion (although it may certainly result from either). As for whether it could be a practice, I would approach this term in the same way as did the EAT in Harvey; that is, as suggesting some degree of repetition. An individual dismissal might certainly result from the application of a particular practice but it is hard to see how it could be a practice as such."* (per HHJ Eady QC in H Fox (father of G Fox, deceased) v British Airways plc EAT 0315/14).

83. Although case law indicates that a one-off decision to dismiss will not amount to a practice within the meaning of section 19, this should be distinguished from a situation where an employer establishes for the first time a practice that it would repeat in the future. In Pendleton v Derbyshire County Council 2016 IRLR 580 the EAT concluded that a policy was capable of including a practice and the existence of highly unusual circumstances does not prevent an employer's response from representing the operation of a practice or policy. The EAT held that there is a difference between an isolated failure to follow a policy and a decision that flows from the application, however rare, of a practice or policy. While an employer may not have had to apply the policy or practice previously the tribunal was entitled to conclude from the evidence that this is how it would respond should the circumstances arise again.

84. In order for a PCP to emerge from evidence of what happened on a single occasion there must either be direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. (Gan Menachem Hendon Ltd v De Groen 2019 ICR 1023. Likewise in Ishola v Transport for London 2020 ICR 1204 the Court of Appeal rejected the argument that all one-off decisions constitute a practice. The Court of Appeal accepted that the words "provision, criterion or practice" will not be narrowly construed or unjustifiably limited in their application. 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. However widely and purposefully purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words "provision, criterion or practice" all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice it is not necessarily one.

85. A PCP need not impose an absolute bar on the employee in order to be caught by section 19.

86. It is important that the claimant identifies the PCP with precision. A PCP must not be exclusive to a group sharing a protected characteristic. There is no statutory requirement that a PCP actually apply to members of the comparative group because it allows for the creation of a hypothetical comparator.

87. It is a requirement that the PCP puts or would put people who share the claimant's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts or would put the claimant herself at that disadvantage. Once it is clear that there is a provision, criterion or practice which puts or would put people sharing the claimant's characteristic at a particular disadvantage the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances.

88. The pool for comparison generally consists of the group which is (or would be) affected (either positively or negatively) by the PCP in question. It may sometimes be necessary to carry out a formal comparison between the groups using statistical evidence but this is not always needed. Statistical analysis is not the only method of establishing a particular disadvantage or a disparate impact. Claimants may rely on evidence from expert and other witnesses and tribunals may take "judicial notice" of certain matters that are well known such as the adverse impact caused to women by refusal to allow part-time working. If there is no relevant statistical evidence the experience of those who belong to group sharing protected characteristics is important material for a tribunal to consider. Such individuals may be able to provide

compelling evidence of disadvantage even if there are no statistics. A tribunal should then evaluate such evidence in the usual way, reaching conclusions as to its reliability and making appropriate findings of fact.

89. Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 IRLR 729 dealt with issues of 'judicial notice' and identified a number of principles:

    a. There are two broad categories of matters of which judicial notice may be taken: facts that are so notorious or so well established to the knowledge of the court or the tribunal that they may be accepted without further enquiry; and other matters that may be noticed after inquiry, such as referring to works of reference or other reliable and acceptable sources.
    b. The court or tribunal must take judicial notice of matters directed by statute and of matters that have been so noticed by the well-established practice or precedents of the courts.
    c. The tribunal has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence.
    d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.

90. The EHRC code states that "disadvantage" is to be construed as "something that a reasonable person would complain about so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently" paragraph 4.9.

91. It is not enough for a claimant to show that a PCP has placed those sharing his or her characteristic at a disadvantage: the disadvantage must be a "particular" disadvantage. Particular disadvantage does not refer to serious, obviously particularly significant cases of inequality but instead denotes that it is particularly persons of a given protected characteristic who are at a disadvantage because of the practice in issue.

92. Indirect discrimination is still unlawful even where the discriminatory effect of the PCP is unintentional unless the respondent establishes the objective justification defence.

93. When considering an employer's objective justification defence the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. 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. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

94. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own

cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

95. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. 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? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

96. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

97. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Burden of Proof

98. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

99. The wording of section 136 of the act should remain the touchstone.

100. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

101. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the

balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

102. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves 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 its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

103. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where

there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

104. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

105. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

106. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

107. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

108. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the

situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

109. In a claim of indirect discrimination, following the case off Dziedziak v Future Electronics Ltd EAT 0271/11 the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice; secondly, that it disadvantaged [those who share the protected characteristic] generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual claimant. Only then would the employer be required to justify the provision, criterion or practice.

