Case Numbers: 2405170/20
2417650/20
2410527/21

EMPLOYMENT TRIBUNALS

Claimant: **Ms K O'Hara**

Respondents: **Windermere Educational Trust Limited (1)**
Mr I Lavender (2)
Ms E Vermeulin (3)
Ms E Loughlin (4)

Heard at: **Manchester (by CVP)**

On: **21-25 March 2022, 28 March 2022, 7 April 2022, 22-26 August 2022 and 30-31 August 2022**

Before: Employment Judge Leach, Ms A Roscoe, Mr C Cunningham

Representation
Claimant: Ms H Winstone (Counsel)
Respondents: Mr R Quickfall (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was not subjected to any detriments on the grounds that she made protected disclosures
2. The respondent did not fail in its duty to make reasonable adjustments
3. The respondent did not unlawfully discriminate against the claimant because of something arising in consequence of her disability
4. The claimant was not constructively dismissed.

All claims are dismissed.

REASONS

Introduction

1. The claimant is an English teacher. She taught at Brow Head School in Windermere, Cumbria ("School") between September 2015 and 1 April 2021.

2. The School is operated by the first respondent. It is the first respondent which employs the School's teaching and non-teaching staff.

3. In September 2018 the claimant became head of the School's English Department ("Department"). Differences arose amongst colleagues in the Department towards the end of 2019. They were not reconciled before the Christmas holidays or on return to School in January 2020. They included issues about a qualification called the International Baccalaureate ("IB") and specifically of one part of the examination of IB students, called the Individual Oral Commentary (IOC").

4. The claimant claims that she raised concerns about the approach other teachers were taking to the IOC examination and that, in doing so, she made protected disclosures. The claimant claims that she was subjected to detriments as a result of these protected disclosures including the way she says she was treated at meetings of 10 and 19 December 2019.

5. 2 students at the School committed suicide in the 2019 Autumn term. These tragedies had profound impacts on the School's staff and students. Teachers were instructed about how best to handle certain situations. Expert external advice was sought which informed the instruction given to Teachers.

6. In January 2020, concerns were raised about aspects of the claimant's behaviour and whether it was in keeping with the advice provided and instructions given about teaching at the School after the suicides. The claimant claims that those concerns were not genuine and raising them with her amounted to further detrimental treatment because of the protected disclosures she claims to have made.

7. On 20 January 2020 the claimant commenced a period of absence from work due to sickness; that period lasted until her employment ended on 1 April 2021.

8. At about the end of March 2020 the claimant raised various grievances under the respondent's grievance policy. These grievances were not resolved to the claimant's satisfaction and, by letter dated 12 August 2020, she appealed (page 656).

9. The outcome of the grievance appeal was set out in a letter to the claimant dated 7 October 2020 (page 659).

10. On 21 October 2020, the claimant gave written notice of her resignation from employment. The terms of her resignation letter noted that in view of the decision to reject the appeal, her trust and confidence in the School had been *"completely eroded."* She claims constructive (unfair) dismissal.

11. On 22 September 2020 the claimant raised a separate grievance against the respondent's decision not to continue to pay her a full salary during her sickness absence. The grievance was not upheld. The claimant appealed the outcome of this grievance but it was not successful.

12. The claimant claims that the decision not to extend her sick pay amounts to a failure to make reasonable adjustments (contrary to section 20 Equality Act 2010) and/or discrimination arising from disability (contrary to section 15 EqA)

The Hearing

Amendment application

13. On the morning of the first day of the hearing, the claimant made an application to amend her claim to add various additional reasons why she resigned under circumstances of constructive dismissal. We dismissed that amendment application.

14. The claimant had three good opportunities to set out her reasons for resigning.
    a. in the resignation letter of 21 October, and it is clear from the terms of that letter that she was in receipt of legal advice at the time.
    b. She then had an opportunity in the claim form itself and plenty of time to consider her position; the claim form was issued after the termination date rather than the date on which notice was given.
    c. a further opportunity when responding to the request for additional information.

15. It was only on the day before the first day of the final hearing that the claimant made the amendment application.

16. We considered the terms of the application and were of the same view as that expressed by Mr Quickfall; that it describes the reasons for resigning in vague and potentially wide terms.

17. In the process of addressing us on the application, Ms Winstone narrowed the extent of amendment sought so that it became an application to include existing complaints of detrimental treatment and discriminatory treatment as (in part) the reasons for resigning under circumstances of constructive dismissal claim.

18. Even though that narrowed very considerably the amendment sought, the respondent resisted it because (said Mr Quickfall) to accept it, would change the basis

of the constructive dismissal claim, it would require more evidence, and it would require different legal tests to be applied to the facts that we find in relation to those issues.

19. We decided that the hardship that would have been caused to the respondent in accepting the amendment, exceeded the hardship that was caused to the claimant in rejecting it.

20. We took into account the timing of the amendment application (that it was made effectively on day one of the final hearing), the initial imprecise nature of that amendment application, the fact that even when narrowed down it gave rise to different considerations and different legal arguments on those particular facts that we would need to find under the detriment and discrimination allegations. The respondent was not aware until day one of the final hearing (or just before) about that and had not had an opportunity of considering and assessing its approach to these.

21. What also particularly struck us was that the amendment application (if accepted) would change significantly the constructive dismissal complaint. It is clear from reading the three documents referred to above (where the claimant had an opportunity of saying why she resigned) that her constructive dismissal complaint has always been about the grievance and grievance appeal outcome. What the amendment would enable the claimant to do (if allowed) is to find that there is some fault, something that the respondent could have done better, in the grievance appeal process that would give rise to a last straw argument. We are mindful that the last straw (the final incident where there is a last straw argument) is something that does not need to be a fundamental breach, and does not even need to be a breach of contract at all (authority for that being **Lewis v Motorworld Garages [1986] ICR 157**. - see further below), so allowing the amendment really would change fundamentally the claimant's argument on constructive dismissal and therefore the case that the respondent has to meet.

22. We also took into account that rejecting the application to amend would not prevent the claimant from putting forward the case that she has put (1) in the resignation letter (2) in her claim form and (3) in the further particulars.

23. We were informed/assured by Ms Winstone that, even if the application to amend were allowed, the claimant's principal complaint on constructive dismissal (the main reason that she resigned) was that the grievance appeal was so fundamentally flawed that it amounted to a fundamental breach of her contract of employment.

24. That is the complaint that was pleaded and the complaint that we heard and determined.

Restricted reporting Order and Privacy Order.

25. On most days, observers who with no obvious attachment to any of the parties, logged in to observe the hearing. The hearing was in public and the parties did not raise an objection. Had they done so then we would have dismissed any objection.

26. One of the observers asked for copies of all papers relating to the case to be sent to him electronically. We discussed this request with the parties and considered it. The parties did not want the documents and witness statements to be emailed to a third party.

27. We provided the observer in question with an opportunity to address the Tribunal in relation to their request. They did not do so. We refused to send out copies of all documents by email. We took steps to ensure copies of all witness statements were displayed in the CVP room and also made available (on all sitting days between 22 and 31 August 2022) hard copies of the agreed bundle of documents for inspection at the Tribunal offices in Manchester.

28. **We made a privacy and restricted reporting order in terms set out in the Annex to this judgment.**

Evidence

29. We started to hear the evidence on day 2. It was soon apparent that the initial 6-day listing would be insufficient. More dates were identified in August. EV (an important witness and also the third respondent) was unable to attend on those dates and fortunately the Tribunal was able to sit on 7 April 2022 to receive her evidence.

30. We heard from the claimant first. Nicky Stubbs (NS), head of Maths at the School gave evidence on day 3. We then heard from the respondents and witnesses as follows:-

a. Susan Ross (SR) the first respondent's business manager. SR's areas of responsibility include HR, finance and administration.
b. Ian Lavender (IL) (second respondent) who was at all relevant times the Head Teacher of the School.
c. Eleanor Vermeulin (EV) (third respondent) who was at all relevant times a Deputy Head at the School and the claimant's line manager.
d. Elizabeth Laughlin (EL) fourth respondent. EL was (and is) employed as an English teacher at the School.
e. Helena Rand (HR) who was (and is) employed as an English teacher at the School. HR was appointed as Head of the Department (the role the claimant had been carrying out before her employment terminated) with effect from September 2020.
f. Jo Harris (JH) who was at all relevant times a governor of the school. JH was the governor with particular responsibility for safeguarding. She was one of 2 governors who considered and determined a grievance raised by the claimant in April 2020 (first grievance).

g. Alison Hodson (AH), another governor and who (with JH) considered and determined the claimant's first grievance.
h. Carol Burrow who, with AC (see below) heard the appeal against the claimant's first grievance and who considered and determined the claimant's second grievance raised by the claimant in September 2020.
i. Jason Dearden (JD) who was at all relevant times a governor and who considered and determined the claimant's appeal against her second grievance.
j. Andrew Chamberlain (AC) who was at all relevant times the chair of governors. AC (with CB) considered and determined the claimant's appeal against the outcome of the first grievance.

31. We heard submissions on Friday 26 August and then considered and reached our decision over Tuesday 30 and Wednesday 31 August 2022.

32. References to the "respondent" in this judgment are to the first respondent unless indicated otherwise. We refer to the second third and fourth respondent by their names or initials or as R2,R3, R4.

33. References to page numbers are to the pages of the agreed bundle of documents the parties prepared and provided for the hearing.

The issues

34. A list of issues was agreed between the parties and provided to the Tribunal at the end of day one of the hearing and following our determination of the claimant's application to amend her claim. We set this out below.

A. Protected Disclosures

1. *Did the Claimant make a qualifying disclosure under the meaning of s.47B of the Employment Rights Act 996 ("ERA"): -*

a. *Did the Claimant make a disclosure of information to the Third Respondent (and thereby through her to the First Respondent) tending to show that some of the English teachers working for the First Respondent were breaching or likely to breach the IB Individual Oral Commentary (IOC) Requirements?*

b. *Did the Claimant reasonably believe that her disclosure fell under s.43B(1)(b), that a person had failed, was failing or was likely to fail to comply with a legal obligation to which she was subject? The Claimant avers that the School had a legal obligation to administer the International Baccalaureate Individual Oral Commentary ("IOC") examinations in accordance with the IB requirements. The Respondents do not accept that the Claimant reasonably believed that there had been, was or was likely to*

be a breach of any legal obligations because the IB requirements are so unclear and leave so much room for interpretation. The Claimant would not have agreed for the IOCs to go ahead if she reasonably believed there had been any breaches of the IB requirements.

c. *The Claimant says that she made the disclosure repeatedly to relevant members of the senior leadership team, in particular to the 3rd Respondent, between the 20th - 27th November 2019. The Claimant relies in the following alleged PIDs:*

(a) 1st email to R3 on 21/11/19 (392)
(b) 2nd email to R3 on 21/11/19 (395)
(c) 1st email to R3 on 23/11/19 (405)
(d) 2nd email to R3 on 23/11/19 (404)
(e) 1st email to R2, R3 and R4 on 26/11/19 (424)
(f) 2nd email to R2, R3 and R4 on 26/11/19 (426);

d. *The Respondents concede that she had a reasonable belief that any such disclosure, if found, was in the public interest.*

2. *Was the Claimant subjected to any detriment by any act or deliberate failure to act by the Respondents on the ground that she had made a protected disclosure?*

The Claimant says that she was subjected to the following detriments:

(a) The manner in which the Fourth Respondent, Elizabeth Loughlin, used the disclosure as a means of attempting to pressurise the Claimant to leave her role so that the Fourth Respondent could take her job (paragraphs 28 and 29 PoC);

(b) The manner in which the Third Respondent (Ellie Vermeulen) spoke to the Claimant at a meeting on the 10th December 2019 (paragraphs 31 – 38 of the PoC);

(c) The manner in which the First Respondent's Business Manager, Susan Ross, spoke to the Claimant at a meeting on the 19th December 2019 (paragraph 43 PoC);

(d) The decision by the First Respondent and/or the Second Respondent (Ian Lavender) to invite the Claimant to a disciplinary investigation meeting by letter dated the 30th January 2020 (paragraphs 65 – 68 of the Particulars of Claim);

(e) Refusing to pay the Claimant full pay during the second six months of her sickness absence despite being provided with evidence that her mental

health breakdown and therefore the cause of her absence was the direct result of the Respondents' treatment of her.