Conclusions

Reason for dismissal and genuine belief in guilt

110. We have concluded that the reason for dismissal in this case was the claimant's conduct. The claimant has been unable to demonstrate any other credible reason why she was dismissed. For reasons which we set out below we do not accept that her age had anything to do with it or that she was dismissed because she was particularly costly to employ. Had the respondent been looking for a pretext for dismissal it could have taken steps to dismiss her when it instigated the capability support programme. It did not do so.

111. We find as a matter of fact that the reason for dismissal was the conduct which came to light in the investigation which followed Child A's parents' report to the school. Child A's parents made that report without any prompting from the respondent. The respondent was duty bound to follow up on the report and look into it. It is not credible to suggest that the substantial evidence which was then uncovered was somehow fabricated to facilitate dismissal. It came from too many sources and was not undermined by the contemporaneous records which the claimant herself kept of the behaviour of the children in her class. Evidence in support of this number of allegations and from this number of different sources is not easily fabricated. In order to find that the respondent did not dismiss because of conduct or that the respondent did not have genuine belief in the claimant's guilt we would have to find that there was some sort of widespread conspiracy amongst all the members of staff to give false evidence. We found no such evidence of conspiracy. The witness accounts given by school staff were not even undermined by the claimant's own class records of the behaviour and attendance of children in her class and of Child A and Child H in particular.

Reasonableness of the investigation

112. Based on the evidence we have heard we have no hesitation in concluding that the respondent carried out a reasonable investigation in this case. The respondent spoke to all the relevant witnesses and obtained their version of events. They heard from the claimant on a number of occasions and took her responses to the allegations into account. They reviewed the relevant documentation, including the behaviour logs, homework logs, planning records, parents' evening records and attendance records in order to test the reliability of the witness's accounts and evidence. They did not just take the allegations or the claimant's response to them at face value. They tested them. The claimant had the opportunity to put forward evidence in her own defence and suggest where the respondent should look for evidence which exonerated her (e.g. evidence as to the behaviour and attendance of Child A). The respondent followed up relevant lines of enquiry.

Reasonable grounds for belief in the claimant's guilt: the quality of the evidence.

113. The respondent concluded that all five factual allegations against the claimant were proven. We have looked at the evidence available to them at the time in order to discern whether they in fact had reasonable grounds for their belief.

Allegation A: A child in the class had been denied access to the toilet and as a result wet herself.

114. There was clear and credible evidence that Child A had wet themselves during class on the day in question. This evidence initially came from the child's parents who had no reason to report something which had not actually happened. Two alternative explanations arise: either the child asked for permission to go to the toilet and this was refused, or she did not ask and just wet herself without trying to go to the toilet first. There was no evidence to suggest that the child had a particular problem in staying dry or asking to go to the toilet as required. Indeed, the evidence collated indicated that any record of 'accidents' had been improving up to this point in time (no wetting incident since EYFS). This means that the refusal of permission is inherently more credible as an explanation for the incident. Furthermore, the child had been able to specify the lesson she was in at the time she made request (literacy) and who she had asked. The quality of her answers to questions reasonably suggested that she had not fabricated this.

115. Given the evidence which had been collated in the investigation it was reasonable for the respondent to conclude that the child had wet herself after the claimant refused permission for her to go to the toilet (even though there was some evidence pointing both ways). The claimant's initial response was that she could not remember the child asking. Consequently, she could not actually deny that this had happened. There was also evidence that, although the starting point would be to allow a child of this age to go to the toilet on demand, there were occasions when staff, including the claimant, might ask the child to wait a short time (e.g. whilst they finished explaining something to the class). This means that it could have happened as alleged. There was also reasonable evidence to conclude that the 'accident' had in fact happened in the morning rather than the afternoon. The child was dry by the time she went home. If so, this meant that the 'accident' had gone undetected for some time which in itself

raises concerns about the standard of care supplied by the claimant. Overall it was reasonable for the respondent to conclude that this allegation was proved albeit, compared to the other allegations, this incident was perhaps less serious.