B. DISABILITY DISCRIMINATION

3. *The Respondents concede that, from 1st July 2020 the Claimant is a disabled person under s.6 of the Equality Act 2010.*

Unfavourable treatment under s.15 of the Equality Act 2010

4. *Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was a disabled person from July 2020 (or at the time it decided to reduce her sick pay)? The Claimant says that at no time did anyone enquire about her health or refer her to a medical expert such as an occupational health doctor but if they had done so they would have had knowledge of her deteriorating and debilitating mental health.*

5. *Was the Claimant subjected to unfavourable treatment by the Respondent by its refusal to pay her sick pay at the full rate from 20th July 2020? The Respondent concedes that this could amount to unfavorable treatment.*

6. *The Claimant says that the 'something arising' from her disability was her inability to attend work.*

7. *Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its legitimate aims were threefold:*

(a) The need to have rules in place to monitor employee absence and to enable employees to carry out their duties, whilst at the same time making appropriate provision for employees who are unable to carry out their duties by reason of sickness (which provision is significantly more generous than the statutory sick pay scheme). By this aim the First Respondent was encouraging staff back to work. Paying staff in full whilst off sick is a disincentive to return to work. See Fowler v Waltham Forest LBC (EAT);

(b) That given the financial impact of the Covid pandemic on the School's finances, it had an aim to ensure that the Respondent's finances were appropriately managed at a time of significant financial pressure when the Respondent had lost £1 million of income and had 60 members of staff on furlough and receiving basic furlough pay. It was also a legitimate aim of the Respondent to pay those at work in preference to those not at work and the Respondent was in financial difficulties for Covid reasons at the time;

(c) That the Respondent had an aim of applying the Absence Procedure consistently to all employees and to avoid a situation under which individual

employees were believed by their colleagues to have received preferential treatment and/or an unfair advantage.

Failure to make reasonable adjustments under ss 20 and 21 Equality Act 2010.

8. *What was the PCP applied to the Claimant? The Claimant says that it was the requirement for her to attend work at the School after 6 months of absence in order to receive full pay;*

9. *What was the substantial disadvantage? The Claimant says that it was her inability, by reason of her disability, to attend work, in comparison with her non-disabled colleagues who could attend work and receive full pay;*

10. *The Claimant says that a reasonable adjustment would have been to continue to pay her full sick pay during the second six months of her absence, to alleviate her financial pressure and hence her mental illness;*

11. *It is not a reasonable adjustment to keep staff on full pay whilst off sick – see O'Hanlon v HMRC (CA). The cause of the disability is irrelevant.*

C. CONSTRUCTIVE DISMISSAL

12. *What was the reason for the Claimant's resignation?*

The Claimant says that the manner of conducting and then rejecting her grievance appeal constituted conduct without reasonable and proper cause which destroyed the relationship of trust and confidence between the parties.

35. The respondents requested more details about the constructive dismissal claim, which were provided. The further particulars are below:-

1. As set out at Paragraph 5 of the Particulars of Claim, the Claimant had appealed against the rejection of her grievance under five main headings. Her appeal letter set out her detailed grounds. All these grounds of appeal were rejected in their entirety, and it is the Claimant's overall contention that had the appeal panel addressed and considered her points of appeal as a reasonable employer would have done, its findings and its outcome decision would have been different and in her favour.

2. Specifically in relation to the appeal panel's decisions on her grounds of appeal, following the lettering in the decision document dated 7'" October 2020 (and without prejudice to the generality of the contention made in paragraph 1 above):

A 1 & 2 The Claimant was entitled to see the full file or pack of documents that the grievance panel had before it: without it the Claimant could not be satisfied that the grievance panel had properly considered the issues in her grievance.

A 3 The Claimant's concerns over the identities of the governors who considered her grievance were not, or not adequately, taken into account, leading to potential bias and lack of objectivity on the part of the decision makers. Contrary to the appeal panel's contention, the handling of the grievance was compromised.

A 4 The Claimant avers that she was deeply troubled by the total absence of ail or any documents and communications concerning her (whether by email, memo, notes or in electronic form) passing between members of senior management of the First Respondent in the period July 2019 to April 2020, including, but not limited to, such documents and communications received or sent by the Second and Third Respondents. The response given by the appeal panel was totally unsatisfactory in the circumstances: it was insufficient for the appeal panel in effect to hide behind the fact that the Claimant had made a formal complaint to the Information Commissioner's Office.

A 5 The appeal panel accepted that comments made by the grievance panel 'could imply a level of criticism of [her]' but rejected the contention that it amounted to a further detriment: in the circumstances that rejection was not properly founded.

B 6 The appeal panel failed to take any, or any proper account, of the fact that the Claimant was dealt with differently to colleagues, particularly regarding the fact that no action was taken in respect of children from Year to attending the performance of 'An Inspector Calls' in Liverpool the same day as the meeting the Claimant had with the Second Respondent on 16'" January 2020. The play has the suicide of a young woman and its effect upon others as its central theme. The Second Respondent knew of this visit; and was reminded of it by the Claimant at that meeting.

B 7 In regard to the meeting between the Claimant and the Second Respondent of 16m January 2020 the appeal panel acted unreasonably in rejecting the Claimant's account (and indeed the corresponding account of Ms Stubbs via the notes she took of the meeting) and instead preferring the Second Respondent's account, particularly in view of the content of the email that the Claimant had sent to the Second Respondent at 16.57 that day. in that email the Claimant had confirmed that the page in the book would be removed — without any contrary response whatsoever from the

Second Respondent until after the page removal had been carried out, and furthermore two days later. The Second Respondent was well aware of what the Claimant intended to do, yet allowed her to proceed, and then criticised the Claimant in the strongest terms. in rejecting this part of the grievance, the appeal panel unreasonably failed to take into consideration adequately, or at all, the accounts of the Claimant and of Ms Stubbs, and also the effect upon the Claimant of the actions and omissions of the Second Respondent in this respect.

C 10 The appeal panel abrogated its responsibility to (i) consider properly the IB Regulations concerning the IOCs and (ii) to determine whether the Claimant's position was correct (and indeed as to whether it had been so from the outset) with regard to the First Respondent being in breach, or being at risk of being in breach, of the Regulations, given that the position taken by the Claimant was subsequently confirmed in responses from the IB, as was then conceded by the Third Respondent. Furthermore, the appeal panel unreasonably failed to find that it was not the Claimant who 'escalated' the matter to senior management, but members of her department.

D 15 The appeal panel's view that the Second Respondent was not seeking to build a case against the Claimant was unreasonable in the light of the Second Respondent's reference to the Claimant's 'erratic behaviour' in his email to the Fourth Respondent in the course of their email exchange of 18m January 2020. The appeal panel failed to take into account that that evinced an adverse view having been taken by the Second Respondent against the Claimant in advance of any proper investigation, or at the least an opportunity being afforded to the Claimant to answer any allegations of misconduct and/or inappropriate behaviour on her part.

D 19 The Claimant contends that the tone of the Second Respondent's letter to her of 17"" January 2020 was threatening, and that this was accepted, at least in part, by the appeal panel; but nevertheless, and unreasonably, the appeal panel rejected her grievance in that regard.

The paragraph numbers noted above ("*A1 and 2*" to "*D19*") refer to the grievance appeal outcome letter dated 7 October 2020 (659-668).

Findings of Fact

13. In this section we set out our findings of fact relevant to the complaints and issues. One of the issues we need to decide is whether the claimant made protected disclosures. She alleges 6, each made by email. We set out (and identify) those 6 emails.

<u>The Claimant</u>

14. The claimant is an experienced English teacher. Her employment with the respondent began in September 2015 by which time she had over 17 years' experience as an English teacher at well-regarded private schools.

15. The claimant became the School's head of English on a temporary/interim basis for a 12-month period commencing September 2018. She was appointed as Head of English on a permanent basis during the 2018/19 school year, having initially been reluctant to take on the role but then, from late 2018/early 2019, expressing a wish to be made permanent.

The First Respondent

16. The respondent operates the School. It is a company limited by guarantee and has charitable status.

17. The School is a fee-paying school for 11–18-year-old students. About half of the students are day students and the other half are boarding students, many having parents based in other countries.

18. The School teaches International Baccalaureate (IB) programmes. For 11- to 16-year-old students, the school teaches a combination of IB and GCSE courses. As for 16–18-year-old students, the School only teaches IB courses. A Levels are not taught.

Relevant facts- up to September 2019

19. At relevant times there were 3 full time members of staff in the Department;
    a. The claimant
    b. Helena Rand (HR)
    c. Elizabeth Laughlin (EL).

20. There were some other staff members in the Department:-
    a. 2 job share colleagues. This was a job share for an English teacher role but not one that taught the older students in the school.
    b. A trainee teacher – in the 2018/19 school year.
    c. A humanities teacher who taught one English class per week. The claimant only had oversight of this employee in relation to that one class.
    d. 2 teachers in the EAL (English as an Additional language Department). The claimant only had superficial oversight of their work.

21. HR's employment with the respondent started in September 2018. EL's started in January 2019. Both were experienced English teachers; both had experience of teaching the IB. The claimant, HR and EL were the only 3 English teachers at the School teaching English IB courses.

22. At the time both EL and HR were appointed therefore, the claimant was their head of the Department and line manager, albeit on an initial temporary basis.

23. EL had been a head of department at another school. On being appointed she was asked by IL if she might be interested in taking up the Head of Department role at the School. IL made the claimant know that he had raised this with EL and also of EL's experience. This prompted the claimant to express her interest in taking on the role permanently. IL then decided to confirm her appointment as permanent. EL was not provided with an opportunity to apply for the Head of Department role. She applied for a role as a full time English teacher and that is the role she was recruited to.

24. Concerns about the claimant's performance in the Head of Department role began to be raised in the Summer term of 2019. We have seen an email from EV to SR dated 28 June 2019 in which EV states as follows:-

> *After speaking to* [HR] and [EL] *(they both requested meetings with me yesterday) I am concerned that the lack of leadership in English is more problematic than I first thought, and I will have to talk to Katie at the start of next term about various issues relating to a lack of leadership, a lack of tracking data and a lack of faculty oversight, including a failure to conduct lesson observations on Helena and Liz.*

25. SR was unhappy about EV addressing difficult management issues with the claimant at that stage. She was aware that the claimant had just raised some safeguarding issues concerning the treatment of a student at the School 2 years' earlier. SR could not understand why the claimant was raising, in the middle of 2019, issues from 2017. She was concerned that the claimant may be doing so in order to provide her with some protection; that she recognised dissatisfaction with her performance. SR ended an email to EV with this question:-

> *Is it possible that Katie got wind of what the others had planned to say to you two weeks ago, and created this huge storm to protect herself from any action being taken?*

26. SR also had concerns about how the claimant would respond to performance concerns and criticisms being raised in June 2018 and was in part at least motivated by concerns about the claimant's fragility when she put EV off addressing the performance issues directly with the claimant at that stage.

27. The safeguarding issues raised by the claimant in around June 2019 (about events in 2017) came up again in a grievance raised by the claimant in 2020 (see below). We find them to have no relevance to the complaints and issues we are required to reach decisions on and we make no further findings of fact about them.