Allegation B: acting in an intimidating way towards the same child while questioning her about the incident in A above

116. The essence of the claimant's case is that she did not deny that the conversation happened. Rather she maintains that it was not inappropriate in tone or content. We find that the respondent was entitled to disagree with the claimant's characterisation of the incident for a number of reasons. Even if the claimant crouched down to the child's level to ask the question she probably should not have confronted the child at all in the circumstances. She had no good reason to challenge the child with the allegation. There would be an investigation into this. She was effectively interfering with the evidence of the 'complainant' in the case and intimidating her. She should have left it to the respondent to take up the complaint and look into it.

117. The claimant accepted that she asked the child why she had lied (based, she said, on the stepsister's suggestion that Child A makes things up). Even on her own account the claimant made an accusation rather than asking the child an open question, which might conceivably have been more appropriate. This in itself could be intimidating to such a young child. The claimant repeatedly said that this child was attention seeking but there was no other evidence to support this assertion. The other evidence did not suggest that the child was a particular problem in this regard and other adults did not have this experience of her. So even if the claimant did not 'tower over' Child A her actions in challenging the child were inappropriate.

118. The claimant repeatedly said she could not 'tower over' the child because she herself is short. However, even if the claimant is considered short, as an adult she would clearly be considerably taller than a 5-6 year old and thus could be seen to tower over a child. She also said she would 'normally' kneel at the child's level. However, she never clearly says that as a matter of fact, on this particular occasion, she knelt down. In the context we conclude that any denial that she was standing over the child lacks credibility. This is particularly so as she herself says that she was distracted during this time due to health concerns. She could not be confident of her own recollections in such circumstances. When considered objectively, if she was standing she would have been towering over such a young child. The claimant could not see her behaviour objectively and clung to her subjective point of view. It was a genuine matter of concern to the disciplining panel that the claimant's behaviour demonstrated a lack of care for the welfare of the child and was driven by her own needs taking priority (i.e. a need to find out the child's motive for 'lying'). The respondent was concerned that the claimant failed to treat the child with dignity and respect by reverting to this form of questioning.

Allegation C: later the same day the same child was denied golden time and observed to be red eyed.

119. Golden Time was a 'free play' event which effectively incentivised good behaviour or work by the children. Portions of Golden Time could be removed if it wasn't fully deserved for some reason. However, the policy was that if a child lost a bit of Golden Time they had the opportunity to win it back through the course of the week. The school's approach was that if Golden Time was deducted then the restorative and reflective approach should be taken. This meant that with children of Child A's age the adult was supposed to explain to the child why they were losing part of Golden Time. In this way they would understand what was happening and why. If this approach was not taken the child would not understand why it was happening. It is part of age appropriate treatment. The removal of Golden Time would otherwise be meaningless and would not assist in behaviour management. The evidence suggested that a child should not lose all their Golden Time, only part of it. The evidence in this case was that Child A actually missed the whole of Golden Time. The claimant could not actively contradict this evidence. In addition, she could not prove why she would be acting reasonably in removing any Golden Time from this child on this occasion. There was nothing in the behaviour logs or other documentation which suggested that she had done anything to deserve losing Golden Time. In addition, this happened on the same day that she had already confronted Child A and accused her of lying. This incident needs to be seen in its proper context. Was the removal of Golden Time a form of revenge for Child A reporting the wetting incident to her parents?

120. If the claimant deliberately took all of the Golden Time away then that is a breach of the policy and is not merited by the evidence. If the claimant just 'forgot' the child that in itself is a problem as it shows a degree of neglect of the duty of care to the child.

121. The claimant queried whether the respondent should be entitled to rely on the classroom log as evidence of patterns of behaviour within the class. The Tribunal is content to accept that the classroom log was supposed to be used for classroom incidents and not just lunchtime or breaktime incidents. If more incidents were in fact logged at lunchtime this is either because there are more problems at lunch time or the adults who cover those times of day are more inclined to log incidents consistently. Either way, we do not accept that this means the respondent was unable to rely on the contents of the log in its assessment of the available evidence. We do not accept the claimant's assertions that the respondent has 'doctored' the evidence or otherwise failed to disclose whole log. If it was not presented to the Tribunal it is because it does not exist and cannot be found. It is more likely, on balance, that the claimant did not in fact keep all the logs she was supposed to and is now seeking to lay the blame at the respondent's door by alleging that they have failed to disclose all documents or have removed parts of the documents from the disclosed evidence.

122. Overall, we conclude that the respondent had reasonable grounds to conclude that this allegation was proved. We accept that the respondent was entitled to find that the punishment given by the claimant in this case to Child A was unjustified and that appropriate interventions had not been used. It was reasonable for the respondent to conclude that this would have had a potential detrimental effect on the child's learning and welfare.

Allegation D: concerns over the behaviour management strategies used with, but not limited to, H. For example, removal from golden time, use of negative language and chastising without prior sharing of expectations.

123. The allegations regarding child A are also considered relevant here.

124. In relation to Child H one way or the other there was reasonable evidence of a breach of proper process, procedure or behaviour management strategies. Either the claimant did not log his bad behaviour (in breach of policy), or there was no bad behaviour by Child H in the way that she alleges justified her treatment/punishment of him. A proper log should have been kept in order to ensure that patterns of behaviour could be monitored and improved. If there was no bad behaviour she should have followed the guidance of her line management to reintegrate the child back into the group. It would only be legitimate for her to refuse to follow the management policy if there was a good reason why Child H should be kept separate from the other children and the claimant had evidence to demonstrate it. Either way she has breached policy and/or refused follow management instructions.

125. We did not find the claimant's evidence about logging behaviour incidents at all credible. She states that she kept full behaviour logs but the documents before the Tribunal do not support that assertion. We heard differing accounts from the claimant about what logs she kept and where they were and she repeatedly contradicted herself in evidence. We have concluded that the bundle includes everything that was available. Given that, the respondent was entitled to reach its conclusions on that evidence and not go searching for more evidence. Indeed, there was a good policy reason why the claimant should have used the class behaviour log for her records. The respondent wanted to be able to monitor patterns of behaviour and take appropriate action. This was not possible if the claimant did not log the problem reliably in the correct place. Furthermore, there was evidence that the claimant had copied reports of incidents into her log from dates when she was not present in the school. It was not something she could have witnessed herself and yet it was logged as her report.

126. One would expect there to be more logged incidents if what the claimant says about behaviour and the reasons for her teaching strategies is correct. If there was something in addition to the class log it was incumbent on the claimant to point to it. She had plenty of opportunity to do so. Her explanations for not doing so during evidence to the Tribunal undermined her own credibility as a witness. The respondent had good grounds for concluding that the claimant was not following the relevant policies and procedures particularly in relation to behaviour management.

127. Evidence was also presented that the claimant repeatedly sent children to sit in another class. According to the claimant's evidence this is supposed to have been a 'one-off' incident in relation to Child H but the evidence collated is that she did it regularly in relation to a number of children. Furthermore, she did not follow the agreed process and send her children to the designated class. Nor could she demonstrate that she had had

appropriate restorative conversations with them on their return to her classroom.

128. The claimant sought to assert that Child H was sitting separately from the others because of a real risk he would hurt other children. This was not apparent from the contemporaneous documents and logs. The picture presented by the evidence was that the claimant was uncaring, intimidating and to some extent bullying towards both Child A and Child H. Even taking the claimant's case at its highest where she says she needs to protect the physical safety of the rest of the class, it is not sufficient for her to separate H out and do nothing further. If the claimant was following policy and appropriate standards the respondent and the Tribunal would expect to see evidence of her trying other strategies to resolve the issue: different inputs with the child, talking to the child's parents; reporting and escalating the issue to line management; taking the matter to the SENCO. None of this is present in this case. The evidence suggests that the claimant put Child H to one side in the classroom and left it at that.

129. The Tribunal finds that the disciplinary panel were entitled to conclude that the claimant had breached procedures and/or failed to follow reasonable management instructions.

<u>Allegation E: use of discriminatory language to colleagues when discussing other colleagues, for example with regards to sexual orientation of a colleague. Use of accent to mimic colleagues and using derogatory language to reference colleagues</u>

130. The evidence in relation to this allegation actually came from the claimant herself as well as from her colleagues. She admitted to using "Gummy" as a nickname to identify a colleague. She accepted she used the term lesbian to refer to a colleague. She accepted she referred to 'bloody lesbians'.