28. At around this time, the claimant experienced difficult relationships with some colleagues outside of the Department. In June 2019 she decided to raise complaints

of bullying against Joanne McCallum (Head of Music) and against Jo Parry (Deputy Head (pastoral)).

29. SR suggested to the claimant that she may want to try to resolve matters informally and, with the claimant's agreement, she set up an informal meeting between Jo Parry and the claimant. SR also attended that meeting as a facilitator. The meeting enabled the 2 colleagues to discuss recent events between them, the claimant was able to tell Jo Parry what had happened that she said amounted to bullying and how she felt. Jo Parry apologised and the 2 individuals appeared to find common ground and resolution.

30. The claimant did not want her bullying allegations against Joanne McCallum to be dealt with informally. They were therefore investigated with a view to possible disciplinary action but the decision was taken that there was insufficient evidence to justify any disciplinary sanction.

31. One of the reasons that HR had raised concerns about the claimant was due to a comment that the claimant made to HR in May 2019. HR had stated an interest in leading or focussing on self-taught literature classes. These are classes delivered to students from overseas whose first language is not English.

32. The claimant decided that she would not allow HR to take a lead. We accept HR's evidence that the claimant told HR that the reason for her decision *was "in case you go off and have babies."* The claimant has denied making this comment although accepts that she did express reservations in the context of teaching staff leaving the department and that HR might leave or become absent on maternity leave.

33. The comment stayed with HR. In many ways that comment was no different to a comment that someone might be absent due to maternity leave (a comment that, had it been made, HR would probably also have objected to). However, in our view, the comment (go off and have babies) in the context of their management/employee relationship was worse. It was more dismissive, indicating a lack of respect in HR as a professional. It led to HR forming a belief that the claimant (and therefore effectively her employer) had arranged timetables in the expectation that the claimant would become absent and therefore denying the claimant certain professional opportunities that she wanted to take up. Whilst we are sure that the claimant recognised that she should not have made this comment, we accept HR's evidence that she has never apologised for the comment.

34. Shortly before the end of the 2018/19 summer term, HR offered to assist the claimant in drawing up class lists for the Autumn 2019 year 12 classes. The claimant chose not to involve HR. In September 2019 EL raised with the claimant that there was a poor distribution of students across the new year 12 classes. The claimant apologised for this but then told EL that it was due to HR's insistence on certain

students being in her class. HR learned of the reason provided by the claimant. This was another reason for HR to be dissatisfied with the claimant's management of her.

35. Autumn term began in September 2019. The misgivings that HR,EL and EV had about the claimant's performance in her role had not been addressed. All three returned in the sincere hope that matters would improve and EV wanted to try a less direct approach to address what she saw as performance shortcomings on the claimant's part. We accept as genuine, her concern (like HR's) that the claimant did not accept criticism well.

36. EV held a departmental review meeting with the claimant which resulted in the document at page 340 headed "*Progress with Action points from 2018-19*." Many points in this document encourage the claimant to involve and work with other employees in the Department. Successful delivery on those action points would probably have helped address some concerns expressed by EV, HR and EL; for example, the action plan of increasing lesson observations. This was something that HR especially had been asking for; the claimant had not acted on HR's request for observations. Despite this action point having been identified, the claimant did not carry out lesson observations in the Autumn term either.

<u>The IOC</u>

37. We heard a lot of evidence about a process of examination within the IB called the Individual Oral Commentary ("IOC")

38. In broad terms:-

a. Students study texts in preparation for the IOC. For a Higher Level (HL) IB, 3 texts are selected. A text can be a novel, play or poetry collection.

b. The texts are studied through a combination of self-reading and more focussed learning in classes.

c. At an oral IOC examination (which is only some 20 minutes long) a HL student is faced with 8 envelopes. Each envelope contains an extract, 40 or so lines in length, from one of 3 texts that student has studied.

d. According to the IB Guidance "*it is essential that students do not have prior knowledge of the work or the extract for commentary."* (see page 419). Taken literally that <u>could</u> mean that (using the play of Macbeth as an example) an extract used at an IOC could be taken from anywhere within the play, whether the relevant scene from which the passage was taken had been studied in some detail or not.

e. Similarly, the guidance (also quoted at 419) provides *"Until the start of the preparation period, students must not know the selection or the part 2 work from which the extract for the individual oral commentary will be*

taken." Again, this could mean that the student must expect an extract from anywhere amongst the three texts studied. Alternatively, it could mean that the student must not know the actual extract or the text from which the extract is drawn but there is nothing to stop schools from focussing on a narrow number of passages and for the student to know or expect the extract on which s/he is examined to come from one of those passages.

f. Expecting a student to be ready to tackle any extract taken from anywhere within the texts taught is not considered to be realistic. Therefore, the first respondent (in common with other schools) adopts methods to ensure that students can apply some sufficient focus to their preparation, understanding that it is not inconsistent with the IB guidance extracts above. The view is that students may know that the extract they will be asked to comment on will be drawn from a finite number of extracts or passages (see below) as long as they do not know they will be asked about a particular extract.

g. This more "realistic" approach is supported by other parts of the guidance that we have seen from the IB (bottom of 399). That guidance notes that it is permissible for extracts that are likely to be used in an IOC to be used in class beforehand. The guidance goes further, stating that:
   i. The work is expected to be taught in detail and that extracts that are important to understanding particular aspects of a text may need to be given extra consideration in class but genuinely as part of the teaching and not as a "dress rehearsal" of the actual assessment.
   ii. in fairness to each student taking the IOC, all extracts provided for commentary must have been similarly taught.

h. Realistically the whole text cannot have been "similarly taught" within the class time available, unless the approach is taken not to teach any part of the text in greater detail than other parts. None of the witnesses has suggested that to be an appropriate approach to teaching.

i. A well-known practitioner and guide to the IB and the sitting of IOCs, Brad Philpot (BP) goes a little further in terms of "signposting" extracts chosen for the IOC. A textbook compiled by BP includes the following note to students sitting the IOC:-

   "your teacher will compile a selection of extracts from your part 4 texts. Although you are not allowed to know which passage you will be given to talk about in your individual oral commentary you are allowed to know which extracts have been chosen by the teacher for the compilation. You can even suggest extracts for

> *the compilation. As a useful class exercise each student chooses an extract, they consider significant to the text and prepares a presentation on it in class. Listen carefully to the other students' presentations as one of their extracts may turn out to be yours in the real exam*

j. If an extract is used in a "mock" IOC examination, it should not be used again in the real IOC for that year. All those giving evidence on the IOC agreed with this.

39. The IB Guidance under the heading "Choice of extract" also provides the following instruction:

> *The extract to be used for the oral commentary may be selected only by the teacher; students may not select the extract for their own particular oral commentary (except when asked to draw an extract randomly from the pool selected by the teacher). Students must not be told about or given the extract in advance. A student may draw an extract from a pool selected by the teacher at the start of the preparation period. which is no earlier than 20 minutes before the start of the commentary. A student cannot knowingly choose one extract rather than another. Teachers cannot allocate specific extracts to suit students. Strict adherence to these rules is indicated by the signatures of both student and teacher on the coversheet for internal assessment that is to be completed for each student.*
>
> *Teachers should ensure that the extracts they select for the oral commentary:*
>
> > *highlight a significant aspect, or aspects, of the works from which they are taken*
> >
> > *offer students ample opportunities to fulfil the demands of the assessment criteria*
> >
> > *enable students to discuss the writer's use of style and literary techniques and their effects*
> >
> > *do not normally exceed 40 lines in length (do try to give a complete poem if the line number is only slightly higher, and do not give two poems)*
> >
> > *are of comparable difficulty*
> >
> > *are of equal teaching*

40. In the evidence provided about the IOC there was sometimes confusion about an "extract" and a "passage." As we heard the case, we became clear that the term "extract" was generally used to refer to the 40 or so lines taken from a text that a

student could be examined on in an IOC. A "passage" was also a section of an overall text; but the term was generally used to describe a larger section than an extract (such as a scene of a play). On that basis a number of possible extracts could be drawn from a passage for IOC examination purposes. Whilst we became clear about the difference, sometimes these 2 words (extract and passage) were used interchangeably in the evidence.

41. In late November 2019, a difference arose within the Department about how to meet the requirements of the IOC. The topic was something of a "raw" one as there had been issues in the previous academic year (in late 2018) with one (former) staff member having precisely guided a student towards the extract they would be examined on in the IOC. This was regarded as a breach of the IB guidance and malpractice on the part of the teacher who left the school shortly after this had been discovered.

42. HR had joined in September 2018 and was a new member of the English Department when the issue arose. EL joined the School as a staff member shortly after then (January 2019) and, as from September 2019, was the School's IB lead.

43. As well as the topic itself being "raw" as described above, it came at a time when working relations between the claimant and the 2 full time members of staff were strained. We have set out our findings about this elsewhere in this Judgment.

44. On 20 November 2019, the claimant was told by a student that, as she knew which extracts had been used in the mock examinations, she had far fewer extracts to study and prepare for the final IOC. She said she had initially had 9 but now only had 6 (3 having been used in the mock IOC). The student was not in a class being taught by the claimant but was in a class being taught by EL. The claimant sent an email to EL, which included the following:-

> *"*[Student] *has told me – in tutor time- that her that her class has only nine IOC extracts to revise and with 3 removed for the practice this leaves them with just 6 to revise.*
>
> *My class has studied 17 extracts or poems (10 x Macbeth and 7 x Duffy — although I hoped to do 10 of each as we discussed) and they are revising all of those extracts. …..*
>
> *How on earth has she got the sense that she only has to revise 6 extracts for her final IOC?"*

45. We accept the evidence of EL that when the claimant sent this email to EL she was sitting very near to EL and, having sent the email, then left the room, therefore effectively preventing any immediate discussion. That behaviour was indicative of the working relations at that time.

46. We also accept EL's evidence that it was the student who was mistaken here:-

a. Because extracts used in a mock would be replaced with other extracts at the actual IOC – so there would still be 8-10 extracts for selection
b. Because EL had not at that stage made a final choice about the extracts for the IOC. She was focusing on particular passages – e.g. scenes or parts of scenes as the date for the IOC moved closer – but had not made a final decision about which extracts to select from those passages.

47. The claimant spoke with HR on 20 November 2019 about the same issue. During that discussion HR told the claimant that she had identified (and was teaching to) 8 extracts (or passages) in total as it was what the claimant told her to do. The claimant responded by telling HR that this was not in the spirit of the IB. There is a dispute about whether or not the claimant compared the position to the previous year (when there had been a clear breach of the IB). We prefer the evidence of HR. We find that comment was made comparing matters to the previous year and, further, that HR reasonably took from this discussion that the claimant was accusing her of malpractice.

48. Later that day, the claimant emailed EV (her line manager). That email included the following:-

> *Just to keep you in the loop: we have had a bumpy afternoon in English with an IOC issue. I have been very firm about each class being in exactly the same position before the assessment so that we can assure students and parents of parity in teaching and revision. Liz and Helena are not very happy with this and may come to see you but I am keen to avoid any repeat of last year's IOC debacle. Everything is in hand but I am well aware that we are all very tired and feeling raw and I really didn't want to have to lay down the law this week.*

49. At about the same time the claimant then emailed both EL and HR:-

> *We need to sort out the situation with IOCs so that all three classes are in exactly the same position before their final assessment.*
>
> *As you know, the IB's definition of a work is a single major text and 15—20 shorter poems. Like many schools, we manage this in relation to the IOC in two ways:*
>
> - *We teach fewer than 15-20 poems (though students read the whole collection) and students often don't study all the scenes of a play in the same amount of detail.*
>
> - *We teach using extracts of the same or similar lengths to the IOC passages so that whatever the students get in the real IOC will have been a text that they have studied in detail in class.*

Both of these strategies stretch the IB's regulations but in a way that schools and teachers accept.