131. The Tribunal does not accept the claimant's position that this was just a factual way of identifying people. Even if it were, it would not be an appropriate way to identify someone in the workplace context. The respondent reasonably considered that taking a particular personal characteristic of a colleague as 'shorthand' for referring to them was inappropriate. The characteristics referred to were not specifically relevant in the context of the conversation. It was not necessary or relevant to make distinctions between the sexuality of different members of staff in the context, even if the description used could be described as factually correct. Furthermore, adding the term 'bloody' to 'lesbian' removes any remaining doubt as to whether the comment is used as a description or an insult/term of abuse. At the very least the claimant should have realised that her comments were derogatory and would be viewed as such. Her refusal to do so naturally increased the respondent's concerns about the claimant's lack of insight into her own behaviour and proper standards in the workplace. The respondent had a duty of care to ensure that that none of its staff were exposed to conduct which could be characterised as harassment within the meaning of section 26 of the Equality Act.

132. The claimant said that she did not make these comments in front of large numbers of people. If correct this does not necessarily make matters any better. In some ways it is more corrosive to talk about people behind their backs in this fashion. Particularly as this is a small school and staff are likely to find out what is being said about them.

133. There was also clear evidence of the claimant mocking Asian accents by imitation. She imitated/mocked the children's parents. The fact that the claimant is herself of Asian origin is irrelevant. It is still unacceptable behaviour. (In any event it was not clear that she was precisely the same race as those she was mocking.) At the very least it was deeply unprofessional behaviour and if the parents heard about it the respondent could well have been facing complaints of racial harassment.

134. The claimant accepted that she referred to 'fat slags'. This was yet another derogatory term. It was alleged that she used it regularly.

135. The above comments and terminology are just what the claimant herself admitted to using/saying. The evidence as to comments made by the claimant also came from her colleagues. The respondent was entitled to go further and find that there were wider instances of problematic language given the wider allegations made by all the witnesses. The only way in which it would have been unreasonable for the respondent to conclude that she had said more than she admitted to was if the witnesses were all lying and this was a conspiracy to get her into trouble. There was no evidence of such a conspiracy and we consider that the respondent would have been entitled to discount the conspiracy theory and rely on the evidence of the other witnesses.

Witness credibility

136. During the course of the Tribunal proceedings the claimant made a number of other allegations against GK and asserted that his evidence could not (and should not) have been reasonably relied upon by the respondent. She asserted that he was an alcoholic and either not a reliable witness because of this or open to manipulation by others as a result. We do not accept that GK was/is an alcoholic. We accept that he had told others in the past that he had been drinking too much and that he was making efforts to curb his drinking to ensure that he did not become an alcoholic. His colleagues had no concerns that he was an alcoholic. Indeed, the claimant and GK had worked closely together for two years. If she genuinely thought he was an alcoholic or had some form of alcohol problem then she should have reported it to her superiors. It would have been a safeguarding issue that she would have been duty bound to raise. The fact that she made no such prior report regarding his alleged alcoholism suggests that she too had no prior concerns that he was drinking to excess or that it had an adverse impact on his ability to carry out his role working with children or give a cogent and reliable account of events at school to his employers.

137. The claimant further alleged that GK had mental health issues which made him an unreliable witness. We find, in line with the respondent's evidence, that GK had needed to take anti-depressants for a period of time which was around ten years prior to the events in question. There is nothing in that which would render him an unreliable witness. The claimant made the further allegation that the respondent was able to manipulate GK's vulnerabilities to make him say things and make allegations he would not otherwise have done. Whilst it is theoretically possible there is no evidence to show that it is probable. This theory is also undermined by the fact that the claimant accepted that 'a' conversation took place between her and Child A. It is the context and the details of the conversation which she challenges. Furthermore, it is not clear to us who is supposed to have manipulated this witness. Who set up or controlled this conspiracy?

138. We do not accept that there was anything wrong with GK's evidence which meant that it could not and should not have been relied upon by the respondent. Plus, we take into account that it was corroborated by others and even the claimant did not fully deny the allegations- she just put a different slant or interpretation on what had happened and why. That was her general approach to the disciplinary case against her.

139. It is apparent from the above that we have concluded that the respondent had a genuine belief in the claimant's guilt which was based on reasonable grounds following a reasonable investigation.

Sanction within the band of reasonable responses?

140. The respondent concluded that all the allegations were factually proven. They classified one as misconduct (allegation A) and the others as gross misconduct. Based on the evidence they had before them we find that that was a reasonable classification. We find that the respondent was entitled to conclude that children were put at risk of emotional harm through intimidation, that there was a serious and wilful failure to comply with school policies and practices and that these showed serious breaches of the code of conduct and teaching standards. The respondent acted reasonably in characterising the claimant's actions as gross misconduct given the educational setting, the age of the children she taught and the regulatory framework within which teachers and schools operate.

141. In most circumstances an employer could reasonably look at dismissal as a potential sanction for one incident of gross misconduct. Four findings of gross misconduct strengthens the argument for dismissal still further. The respondent was certainly entitled to consider dismissal.

142. Were there factors in mitigation which took the dismissal outside the range of reasonable responses? The claimant contended that her health and the cancer scare were mitigation for her actions. In some ways she relied on her health concerns as an explanation for why she could not remember certain events. However, she still denied that she had actually done

anything wrong and to some extent still maintains that she was 'in the right'. It is hard to understand how she can say her conduct was health related (some sort of aberration) and yet still deny that what she did was wrong. It is apparent to the Tribunal that the claimant would be likely to behave in the same way again in the future. She believes that this is her style of teaching and that it is legitimate even if it is not currently 'fashionable'.

143. Even taken at face value health is not an entire explanation/justification. The problems with her teaching standards go back over a number of months and the support programme dated from April. This pre-dates the cancer scare even if the symptoms started some time before November. The cancer scare took place in the Autumn.

144. Furthermore, the claimant had already received support through the capability programme. Looking at this as an alternative to dismissal it is apparent that further support and training had not worked up to that point in resolving the problem.

145. The Tribunal also considered the significance of the previous expired disciplinary warning. We accept the respondent's evidence that they did not use it as part of a 'totting up' exercise. (They felt that this conduct was sufficient justification for dismissal even with a clean disciplinary record). Instead, they looked at the context of the claimant's past history in order to see what guidance it could give to her likely conduct in the future. The claimant had had three LADO referrals and repeated guidance about how she should improve. Even with that the disciplinary conduct still occurred. In those circumstances the chances of recurrence were relatively high. We do not think that the respondent did anything legally impermissible in looking at the claimant's conduct in context in this very specific and limited way. In any event, it should be remembered that the misconduct was sufficiently serious for dismissal to have been a fair sanction even without any previous (live or expired) disciplinary warnings.

Procedural fairness

146. We conclude that the procedure followed by the respondent fell within the band of reasonable responses. The allegations were put to the claimant and she had a number of opportunities to state her case, including at appeal. She was given fair notice of the evidence and could refer the respondent to any further relevant evidence. She knew the charges in advance and was warned that dismissal was a possible outcome.

147. The respondent followed the ACAS Code.

148. The claimant alleges that Hazel Jones should not have been the disciplining officer because she was a parent who did not want the claimant to be her child's class teacher. We cannot see that the claimant raised this at the time of the disciplinary hearing. She did not challenge the makeup of the disciplinary panel. She now criticises them but did not at the time.

149. We accept Hazel's Jones' evidence that this issue had not crossed her mind because her child had only just started at the school. She says (and we accept) that she was not thinking ahead to who would teach her child the next year. We also heard evidence about a school trip. Mrs Jones was a parent supervisor on the trip. She did not feel able to cope with eight children in her group and so had two children taken off her. There was no reason for her to think badly about claimant regarding this. There was no assertion that the claimant had not done her job adequately. Indeed Mrs Jones accepted that this was her first involvement in a trip and she may have been overly anxious about children running off and about ensuring adequate supervision. She did not hold any of this against the claimant.

150. The Tribunal does not find that there was any problem with the composition of the disciplining panel. The claimant did not raise it as an appeal issue either.

151. The claimant asserts that Jane Turner should not have been part of the appeal panel. It was accepted that she was a late substitution onto the panel. The claimant only became aware of this immediately before the appeal hearing. She did not challenge Jane Turner being on the panel in the actual appeal hearing. The claimant asserted to the Tribunal that Ms Tuner was a parent governor who had taken issue with the claimant in 2018 after she had spoken to her about Ms Turner's son, who was in the claimant's class at the time. Apparently the boy always called out in class. The claimant asserted that since then Ms Turner had taken an extreme dislike to the claimant.