We agreed that we would all teach 10 extracts, poems or scenes from each text that we have studied giving students close analysis experience of 20 extracts during the term. We also agreed that we would use the 'wink and nudge' technique to reassure students that their assessment would be on one of these class extracts and not on the whole text. We did not agree that we would further narrow down the number of extracts in any other way. And we discussed the difference between the IB's teaching requirements and the table that gives us the number of extracts that we need to use for the assessments themselves.

50. The claimant's concerns were raised some 2 weeks before the students were to sit their IOCs and only 3 or so weeks after the claimant had provided some verbal instruction in a department meeting to EL and HR about the number of passages or extracts to focus on. The claimant had indicated 8-10 extracts. We accept HR's evidence that she understood this to mean 8-10 extracts (or passages) in total whereas the claimant's position in correspondence from 21 November and at this this Tribunal hearing was that she had meant 8-10 extracts per text.

51. At the same meeting the claimant had also told EL and HR to avoid saying that the particular extracts would be in the selection at the IOC but instead to hint (with a *"nudge and a wink*") that they would be.

52. We find as follows:-

a. The claimant was not sufficiently clear about the number of extracts the staff should teach to. We accept that she thought she had said that the staff should target 8-10 per text. We also accept that HR genuinely believed that she had been instructed to focus on 8-10 in total. When using the term "extract" here the claimant did mean those 40-line extracts (not longer passages) but, except in the case of certain extracts from Macbeth that the claimant identified for EL, this was not made sufficiently clear. EL and HR taught by reference to larger passages (whole scenes, poems etc) from which extracts could be later taken;
b. Focussing on 8-10 passages of a text (from which extracts would then be drawn) in total made sense to HR. That is the approach she had taken at her previous school and was consistent with the guidance in BP's textbook (see above).
c. Each of the 3 teachers had her own teaching style. The claimant spent more lessons than the other 2 teachers, focussing on a wider range of specific extracts from a text. EL spent less time focussing on specific extracts, choosing instead to focus on particular scenes and themes from which extracts would be selected shortly before the IOC. We accept EL's evidence that, as of 22 November 2019, she had not

> decided on the 8 extracts to choose. In an email from EL to the claimant dated 21 November 2019, EL explained that she was focussing on scenes and poems (not extracts) so that, as far as the HL students were concerned, she had highlighted 3 important poems, 3 important scenes from Macbeth and 4 from a Streetcar Named Desire (10 in total). She explained to us that as the IOC moved closer there would be more specific emphasis within these scenes/poems.

53. HR also contacted EV to express concern about the IOC position. She told EV that the claimant had spoken with her and that she was concerned that the claimant was accusing her of malpractice even though, as far as she was concerned, she had done what she had been asked to do and was preparing for the IOC in the same way as in previous years.

54. At that stage EV became involved. She met with the claimant on 21 November 2019. EV listened to the claimant's concerns and reviewed relevant emails provided to her. She tried to assist by telling the claimant that she and her colleagues should work with the students towards "the lower end" of the extract numbers provided by the table. In other words, she considered the approach taken by EL and HR to be a pragmatic one that did not overburden the students but complied with the IB requirements. The discussion also touched on unhappiness within the English department.

55. The claimant was not satisfied. She emailed EV later that day (page 392 – alleged disclosure 1). The email included the following:-

> *As I said to you at lunchtime, I am shocked by your response to this. I understand the pragmatism here but I feel in a very difficult position. As HoF I am duty bound to do the right thing according to the spirit and word of the specification because if I don't then I am at fault in my management strategy. We already bend the rules of the IOC, as many schools do, by teaching through extracts. Pushing further into the grey area is dangerous and I would never want to be guilty of malpractice. I have worked hard to do the right thing in accordance with my job description and I feel undermined in that today. '*
>
> *As far as unhappiness in the department goes, that is a serious issue and one that I would like to address as soon as possible and certainly before the IOCs. I have been aware of it since Easter and Nicky and I have talked about it often. I haven't talked about it with you because I wanted to try and resolve it using the strategies below and because I wasn't confident that you would support me. To be honest, my impression was that you felt warmer towards Helena than towards me and so I was anxious about the outcome of a discussion with you.*

Liz has always been a bit unhappy in the department because she was H0D in Italy and she would like to be HoF here. She and I have talked that through and I have also talked it through with Ian. I hope that the IBDP role will give Liz access to Head of Sixth Form and/or an academic deputy role as her career develops.

56. EV replied by email later that afternoon. It included the following: (page 705)

"Many thanks for your email. In my view I think It is a very sensible idea for all of you to work at the lower end of the number of extracts that need delivering. This creates a much more manageable workload for the students and reduces their stress levels. Given that the largest class has 17 students, I would suggest 8 as the minimum number of extracts that should be taught in greater depth, although it sounds very much as if all of you have done more than that. You can manage the reduction of extracts in your class very easily, and without creating any need for complaint, by simply saying that you have prepared your class in terms of breadth and having done that the focus between the mock and the real IOC will now be on a smaller core of important extracts. I cannot imagine that any student (or parent) would complain about this as it is eminently sensible.

I apologise if you do not feel 100% supported, but you also need to look at this from my position. My role as your line manager is clearly to support you whenever I can, which I do, but not at the expense of doing the best thing for the department as a whole and the students within it (and that is the bottom line here — what is best for the students). In this instance, and having looked into it in some detail, I think that it is better to prepare (in detail) 8-10 extracts on the back of having taught of all the poems / texts beforehand. This is entirely within the IB brief, and it appears to be what Helena and Liz have done. In our meeting at lunchtime, you said that your only option left was to 'cheat' in the same way that Helena and Liz have. This is a serious thing to say, particularly as I do not feel Helena and Liz have cheated. I do understand what you were trying to say (i.e., that you would need to do the same as they were doing to create parity for the students) and that this was simply a poor choice of words on your part, and I also understand that you are very keen to ensure that we are operating both within the letter and the spirit of the law. I don't think we are bending the IB rules as staff are teaching the whole text before then focusing on extracts. I cannot see how else the IOC task could be achieved.

I am concerned that you perceive this whole discussion rotating on to how 'warm' I am to some staff over others. I do not operate like that and never have. I operate on what is best for staff and best for students. I see Helena slightly more than some other staff simply

because she is line-managing me within ToK, but outside of that interaction I see her no more and no less than anyone else.

I do think we have some issues to address in terms of unhappiness in the department, and I am very happy to meet at a time that suits you. Sadly, tomorrow is very busy for me, but looking at our timetables we are both free period 3 on Monday if that works for you

57. The claimant's reply that evening (alleged disclosure 2 – page 395) was as follows:

We can talk through our working relationship when we have time on Monday. That would be great, not least because I wasn't intending to suggest any favouritism. There are things that I need to say but not that. And with regards to my language, cheating is a serious thing to say and I would never use that language outside a closed-door meeting with you and certainly never as an accusation to Liz or Helena. They are excellent teachers who work brilliantly with their students. The word cheating comes from my last school where I was a member of a department of 12 and where there were very strict rules about how we interpreted exam board specifications. The sort of approach that I am taking now would have been a serious issue there but I need to talk to colleagues in other schools to get a wider sense of policy and perspective. I am so aware that I could be disciplined for misleading my team with regard to a syllabus and I am also aware that my responsibility is to do the best for all the students for whom I am responsible so that they can achieve their best results. This is so hard with IOCs where there is so much scope for anything from pragmatism to misconduct, which is why the assessment has been scrapped in the new specification.

58. The claimant emailed EV again in relation to her instruction to teach at the "lower end" of the number of extracts. This email was sent early in the morning on a weekend day (23 November 2019 – alleged disclosure 3)

I am sorry to email at a weekend but I need to do a last check before I get in touch with my Year 13.

As you know, our IB teaching strategy is as follows:

- *Teach the whole text*
- *Use at least 8-10 passages / poems / extracts in order to highlight central themes, concerns, imagery, techniques and characters*
- *Teach IOC techniques and begin practices with MP3 recordings marked with assessment criteria specific feedback*
- *Ensure that classes have heard exemplar IOCs*

- *Do one formal recorded practice per student and save that onto the Shared Drive.*

Do you want me to tell my class that some of the passages that we have studied are more 'important' than others for the oral exam?

This "teaching strategy" that the claimant described to EV is not quite what she set out to HR and EL (see para 49 above). We see 2 important inconsistencies (1) when setting out the teaching method to EL/HR, in the example being used (poetry collection) she was clear that students would be told to read the whole text but the whole text would not be taught (2) when emailing HR/EL the claimant was very clear – that the 8-10 extracts were the same or similar length to the IOC (40 lines or so). In this later email to EV, she described more closely the method used by EL/HR.

59. EV replied that same morning:

Dear Katie,
My understanding is that after the whole text has been studied you have all taught more than 8—10 extracts, eg for poetry alone 15 have been prepared, etc. From those some are mentioned as being more important, and that is where the 8—10 comes from.

60. The claimant was not satisfied and wrote to EV again later the same day (alleged disclosure 4 – at page 404)

Sorry: this is so complicated.

No: we study a whole text (Macbeth or a collection of poems). Then we use 8—10 poems or passages per text to explore themes/ideas in more detail. HL students therefore experience 30 close reading experiences over a term; SL experience 20 or so. The soliloquies of Macbeth would be an example of how to explore the character's evolving state of mind. This number— 8-10 passages per text -— is entirely of my own making and has been honed after years of teaching this syllabus and in conjunction with colleagues in previous schools, and in discussion with Elizabeth Stephan who wrote the text-book on this. This number is manageable in the teaching time, provides enough stretch and challenge, and allows for proper exploration of a text.

All this is fine with the IB.

The dangerous territory is when teachers select a few of those 8-10 passages per text and describe them as more important.

As an example, a class might be told that 3 poems and 3 Macbeth passages were 'important'. This would be a breach of regulations — see below - and

would put us as risk of malpractice if that were discovered because it means that the students have been told what the selection of exam extracts will be. This is why I was alarmed last week when as student mentioned having to revise just 6 extracts in total. I talked to a previous colleague last week about this, in confidence, and she was horrified.

I do not want to let any of our students down by putting them at risk and I have to meet the terms of my job description in relation to exam board specifications. At this stage, and with IOCs in one week, the best that I can do is to understand the situation and manage it. But we have to be clear about the regulations so I can go back to the IB with all this on Monday.

61. The claimant copied and pasted at the foot of this email, a question and answer that she had obtained either from a FAQ part of the IB website on the IB website.

Question
Can I indicate to students which extracts are likely to be chosen for the Language A: language and literature oral commentary?

Answer
No. it is not permissible for students to be told in advance which particular extracts are likely to be chosen.

62. The claimant next contacted the IB to obtain more instruction. The IB runs an online chat function, helpline or similar. It appears to be operated by a third-party provider (the email responses came from an email address "noreply@salesforce.com"). The claimant contacted the IB using a Gmail account that did not reveal the name of the School. The claimant put the question (and received the response) noted below (page 419):

Question

Can teachers tell students which 7 extracts (for a class of 11-15) are to be chosen for the IOC itself?

Response

That would indeed be a very serious breach. Please see the current Language A Literature Guide, page 52, where it states clearly in the section Guidance and authenticity that:

For the oral commentary, it is essential that students do not have prior knowledge of the work or the extract for commentary.

and again on page 54 in the Individual oral commentary section:

> *Until the start of the preparation period students must not know the selection or the part 2 work from which the extract for the individual oral commentary will be taken.*
>
> *So: for 2020: .*
>
> *1. No, candidates should have no idea what extracts they might have to tackle in their IOCs.*
>
> *2. No, teachers shouldn't be alerting candidates to any particular extracts or practising them.*

The claimant forwarded this response to EV in the evening of 26 November 2019.

63. Once EV received this further information, she informed the claimant that she had better cancel the IOC's due to go ahead in the following week and instructed her about steps to take to do this (including letters to parents) and move forward. We find that EV was somewhat sceptical about the instructions in the email being the approach to IOCs that was required but if it was accurate, the English department (including the claimant) appeared to have used teaching methods that were not permitted. The claimant had focussed on specific extracts and indicated to students (by a nudge and a wink) that they would be examining on one of those extracts.

64. The claimant was very clear to EV that HR and EL were engaged in teaching practices that were forbidden and now she had an email from the IB to support this. Somehow though, she was oblivious to her teaching methods also being in breach of the requirements of this email. She simply did not recognise that.

65. The claimant provided 2 draft letters; one (to parents) on the basis that the tests would be cancelled and the other (to students) on the basis that the tests went ahead (containing more instructions to the students).

66. However, no one (including the claimant – see her email of 26/11/19 at 424 – alleged disclosure 5) wanted to postpone the IOCs. The view was that would not help the students who were ready for the assessments. The preference therefore was to ensure compliance and go ahead.

67. The claimant's email of 26/11/19 (alleged disclosure 5) reads as follows:

> *At this stage, I will let Liz as IBDP co-ordinator talk to the IB. Then we will have advice from my communication with the exam board and from Ellie's communication with them.*
>
> *I have been in touch with Malvern to clarify their policy since it is now 5 years since I left and the department is managed by a different HoF. Malvern - a department of 12 IB staff - do as we do: teach whole texts*

and then use 10-15 focal passages from each text in class. The IOC material is taken from this collection of important passages.

I will also make my training material available to Ellie. Liz has material from her own training and access to her old school which uses a senior IB trainer called Brad Philpot. He writes text-books for Language A and his advice will be invaluable.

By altering the dates of the IOCs we will not help the students in any way: they are ready for the assessment. But we need to ensure that we are complaint [sic] *and this has been so difficult since Ellie and I discussed it last Thursday because the advice does not match.*

68. Late that same evening, the claimant sent an email to HR, EV, EL and IL (who by now had been informed of the issue) in which she set out what she believed the position was at that time (alleged disclosure 6 – page 426):-

As promised, here more details on where we are.

As you know, the sequence of events is as follows:

- *Last week, one of my tutees told me that she only had to revise 6 passages for the lOC:*
- *I asked you both to clarify what you had done with your classes in order to make sense of this information:*
- *You shared your concerns with Ellie*
- *I then had a series of complaints from my class that I had not indicated which of the 20 important passages that we have studied in class were more important than others*
- *I had a meeting with Ellie to talk through our IOC teaching strategy and Ellie sought advice from the IB and from Lynn*
- *Ellie's investigation suggested that our focus on 20 (or thereabouts) important passages for SL — or 30 for HL left students with too much material to revise for their lOC*
- *For comparison, Ellie asked about how the German A Literature orals are conducted and was told that students only have 3 passages to work on for their IOC*
- *I asked Malvern College for their IOC policy*
- *I also wrote the IB to ask for clarification about whether we can narrow the focus from our teaching range of important extracts to an 'even more important' range. This was the response:*

- No, candidates should have no idea what extracts they might have to tackle in their lOCs

- No, teachers shouldn't be alerting candidates to any particular extracts, or practising them.

After all this, we are left with an apparent discrepancy between how we have taught, the contradictory advice from the IB, and the students' perception of what they should know in advance of the IOC examinations.

I am absolutely confident, from all the teaching material that Liz and I have shared, and from all the material that my tutees have shown me, that we have delivered excellent teaching to each of our Year 13 classes, All this is available for any member of staff to check through ManageBac and through the teaching plans on the R drive. As a team, we have to resolve this series of discrepancies that have suddenly come to our attention. If we can do that, and put to rest the notion that some students think that they only have to revise a very small selection of extracts, then I hope that we can go ahead with the IOCs.

This is the last thing that any of us needed at the moment.

My comfort is a memory of my weakest Literature student from last year who revised all 30 of the important extracts that we studied in class (from Donne, Angelou & Streetcar) and achieved a top 4 to add to her good level 5 for her oral presentation. I was delighted for her.

I know that we can do the same for our students this year.

69. On 27 November 2019 EV contacted the IB herself. She did so openly, using her School email account. She explained 2 different approaches being taken.

> *We are currently struggling with a considerable degree of conflict between our English staff as to the most appropriate way to prepare students for the IOC. This conflict centres around the exact interpretation of the IOC guidelines.*
>
> *All our staff have taught the required texts in full, so for example at SL they have taught the entire text of Macbeth and for poetry, they have studied the World's Wife by Carol Ann Duffy. Our largest class has 17 students in it, and so the minimum requirement for extracts on the day of the IOC itself is 8.*
>
> *The IB guidelines state that 'students do not have prior knowledge of the work or extract for the commentary' and 'students must not be told about or given the extract in advance'. However, the guidance also states that 'passages can be used in class provided the teacher is careful not to give students any indication that a particular passage will be used in the actual oral commentary.' We have interpreted this to mean that texts are taught in their entirety and then the teacher drills down and focuses on certain areas in more detail in preparation for the IOC. Where the problem arises is how many areas of the whole text the teacher should focus on in more detail.*

> *The exact conflict is that as we have moved closer to our IOCs (which are scheduled for next week) one Standard Level teacher has focused on around 10 areas of text in particular (these areas are broader than an extract and this teacher has not been teaching these as extracts, but as areas of focus having taught the whole text). Another teacher has focused more broadly on 20 areas. I cannot find any guidance on how many areas should be looked at in preparation for the IOCs.*
>
> *In both cases (i.e. for both classes) none of the students are aware which specific extracts will be used for the IOC, although the students in the class where the focus has been more selective are able to see that the extracts are likely to come from these areas of Macbeth / The World's Wife.*
>
> *I have spent considerable time trying to get to the bottom of which member of staff is correct, or if they are both differently correct. It is a concern that the guidance is not very clear, e.g. it is very clear how many extracts are a minimum for the day of the IOC, but it is unclear how many passages should be prepared / focused on as part of the IOC preparation. The textbook we use (a Cambridge IB text) goes so far to say that "students are allowed to know which extracts have been chosen by the teacher" and also says "you (i.e. the students) are likely to have a good idea where in the text the extract might be selected from,' but the teacher who has not focused in as selectively feels that this is malpractice.*
>
> *Clearly, I am keen to ensure that there is no concern in any way relating to malpractice, and to ensure that our students are prepared equitably and fairly for the IOC, which is why I am contacting you directly for clarification.*

70. The IB provided the following response on 29 November 2019.

> *Thank you for your query. We followed up with the Curriculum Manager and teachers should focus, in the preparation of the IOC, on strengthening the students' commentary skills. There should be no indication on the part of the teacher of which the possible extracts might be. In that sense, the second approach described is not the correct one: students should be prepared to comment on any extract from the work and not be told in advance about a pool of 25-30 extracts their extract could be drawn from.*

71. Once the school received that advice it was decided by all (including the claimant) that the IOCs could go ahead in the English Department. Firstly though, students were contacted by EV who told them that extracts in the IOC can be taken from any part of a text but that they should also focus on those parts of the text that have been more closely taught.

72. We note as follows about the IOC's response of 29 November 2019

a. It does not say that the approach adopted by the claimant is correct; it specifically says that it is not.
b. Many recipients would, in our view, have followed this up with further questions/a dialogue with the relevant person/department at the IB.
c. It does not address a significant issue behind the claimant's concern – parity of teaching. It was clear from the outset of her raising concerns about the IOC that she was unhappy that other classes appeared to be focussing on fewer extracts than her class and as a result, students may be at some advantage over the students being taught by her. We note here however the difference between passages and extracts. The claimant focussed on extracts of the length used in IOCs (email at para 49 above). Her colleagues focussed on longer passages, themes, scenes etc. The teaching methods were different. It is not obvious to us that the different methods advantaged one class over another.

73. We agree with the position put forward by the respondents at this Tribunal hearing; that the requirements of the IOC are confusing. We do not agree with the claimant's position that the requirements are straightforward. These are our reasons for agreeing with the respondents' position.

a. The IB Guidance itself is inconsistent with the instruction given to EV on 29 November 2021. The Guidance requires extracts (plural) used in the IOC to be equally taught; the Guidance prohibits a student from knowing the particular extract (the singular is used) that they will be tested on.
b. BP is a well-known and influential commentator on the IB. His commentary is not consistent with the advice/instruction provided to EV on 29 November. However, that advice/instruction appears to take no account of the requirement of the Guidance, for all extracts to be equally taught.
c. The advice/instruction provided on 29 November prohibits the claimant's approach to teaching for the IOC. Her approach was the "second approach" referred to in the IB's response of 29 November, described by the IB as not correct.
d. By her own admission the claimant's method of teaching requires her to "bend the rules." She has not explained why her method is a permissible bending of the rules and other methods (such as teaching fewer extracts in more detail or teaching 3 or 4 passages in more detail, from which extracts will be chosen) would amount to a breaking of the rules whereas her method does not. As noted in c above, the response from the IB was that the claimant's method would break the rules.

74. The IOCs were held in early December 2019. No one has said to us that they should not have been held or that there was anything incorrect about the examination of the students in these IOCs.

75. The 2019/20 academic year was the last year that the IOCs (in that format) would form part of the IB. We have seen correspondence in which staff members (including the claimant) indicated their relief at this.

Meeting on 10 December 2019.

76. The IOC issue highlighted the need to improve relations in the Department. HR wrote to EV expressing ongoing unhappiness with her relationship with the claimant. She told EV that the claimant was intending to have a meeting about "unhappiness" in the department.

> *Of course I am happy to have a meeting together and I really hope that it helps. I will absolutely go into the meeting hoping to improve our working relationship, but I am concerned that Katie will not understand the way that her management is affecting the department.*

77. EV spoke with SR and it was decided between them that an informal meeting should be arranged. As already noted, tensions had not been dealt with before the summer break.

78. EV emailed the 3 affected members of the Department on 6 December with arrangements for the meeting on 10 December 2019.

> *"I am sorry to email at the end of a long week but I think it is important that we all meet up before the end of term to discuss some of the issues that have been causing unhappiness in the English department this term. These issues came to a head with the recent IOC issue, but the IOC issue itself was (I feel) a catalyst, rather than the only thing causing unhappiness.*

79. The decision to hold the meeting was a reasonable one. All parties recognised the need for a strategy to improve working relations.

80. Separately EV emailed EL and HR (451). She did so because they had spoken with her about their unhappiness with the claimant's management of them. In this email EV recommended how EL and HR might approach the meeting; for example:-

a. Focus on behaviours rather than the person
b. How the situations (or behaviours) made them feel
c. Actions to improve the situation.

81. These recommendations were designed to assist the meeting achieve a positive outcome for the Department.

82. As it was, the meeting did not help resolve the relationship issues and the claimant claims to have been unfairly treated at that meeting. These are our findings about the meeting itself:-

a. SR and EV hoped to achieve an amicable outcome. At stages during the meeting SR (ion her role as facilitator) tried to make suggestions for a way forward (see for example page 460).

b. HR and EL provided specific examples of what had made them unhappy. These included the following:-
   i. The “babies” comment (see earlier)
   ii. The IOC issue (see earlier)
   iii. The issue of class lists (see earlier)
   iv. A lack of support and sharing (involvement) by the claimant in decision making in the department (see earlier)

c. The claimant’s response to the issues was defensive. We accept the evidence of SR, EL,HR and EV about the claimant’s behaviour at this meeting. This was summarised by SR as follows; that the claimant refused to take any responsibility for any of the issues raised; she did not acknowledge that her actions had caused upset to others, she claimant could only see the upset which had been caused to her.

d. The claimant did not propose any solutions to repair her working relations with EL and HR. Instead, she sought to justify actions she had taken. The exception to this was the baby comment although even here, she denied making the specific comment and attempted to pass the incident off as a joke. She refused to apologise, saying she had done so on an earlier occasion. We accept HR’s evidence that the claimant had not at any stage apologised to her.