152. We heard (and find) that the claimant was told who was on the appeal panel but did not realise who it was until she saw her in person at the meeting. Only when she got into hearing did she 'put the face to the name' and realise that she thought (im)partiality a problem. Even then she did not raise it in the hearing. The respondent asked if the claimant had a problem with the named person who was to be substituted onto the panel and the claimant said 'no'. In those circumstances what more could the respondent do? If the claimant does not make it clear that there is a problem and the respondent has asked the question then as far as the respondent knows they have the claimant's (and her representative's) consent to the panel. The respondent did not know it had a problem to address and could not reasonably have been expected to know there was a problem unless the claimant raised it. We therefore conclude that the respondent acted reasonably in proceeding as it did with the appeal panel that it had. Indeed, there was a limited pool from which the panel members could be selected and there was no evidence as to which alternatives the claimant would have deemed acceptable. Any further changes also risked further postponement.

153. In any event there is insufficient evidence that there really was a problem with Jane Turner or that Jane could not be independent. Furthermore she was one of a panel and not the sole decision maker. There was nothing to indicate that she was the decisive voice on the panel so as to make a substantive difference to the outcome. It was a unanimous appeal decision.

154. The claimant made the point that the disciplinary hearing at which the decision to dismiss was made took place in her absence. We do not consider that this renders the decision to dismiss unfair. The claimant did not request a postponement of the hearing to a day when she could attend and did not ask her trade union representative to make such a request either. The claimant may well have thought that even if she requested it she would not get a long enough postponement for it to be of benefit to her. The relevant policy suggested that a short adjournment would be considered, usually not longer than 5 working days ("a formal request for deferment, by either side, will not be unreasonably refused and will not normally exceed five working days." [67].) Given the nature of her illness the claimant might well have thought that any delay would not be long enough to be useful. In any event she did not ask and therefore the respondent was never put in the position of having to agree or disagree with a request for a postponement. We find that in all the circumstances it was not unfair or unreasonable to proceed in her absence given that she was represented and the representative didn't ask for a postponement either. The claimant took the opportunity to put her written statement before the disciplinary panel and the decisionmakers understood her case. We cannot really speculate on what the respondent would have done had a considerably longer postponement been requested. In any event, the claimant was able to attend the appeal hearing and respond to what had happened at the disciplinary hearing. We cannot say that her absence at the disciplinary hearing made a real difference to the outcome in the circumstances and the procedure as a whole fell firmly within the band of reasonable responses.

155. The claimant's representative was given a fair opportunity to put forward her case and any mitigating circumstances that should be considered in her absence at the disciplinary hearing and the evidence was considered and reasonably tested during the disciplinary hearing.

156. We also accept the respondent addressed all the points the claimant raised on appeal and gave her the review that she was entitled to. It was not a rubber stamping exercise.

157. Job adverts were placed on 14th May 2019 [497]. The claimant says that this pre-dates the dismissal and shows an intent to replace her with a newly qualified teacher before she was told that she had been dismissed. In terms of job adverts there were job adverts placed by the Trust as a whole for other schools within the group. There were five vacancies and they were not at the claimant's school. The evidence was that the headteachers and the senior management team at this school were not involved in that recruitment process and did not place that advert. There is no evidence that the respondent set out to advertise for the claimant's replacement before the decision to dismiss had been communicated to the claimant.

158. There was also no evidence to show that there was an attempt to recruit a newly qualified teacher to replace the claimant. It is unclear from the evidence we have heard what the age and experience of the person who

took over from the claimant actually was. It may or may not have been a younger, less expensive teacher. He or she may well have been the best qualified for the post. There is nothing to suggest that a lower cost was the causal factor in her replacement being appointed. The claimant said it was her opinion that a lower cost teacher was engaged to replace her. But there was no actual evidence that cost or age was a factor in choosing her replacement.

159. The allegation that the disciplinary process was used to save money was raised by the claimant as part of her appeal and was considered by the appeal panel. This was the first time in the process that the claimant had raised what could be called an allegation of age discrimination. The appeal panel dismissed it based on a range of evidence including the evidence that the decision makers had not discussed saving money at all as part of the decision making process. The stated need of the Trust was to retain and recruit experienced teachers. There was no evidence that the recruitment process within the Trust would save money given that the adverts were for a range of teaching positions across the Trust and not specifically NQTs.

Direct discrimination

160. Given the evidence we have heard we do not accept that the claimant's dismissal was an act of direct age discrimination.