83. At one stage in the meeting, EV said the claimant was prepared to throw the school under the bus just to prove she was right about the IOC issue and that she felt she had to threaten to cancel the IOCs to get a resolution. We accept the evidence of SR that EV made this comment at a stage in the meeting when the parties were discussing the upset that had been caused by the IOC issue and the claimant noting (by looking at EV) that everyone had handled the issue badly.

84. Neither EV nor anyone else has sought to deny this comment was made. We accept the evidence of EV that she apologised to the claimant immediately after the meeting and that she felt awful that she had made the comment. We also accept that EV apologised to the claimant again in January 2020.

85. We also find that the outburst was out of character; it was not typical of EV. It was not the start of a longer outburst. It was said and immediately regretted.

86. We need to make findings of fact about the reason why EV made this comment. These are our findings:-

a. EV has given evidence about her father's serious ill health at the time. We accept that this was a worrying time for EV although we find that this had limited impact on her behaviour at the meeting.

b. The meeting took place at the end of a long working day and a very difficult term. Again, these factors played some, but limited part in EV's snapshot decision to speak as she did.

c. A more significant reason was the way that the claimant was behaving in the meeting; EV's view (and the view of other attendees) that the claimant was refusing to listen and providing considered responses to the reasons for unhappiness; she was defending rather than mediating.

d. The comment also arose from a frustration about the management of the IOC issue at the end of November; the intransigent position adopted by the claimant that she was right and others were wrong; the lack of effective communication within the English Department and the fact that the manner in which the claimant dealt with her concerns led to a worsening of already poor relationships. Yet at the meeting the claimant accused others (particularly EV) for having handled the IOC issue badly.

87. We find the last 2 of these were the main cause of the outburst and particularly the claimant's behaviour at the meeting. Our unanimous view is that, had the claimant behaved in a conciliatory manner at the meeting then the outburst would not have occurred. We make this finding having heard for ourselves the various accounts of this meeting and other evidence about the IOCs. Our finding is consistent with a view expressed by HR during the grievance process (page 816).

88. The claimant did not attend school on 11 December 2019, due to illness. That was the last day of term. Emails were exchanged between the claimant's partner and SR and IL. SR wanted to meet with the claimant again before Christmas and the claimant agreed, attending a meeting on 19 December accompanied by a friend.

Meeting on 19 December 2019

89. One of the claimant's complaints refers to this meeting. She says she was told by SR that she needed to apologise and that this was detrimental treatment on the grounds of her making protected disclosures. We need therefore to make findings relevant to this issue.

90. SR did raise the issue of an apology at the meeting. She did so because, in one of the emails exchanged following the meeting on 10 December (page 471) the claimant wrote that at the meeting on 10 December 2019, she had said sorry that EL and HR felt unsupported during the IOC issue but that she found it hard to support them because she did not know what was happening. SR was clear that the claimant had not made any apology at the meeting on 10 December.

91. SR kept a note of the meeting of 19 December 2019. It is evident from this note and from SR's evidence about this meeting (which we accept) that the claimant was not told that she needed to apologise. SR continued to talk with the claimant about how to resolve the relationship issues within the English department. The notes are evidence of a supportive meeting in which SR was trying to help the claimant.

Other evidence relevant to relationship issues.

92. HR commented that the claimant would sometimes put forwards one approach in writing but act differently. We have seen evidence of this. By way of example, in her evidence (in chief- in response to supplementary questions) the claimant told us that HR and EL were members of staff that she liked and respected; that they were a pleasure to work with; they were good at their job. We have seen similar comments in the claimant's email to EV of 21 November 2019 for example (page 395) where she refers to EL and HR as *"excellent teachers who work brilliantly with their pupils*."

93. Although willing to make complimentary comments about EL and HR in writing during the IOC issue (page 395) these comments did not reflect what she said verbally. The claimant effectively accused both of malpractice and cheating without any regard for the professionalism of the 2 colleagues, her own communication failings and the confusing nature of the instructions concerning the IOC (see above) . This worsened working relations in the Department.

94. We have also seen an email from the claimant to NB dated 25 November 2019 in which the claimant includes the comment *"the terrible duo don't like being told what to do. But their exercise books have no marking stickers, no dialogue marking and a lack of very clear targets for student improvement."* Ms Winstone, on behalf of the claimant, rightly points out that this email postdates the initial alleged protected disclosure. However, we find (in case that is the claimant's position) that these relationships did not "turn on a sixpence" once the claimant had raised her concerns about the IOC preparation. This email is evidence of poor relationships over a period of time and of the claimant's dislike of (and lack of respect for) her 2 colleagues.

95. We accept comments from HR that the claimant would make what HR regarded as inappropriate remarks about the claimant's personal life and that of others. HR gave evidence of personal subject matters that she says the claimant referred to in the first week of HR's employment. HR was questioned about these comments but the accuracy of the examples provided was not challenged. It was suggested to HR that these things may have been said over the course of the first year of HR's employment. HR was adamant (and we accept her evidence) that the personal information provided were all said to HR within her first week of employment, that stuck with HR and she thought it was unusual and unprofessional.

96. We also accept the other comments that HR refers to being made by the claimant over the first 6 months or so of her employment including the comment that EL was after the claimant's job. This is supported by the claimant's persistence with this view up to and including the allegations made in these proceedings (see issue 2(a)). The claimant's ongoing, unwarranted suspicion that EL wanted her job, contributed to the claimant's poor management relationship with EL.

Student suicides

97. Two students took their own lives at the end of 2019; one in November and then another just at the end of Autumn term/start of the Christmas holidays.

98. The School community was deeply affected by these tragedies. Staff needed to teach and manage students in a way that kept them safe and enabled their education to continue without it (and them) being overawed by the tragedies. The second suicide created concerns about whether this may be the start of a "cluster" of suicides at the School.

99. Understandably IL was focussed on managing the School's students and staff through this crisis, ensuring measures were put in place to maintain the safety and wellbeing of students; providing assurances to the families of students. Whilst IL had some knowledge and involvement in the staff relationship issues within the Department and the IOC issue, these issues were far from the front of his mind once he learned of the second suicide. They did not influence his treatment of the claimant in January 2020.

January 2020

100. The first day of the School's 2020 spring term (6 January 2020) was an inset/non-teaching day. By this stage a suicide prevention charity called Papyrus was helping the school in the light of the 2 recent student suicides and the concern about a suicide cluster developing.

101. All staff members (teaching and non-teaching) met on 6 January and representatives from Papyrus attended and offered guidance.

102. Departmental staff meetings also took place on 6 January. The claimant held a Department meeting. She announced at the start of the meeting that she was recording it. The claimant claims that she did so as her memory was not functioning well and it would assist her in writing up minutes. We observe that, had there been genuine concern about taking accurate minutes, then the claimant could have asked or instructed a colleague to take them

103. Whatever the reason the claimant had for recording the meeting, it had a negative effect on the already fragile relations between claimant and HR and claimant and EL.

104. We have not seen a transcript or heard the recording itself. We have seen an action points document from that meeting. It is evidence of discussions about certain texts; whether they should be taught in the light of the suicides and guidance being offered by Papyrus. Hamlet is discussed as are some poems written by Maya Angelou.

105. Notably (for reasons we explain below) what are not discussed are some texts that the claimant was going to teach that term, particularly Antigone (Sophocles). A main feature in this text is a suicide by hanging. Another text that the claimant was about to start teaching was a novel called the Reluctant Fundamentalist (Mohsin Hamid). Whilst suicide is not a topic or theme in this novel, the claimant was aware of a passage (a couple of paragraphs or so) in which the book's narrator discusses suicide.

Antigone

106. Later in January 2020, HR learned that the claimant was going to teach Antigone that term. She was worried about this in the light of the instruction and guidance provided (including by Papyrus). On 14 January 2020 she emailed EV about this. Had there been good working relationships between HR and the claimant, HR may well have spoken with the claimant directly. However, someone needed to be informed and we find that it was not unreasonable for her to contact EV. We have seen HR's email to EV (page 524) and it is proportionate and appropriate.

107. EV did not act immediately. She was concerned that raising the issue with the claimant might only worsen the relationship issues within the English Department – as the claimant would know that the information came from someone in that department. She contacted SR and IL.

108. IL chose to act. Later that day he emailed the claimant, referred to the departmental minutes, noted that they did no mention what was being taught to years 11 or 12 and asked for details. The claimant replied and listed the texts. She noted that 4 of them involve a death by suicide and that "inevitably many others deal with death, loss and other challenging topics." Included in her list was Antigone by Sophocles and the (relatively) recent adaptation of Antigone by Jean Anouilh.

109. IL responded.

> *Thank you for sharing this. Following on from the Papyrus meeting, I am sorry to say that you may not teach Antigone at this time. As was said by Papyrus, if any text is required by an examining board that could to be associated with the recent tragedy, it needs to be studied at a different time and much later in the Summer term. It would be better, however, if this is text is not essential, that you chose another book altogether. I am sorry to add to your work, but this is an instruction.*

For obvious reasons, no texts studied for the rest of this academic year to any year group should mention suicide or death by hanging.

110. That clear instruction not to teach Antigone needed to be given by IL in order to ensure that the claimant complied with directions and guidance provided to the School. In the course of this Tribunal hearing (and as part of her grievance appeal – see page 656d) the claimant stated that she intended to teach Antigone much later in that term (after the February Half Term). We do not accept that. HR learned of the claimant's intention to teach Antigone (1) because a student told her that is what they were going to do and (2) because HR saw the pile of Antigone books *"ready to go"* (HR's email to EV at pages 523). We also note details in email correspondence from the claimant at the time. In an email of 16 January to the English department the claimant states that students had already begun work on Antigone; in email exchanges with IL, the claimant made half- hearted attempts to justify her initial decision to go ahead with teaching Antigone but gave no indication that she had not intended to teach this text until much later that term (pages 747-8).

<u>The Reluctant Fundamentalist</u>

111. The claimant and IL met on 16 January 2020. Also present (at the claimant's request) was NS. No notes were taken at the meeting itself. NS wrote some notes the following day based on her recollection. These were then typed a few days after that. The typed version is at 536-7.

112. The purposes of the meeting were (1) to discuss the texts on the various English Syllabi (2) for IL and the claimant to catch up about the claimant herself, including how she was after the meeting of 10 December 2020.

113. The claimant mentioned that there was a "problematic" paragraph in the Reluctant Fundamentalist, a text she intended to teach. NS notes do not capture all of the discussion about the Reluctant Fundamentalist. We find as follows:-

a. That the claimant explained that the reference to suicide was not in any way central to the book. Removing the reference would not impact on her teaching or the student's understanding of the novel.
b. That the claimant talked in general terms about removing the paragraph.
c. IL did not try to prevent the claimant from teaching the novel. When the claimant mentioned removing a paragraph, he did say to her there was no need to tear any pages from a book. He did not specifically instruct her not to.

114. The claimant's position is that she discussed with IL removing 5 lines from a page of the novel, typing up the remainder of the page and swopping the 2 pages (her grievance appeal letter at 656d)

115. Later on the same day as their meeting the claimant emailed IL and told him "I will however keep teaching the Reluctant Fundamentalist and we will remove paragraph 185 and the reference to suicide" (page 578)

116. The following day (17 January 2020) the claimant had a lesson with the class that she was to teach the novel to. During that class the claimant instructed all of the students to tear the particular page from a copy of the book provided to them. IL learned of this on 18 January 2020. Lynn Moses (LM), Head of Sixth Form had been called by the claimant to inform her that a student was upset and had left her class. LM found and spoke with the student who explained to LM that she had become upset at being asked to tear a page out of a book. LM reported the incident to JD (the safeguarding lead) and it was in turn reported to IL.

117. IL did not contemplate (when speaking with the claimant on 16 January) that the claimant would, during her lesson, instruct students to tear out the page of a book. He knew that text would be removed or exchanged but expected (reasonably in our view) that it would be done by one or more members of staff not by the students themselves and that it would not be done in a lesson An important aim of course was to reduce the possibility for students to be upset. The steps that the claimant took were reasonably seen by IL as increasing the possibility for students to be upset. The claimant's actions did upset at least one student attending the lesson in question.

<u>Inspector Calls theatre trip.</u>

118. One of the texts being studied in English classes in the 2o019/20 school year was the play, "An Inspector Calls" by J.B. Priestley. This had already been taught in the Autumn term. A theatre trip had been arranged and this was due to take place in Spring term. This text was raised by the claimant in her discussions with IL on 16 January 2020.

119. On 16 January 2020 the claimant sent an email to the whole English department that included the following: "Just to say that I have met with Ian and I think that we will be able to continue with Macbeth because the course work is almost done and with An Inspector Calls for the same reason."

120. The claimant gave evidence (not contested) that suicide is a central theme of this play. IL gave evidence (which we accept) that he did not know this. The claimant did not raise with IL any concerns she had or may have had about a theatre trip to a production of An Inspector Calls. In her role as Head of English, she permitted the theatre trip. The constructive dismissal claim includes an allegation (at B6) raised by the claimant that, when concerns were raised about her actions or intentions regarding the 2 texts noted above (the Reluctant Fundamentalist and Antigone) that she was treated differently and less favourably than those colleagues who arranged the theatre

visit to a production of An Inspector Calls. We do not find the circumstances to be comparable at all.

Smoothwall warning trigger incident- 17 January 2020

121. Our findings are set out below. They are consistent with the account provided by EL (see for example page 557).

a. Papyrus and the School had put in place a "Smoothwall" warning system. This system picked up on key words or subject matters on the internet activities of students and alerted relevant staff at the school when a student may be viewing a website which might include concerning material. .
b. On 17 January 2020 a student had been online and a word on a Star Wars website accessed by that student (we will refer to as P) triggered an alert.
c. The School's deputy head (pastoral) (JP) called the English Department at about 3.25pm on Friday 17 January 2020. The claimant answered the phone. JP asked the claimant to check on P.
d. P was at that time in a class being taught by EL.
e. The claimant entered the classroom without first speaking with or acknowledging EL. Having entered the classroom she identified P, walked over and spoke to him. The claimant did not raise her voice but, in the quiet of the lesson, EL and the students could hear what the claimant said to P. The claimant asked P if he was OK and then said these or similar words *"we were worried you were going to die."*
f. The claimant left the classroom, again without acknowledging EL.
g. Once the claimant had seen and spoken with P, she informed JP that P had been searching for Star Wars memes whilst in class and that he was OK.
h. EL raised the issue with IL. She did not do so immediately though, contacting him by email on Saturday 18 January 2020 (page 558). That email also referred to upset that EL says she witnessed arising from the incident in which students were instructed to tear a page from the novel.

122. We are satisfied that EL alerted IL because she was genuinely concerned about the claimant's behaviour. Her email at page 558 accurately sets out her concerns and reasons for contacting IL.

123. IL responded to EL by email dated 18 January 2020 in the following terms:-

> *Dear Liz,*
> *Thank you for telling me. This is really helpful to know. I am sorry she disrupted your class and moreover singled out-* [name of student] *Furthermore, and so you know, I did not ask her to remove any pages from any book. It is my expectation that she does not come to school on Monday. if she does, I will send her away again. if you have any other information regarding erratic behaviour, please let me know.*

The claimant's absence due to sickness

124. The claimant informed the School early on 18 January 2020 that she would not be in school the following week, due to illness. 17 January 2020 was the Claimant's last day at the School before her employment ended.

125. The claimant claims that the trigger for her absence was a letter from IL to her dated 17 January 2020 that the claimant received by post on the morning of 18 January 2020. That letter followed the meeting between IL and the claimant on 16 January 2020 referred to above. The letter included the following comment from IL to the claimant *"My primary objective is to help you recover your health and ensure that you are well enough to enjoy your job. I asked you two questions: what you would like and what can I do to help?"*

126. Having acknowledged his limited involvement in the relationship issues to date IL put forward some options. He finished his letter in the following terms:-

> *My reading of this situation is that this is not about email chains. and evidence of competency or otherwise. It Is about behaviours. Some things have been said on all sides, which are hurtful. Unhappiness is contagious and goodwill drains quickly. Recording a department meeting, for example, will have put others on edge. They may have agreed, but one must also ask whether they felt able. in the context of current emotions and sensitivity. to disagree?*
> *My overriding advice, therefore, is that we attempt some sort of reconciliation with members of your department and with Ellie Vermeulen. but I will do what you would like to help you recover your health and find joy and mutual support in your department again.*

127. We accept that IL had genuine concerns about the claimant's health and that he wanted to try to resolve the relationship issues within the English department and between the claimant and EV. Those concerns and his wish to help resolve those issues (for the benefit of the individuals and the School) were what motivated IL to meet with the claimant on 16 January 2020 and to write this letter.

128. At the time that IL wrote and sent this letter, he had not been made aware of either incident on 17 January. Once he became aware of the page tearing incident involving the "Reluctant Fundamentalist" text, he emailed the claimant in the following terms (18 January 2020 timed at 09.55):

> *I understand that some students were upset by what happened in English yesterday and I would like to clarify one point. When we met on Thursday, it was your suggestion to tear the page you were worried about from a book you were studying with your Sixth Form. This did not come from me and I said repeatedly that I did not think you should tear the page from your book, I specifically remember saying that there was no need to tear any page from*

any book, but that you may wish to consider the timing of any contentious material. I have since heard that you asked students to remove a page from their books in Friday's lesson and this public action has upset some students. One even had to leave the room she was so upset. It never crossed my mind that an English teacher would ask their class to remove a page from the text they were studying. I am not sure who paid for these books.

I know from yesterday's email exchange that you volunteered to help out in the Sixth Form house on Sunday. This is not a good idea and I would like to ask that you do not come in.

If I may be forgiven for suggesting this, I would urge you to return to the doctor on Monday. You said to me on Thursday that the doctor has said you are not well enough to work and I really think you should follow their advice. I am worried about you.

I hope you can enjoy some sunshine this weekend.

129. We accept that IL was increasingly concerned about the claimant's health and her behaviour. That is why he stated that it was not a good idea for the claimant to help out on the Sunday following his email. He had not by that stage been informed of the Safewall incident. The email from EL was not sent until the afternoon on 18 January 2020. By that stage he had been made aware that the claimant was not intending to attend work on Monday due to ill health although he was also clear (and stated to EL in an email responding to hers of 18 January 2020) that if she did attend, he would send her away.

130. On or about 21 January 2020, the school received a letter from the claimant's father. We have decided that letter has no bearing on those matters were are required to reach a decision on.

131. On 22 January 2020 and in the days following, SR corresponded with the claimant about a return-to-work meeting although the fit note citing "work related stress" as the reason for absence is for a month, ending on 23 February 2020.

132. At about this time the School decided to look further into the claimant's behaviour on 17 January 2020 to decide whether disciplinary action should be considered. SR carried out some initial interviews with relevant employees.

133. SR wrote to the claimant by letter dated 30 January explaining that the School had decided to investigate concerns about 2 incidents of 17 January 2020 and that she wanted to talk to the claimant as part of the investigation process. SR made clear to the claimant that this investigation was only about the 17 January 2020. She asked

whether the claimant was well enough to attend a meeting and offered to ask questions by email correspondence should this be easier for the claimant. (589).

134. In fact, the claimant did not offer to participate in the disciplinary investigation and this did not conclude.

135. A response to SR's letter came from a firm of solicitors then instructed by the claimant. It is dated 31 January 2020 (593). It promised a substantive response the following week. The next communication seen by us however is a detailed letter of grievance from the claimant which is at pages 605-619. The letter is undated although we understand that it was sent and received late in April 2020

The claimant's grievance

136. The grievance letter is detailed. The following is a very brief summary of the issues raised:

a. The claimant's disclosure and circumstances around the disclosure – the IOC issues. The claimant says she found the matter of making disclosures worrying and was shocked to be treated in a "hostile and demeaning manner" between 10 and 29 November 2019.
b. The treatment of the claimant in and around the events of the meeting of 10 December 2019.
c. Conduct by IL in January 2020 including the threat of disciplinary action.
d. Breach of duty to provide a safe system of work
e. Equality Act 2010 – disability discrimination (being an unspecified allegation of failures to make reasonable adjustments)
f. Safeguarding and pastoral care issues dating back to 2017-19.

137. The claimant wrote directly to Andrew Chamberlain (AC) the chair of the School's governors. As some of the grievance was against IL, the decision was made that that it would need to be considered by one or more Governors. It was decided that AC himself should be kept "in reserve" in order to deal with any possible appeal.

138. The governors decided that (out of a total of 6) 2 of them should consider and determine the grievance and then leaving 2 for an appeal stage. The other 2 of the 6 governors were unable to provide enough time due to external business commitments. Had the grievance not included IL then the expectation would have been for the grievance to have been investigated and determined at executive level rather than by volunteer governors.

139. It is also relevant to note that at the time the School received the long grievance letter, the country had just entered a period of lockdown due to the Coronavirus pandemic.

140. The 2 governors chosen to investigate and decide the grievances were Jo Harris (JH) and Alison Hodson (AH). One area of grievance (the one identified at

paragraph 120f. above) was dealt with by AH alone as JH had been involved in the issue in 2019.

141. They initially wrote to the claimant in order to arrange a meeting with her (pages 623-4). We have not seen a response from the claimant to this letter but we do note:-

a. A few days later – 12 May 2020, the claimant wrote to AC with significant further detail about her grievance.
b. The claimant referred the respondent to her GP as noted below.
c. She did not agree to meet with JH and/or AH.

142. The claimant provided the respondent with the opportunity to contact her GP to request medical information which the respondent did, via solicitors. By letter dated 5 June 2020, the claimant's GP advised as follows:

> *Whilst avoidance of any engagement on a short-term basis is likely to be beneficial, to move forward Katie needs to complete the grievance process and understand any actions arising from it in order to make long term and significant steps forward. On balance therefore I feel it is in her best interests for the process to be completed by correspondence rather than face to face meetings.*

143. We heard from both JH and AH. We find their investigations were reasonably thorough and they reached their decisions having taken account of all of the information obtained in their investigations. This included some points of clarification that JH sought from the claimant, via her solicitors. This correspondence is referred to at page 645.

144. At this Tribunal hearing, the position put on behalf of the claimant was that these governors were in reality determining the grievance with a view to strengthening the position of the school in Employment Tribunal litigation that was by then underway. We do not agree. We are satisfied that JH and AH looked at the areas of grievance impartially and, had they decided that the grievances (or any of them) were valid, would have said so. Much of the evidence obtained during their investigations was unhelpful to the claimant; but they only learned that because they undertook appropriate investigations. They did not in any way "manufacture" evidence. It was not their evidence. They started their grievance investigation with an open mind and, because of their investigations, found that the weight of the evidence was against the claimant.