161. The claimant has not identified any named comparator. If a hypothetical comparator were constructed by reference to section 23 Equality Act 2010 the only material difference between the claimant and the comparator would be age. The comparator would be facing the same disciplinary case with the same allegations and evidence ranged against her. We find that the hypothetical comparator would also have been dismissed. There would be no less favourable treatment of the claimant.

162. To put it another way, the dismissal was not because of age. The dismissal was, on the evidence we have heard, solely because of her conduct (which formed the basis of the disciplinary case against her). The claimant's age was not an effective cause of the dismissal. It was not a material factor. It made no contribution to the decision.

163. If age had been a relevant consideration in the decision to dismiss then we consider that the respondent might have taken the opportunity to try to dismiss the claimant in the earlier disciplinary process which resulted in a 6 month warning. Alternatively, the claimant seemed to think that academies often used capability procedures to manage older teachers out of employment. If age were an issue one would expect the respondent to have tried to manage her out of employment via the capability process when the opportunity presented itself (much earlier than when these disciplinary allegations arose). The respondent could have let the capability process run to its conclusion and could have dismissed her for that rather than for gross misconduct. The respondent did not use either of these earlier issues as a

pretext for dismissal. This suggests that the real reason for dismissal was the evidence collected in the disciplinary process and that age had nothing whatsoever to do with it.

164. For the avoidance of doubt we have not found it necessary to use the burden of proof provisions at s136 Equality Act 2010 as we were able to make direct findings as to the reasons why the respondent acted as it did. However, for clarity, we do not accept that the claimant in fact shifted the burden of proof to the respondent to show that its decision was in no sense whatsoever because of age.

Indirect Age discrimination

165. During the course of the Tribunal hearing the respondent provided the following statistics which they had compiled :

The year in question in this case:

	2019 OECD UK wide data- teaching staff	**2018-019 %out of 13 teaching staff only (11 teachers and 2 HLTA)**	**2018-19 Numbers teaching staff only (11 teachers and 2 HLTA)**	**Difference in age at NCC from National**
>50	15.8%	23%	3	+7.2%
40-49	23.3%	23%	3	-0.3%
30-39	32.8%	38%	5	+5.2%
< 30	28.1%	15%	2	-13.1%
Ave age		40	40	

Current data

	2019 OECD UK wide data- teaching staff	**Current %out of 13 teaching staff only (11 teachers and 2 HLTA)**	**Numbers current teaching staff only (11 teachers and 2 HLTA)**	**Difference in age at NCC from National**
>50	15.8%	15%	2	-0.8%
40-49	23.3%	23%	3	-0.3%
30-39	32.8%	54%	7	+21.2
<30	28.1%	8%	1	-20.1%

Ave age		41	41	

166. Having considered this data we concluded that the pool of data is too small to give significant guidance. The numbers of staff at this school are just too low to give a meaningful statistical analysis. Any disparities will be statistically insignificant. Furthermore, if one takes the figures as they are currently presented they could reflect two opposing arguments. In the first place they could reflect the end outcome of a tendency or a desire to recruit above average numbers of older teachers. Alternatively, they could reflect a starting point of having an older workforce which then triggers a change and a drive to recruit younger, cheaper teachers. This Tribunal is not in a position to draw any conclusions from these tables.

167. Returning to the claimant's case as she clarified it at the outset of the hearing we find that the claimant has failed to establish a PCP that the respondent dismisses more expensive teachers. The claimant has not asked for and has not provided any evidence about other dismissals, whether the more expensive teachers were in fact dismissed, and whether cost was a factor in either dismissals or recruitment decisions by the respondent. She has not established the PCP that the respondent dismissed more expensive teachers. If such a PCP had been shown to exist in practice we accept that it might well have put the older age group at a particular disadvantage but this is not necessarily a 'given' in light of the evidence about the progression of teachers through the respective MPS and UPS pay scales and the diminishing impact that age has on levels of pay as a career progresses. The older teachers are not necessarily the more expensive teachers depending on the career choices individuals make. They would not necessarily be the more expensive teachers who would be at risk of dismissal. However, in any event, the claimant would not have been able to show that the PCP put her at a particular disadvantage because cost was not, on the facts of this case, a relevant factor in the decision to dismiss the claimant. The claimant would not be able to show that the PCP would put her at a particular disadvantage because cost was not a relevant consideration in this decision to dismiss.

Employment Judge Eeley

Date: 31st December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11 January 2022

FOR EMPLOYMENT TRIBUNALS