145. We have seen statements prepared for the purposes of investigating the grievance. In these statements some of the parties express strong views about the claimant's behaviour. By way of example only:

> a. *As Katie did not show any signs of wanting to support me, I also felt very upset after the meeting. I continued to feel anxious about coming into work and could not see a way in which we could move forward with Katie*

as HOF. I furthermore questioned how I could continue working at Windermere School. (EL – page 811)

b. *Katie says that she had not noticed any negativity. I believe that she was fully aware that there were issues and was choosing not to deal with them. Her comment to me on the last day of the summer term 2019 when I said 'see you next term' and she said "you will!' suggests not only that she had known for a long time that there were issues, but that she preferred to battle and fight rather than have discussions and try to move forward.* (HR page 813)

d. HR's comments on the following quote from the claimant - 'It is not my wish to cause difficulties. I simply want to ensure that we manage such situations more effectively when they arise, as they will.'

- *I truly do not believe that there would have been any difficulties if Katie had not been managing the situation. She overcomplicated everything. Both Liz and I have come from successful IB English departments and have worked in departments which ran the lOCs smoothly and in accordance with the guide.*

There is a strange certainty in her future tense 'as they will' — was she predicting further issues? Why would there inevitably be issues unless she wanted to generate them? (page 813)

146. JH and AH decided not to share all of their investigation notes with the claimant. When asked about this JH explained that (1) she had received advice that she was not obliged to (2) she and AH felt that sharing this material would have driven the parties even further apart. At the time of the grievance, the expectation was that the claimant would return to the School.

147. The claimant was provided with the outcome to her grievance by letter dated 22 July 2020. (644-654). The grievance was rejected. We comment under the heading below on relevant parts of the grievance outcome that the claimant raised specific objections to in her appeal.

<u>Grievance Appeal</u>

148. The grievance appeal was considered and determined by AC and Carol Burrow (CB).

149. As with the grievance, the position put on behalf of the claimant was that the manner in which the grievance appeal was conducted was to protect the interests of the school by assisting a defence to the claimant's claims. It was also put to AC particularly that he was interested in protecting the reputation of the school rather than looking at the appeal from an impartial independent perspective.

150. We find that AC and CB conducted and decided the grievance appeal appropriately. We comment below specifically on those aspects of the appeal and conclusions which are relevant to the further particulars of the constructive dismissal complaint. However, before we do so, we make some general findings:-

a. At the claimant's request the appeal was dealt with by way of correspondence. Therefore, AC ad CB did not meet with the claimant.
b. Our unanimous view of AC (having heard his evidence) is that, had he considered any of the claimant's grounds of appeal to be valid, he would have said so. We were impressed with his evidence. AC is not someone who would have tolerated issues being "swept under the carpet."
c. Added to this is the fact that the School was at the time under scrutiny in the light of the suicides in 2019. AC knew this and even if he had been tempted to ignore any concerns about practices at the school (which he was not) this was not the time to ignore allegations of detrimental treatment, malpractice, discrimination.

151. The appeal panel decided that the claimant was not entitled to see the grievance investigation materials; that the grievance panel was entitled to withhold these. The appeal outcome letter noted that a full and detailed response to the claimant's grievance had been provided and that gave sufficient information to the claimant about the outcome and reasons. By this stage the claimant and respondents had instructed solicitors who were active in providing advice and in conducting the Tribunal litigation which was underway. AC took legal advice on this issue from the respondents' solicitors and decided to follow it.

152. The claimant's appeal included her disagreement about the appointment of JH as a grievance investigator, having highlighted JH's involvement in the 2017-1019 safeguarding issue. We heard from AC about the care taken in deciding which governor should deal with which issue. Given the limited availability of governors, the only approach other than the one adopted was to require AH to carry out the grievance investigation and decision making alone. AC explained to us (and we accept) that the grievance was detailed and lengthy and would require significant work. That is why they wanted 2 governors to be appointed. JH's involvement in the 2017-19 safeguarding issue was dealt with pragmatically by JH not being involved in that aspect of the grievance.

153. In her appeal the claimant complained of an absence of documentation (point v. of the appeal letter at page 656b) or transparency as to what documentation was taken into account in deciding the grievance. To a large extent it is a repeat of another ground of appeal (not providing her with a pack of documents considered in the grievance investigation and outcome). The claimant also referred to an ongoing subject access request (SAR) process under Data Protection legislation and complaints that she was pursuing against the School with the Information Commissioner's Office (ICO). We have not seen any detail of these complaints except

for an exchange of correspondence between solicitors at pages 682-683. We have no information about the outcome of any complaint to the ICO.

154. The appeal outcome letter dealt with this element of appeal as follows:-

> *We are conscious that the subject access request has led to a complaint on your part to the Information Commissioner's Office. We have not yet heard from them but I wish to assure you that when your Subject Access Request came in we asked the School's solicitors to assist us to deal with the matter to ensure that your request was handled comprehensively and appropriately. We are advised by our solicitors that they are confident that the SAR was handled properly but whilst this matter is potentially under investigation by the ICO I do not think it would be appropriate for us to comment further*

155. The Grievance Outcome letter included some comments about the claimant; about her conduct at work (as found by the grievance panel). In her appeal the claimant noted that the comments are not fair and justified conclusions and that she trusted her grievance would be investigated in good faith; that it has resulted in further detriments to her in the form of the comments made. We do not set all comments out in this Judgment although make reference to some of them below.

156. In their outcome letter the appeal panel stated that the grievance panel were justified in their comments having regard to the from the information obtained by the governors investigating the grievance. They also noted that it might have been possible to express the points differently.

157. Having had the benefit of reviewing the comments alongside the evidence that was with the grievance panel our view is that the comments reflect decisions about the claimant's behaviour that the grievance panel was entitled to reach. We also agree with the appeal panel that some of these comments could have been phrased differently. We also note that it would have been better for senior managers to have shared with the claimant concerns about her performance at an earlier stage (for example in a review meeting) with the aim of seeking improvements in behaviour, rather than leaving the delivery of criticisms to 2 volunteer governors in their grievance conclusions. There is evidence (referred to earlier) that managers "tiptoed around" the claimant and were reluctant to speak with her about concerns that had been raised. Having said that, we note that it is possible that EV attempted to do this in the meeting in September 2019 and earlier review meetings but without successfully persuading the claimant to alter her behaviour.

158. What is clear is that the grievance panel investigated the grievances and decided that what they heard from HR. EL, EV and IL was substantially true. We find that was reasonable for the grievance panel to have reached that conclusion. Significantly, where there has been a conflict of evidence and identified in this

Judgment, we have also preferred that provided by these parties/witnesses over the claimant's evidence.

159. Paragraph 2ix of the claimant's appeal letter refers to "The Inspector Calls" theatre visit. This visit is not referred to in the claimant's grievance and consequently not in the grievance outcome letter either. It is in the appeal letter as the claimant makes a comparison between the way she says she was treated in relation to the Antigone and Reluctant Fundamentalist issues and the treatment of her colleagues who had arranged a theatre trip to see *"An Inspector Calls"* The appeal panel took steps to understand more about the staff meeting on 6 January 2020. As noted above, this was a meeting which the claimant held with members of the English department where a discussion took place about what texts could be taught or should be avoided. The claimant chose not to discuss with her colleagues her intention to teach The Reluctant Fundamentalist or Antigone. Colleagues did bring up the intended theatre trip to see "An Inspector Calls." A collective decision was made to go ahead with the trip. (see our findings of fact above). The appeal outcome letter notes as follows *"we feel the real issue here is the atmosphere in which the entire school was operating after the 2 tragic deaths and the real concern that there might be a third. WE therefore believe that it was reasonable to expect employees – and senior employees in particular- to be aware of the environment in which they were working and to take steps to steer people's attention away from studies that would invoke thoughts of suicide or which dealt with those themes."*

160. In her appeal, the claimant also complained that the grievance panel had not paid sufficient attention to the detail of her version of events of her meeting with IL on 16 January 2020 (para 2vi at page 656d) and that they misunderstood the position. The appeal panel reviewed the evidence on this and concluded that there had been no misunderstanding. The appeal panel's conclusions are at paragraph 7 (page 662) of their outcome letter. We are satisfied that their decision that the grievance panel had not misunderstood the position was a reasonable one. We also note that the grievance panel reached a conclusion (in relation to the issue with the Reluctant Fundamentalist) that the claimant had not taken the actions that she had stated to her colleagues she was going to take. In reaching this conclusion the grievance panel noted what the claimant had said in an email chain on 16 January 2020 (page 541) *"I will continue with the Reluctant Fundamentalist but I will remove one paragraph on p185 from the students' texts."* It was a reasonable for the grievance panel to reach this conclusion.

161. One of the grievance outcomes was that the claimant should take some responsibility for misunderstandings arising out of the IOC and that could have been achieved better though effective dialogue within the department rather than by escalating the issue so quickly. The claimant appealed against this, noting (1) that she accepts it is her responsibility as head of Department to ensure compliance (2) that she did discuss these issues regularly with HR and EV (3) that she cannot take

responsibility for what colleagues say to classes behind closed doors and (4) that it was HR and EL (not the claimant) who had escalated the matter to EV.

162. In the appeal outcome, the panel declined to provide a definitive view on the IOC Regulations *"as we are not teachers and rely on the senior management team and others to ensure compliance with those Regulations."* They noted that the issue had ultimately been resolved with the IB.

163. As part of their review of this ground of appeal, the panel discussed the issue with the grievance panel. These are their conclusions:

> *"Having discussed the matter with the grievance panel we understand- and agree with- their concerns which were that you had created an environment in which members of your team felt that you had accused them of malpractice. We accept that they raised their concerns with EV and we further accept that EV made a genuine effort to try and resolve the dispute and establish the right way forward. She engaged both EL as the current IBDP coordinator and LM her predecessor in this role for that purpose. Accordingly this part of your grievance is rejected*

164. We find that this appeal outcome does not fully address the ground of appeal although it does address (and uphold) the main criticism of the grievance panel – which is that the claimant should bear some responsibility for the misunderstandings arising in relation to the IOC. The decision of the appeal panel to decline to say what would or would not constitute compliance for the purposes of the IOC is understandable. The appeal outcome letter does note that ultimately the correct interpretation of the IB Regulations appears to have been resolved following dialogue. It does not specifically note, in that dialogue, the IB was critical of the claimant's preferred approach to preparing students for the IOC.

165. The claimant's appeal also referred to the conclusions reached by the grievance panel that IL was seeking to build a case against the claimant. The appeal panel rejected this, concluding that IL's actions were appropriate in his role as head teacher. They concluded:

> *"Concerns had been raised about you and it was entirely proper that he should seek to inform himself about those concerns before deciding what (if any) action was needed. However, we do not believe that IL was acting in bad faith in actively trying to construct a case against you."*

166. That was a reasonable conclusion for the appeal panel to reach.

<u>Ill health payment.</u>

167. The respondent has an absence procedure which contains an entitlement to payment during sickness absence. The entitlement is generous for a relatively small private employer such as the respondent although is similar to the entitlements we see in areas of the public sector including in teachers' terms of employment. It provides an employee (during the fourth and subsequent years of service) with full pay for 26 weeks and half pay for 26 weeks (page 290).

168. As the claimant's long period of absence began on 18 January 2020, by July 2020 she was to move on to half pay. The claimant's solicitors emailed the respondents' solicitors on 23 July 2020 (page 685) stating that the respondent could, at its discretion, continue paying the claimant at her full rate and asking it to do so. The letter also said this

> *You will no doubt recall from our early correspondence that I advised that we were apprehensive then that our client would potentially be a person with a disability for the purposes of the Equality Act 2010. On the assumption that that is correct - and your client has been in receipt of information recently from our client's GP that would certainly further support it ~ certain considerations apply in terms of the current and future treatment of our client in the context of her employment and against that background of disability. Her absence from work has been, and is, in consequence of that disability condition.*
> *In addition, it is part of our client's case as it currently stands in the Employment Tribunal (in the context of whistleblowing detriment) that her medical condition is causally related to the treatment she identifies in her Claim.*
> *We consider that that adds a further dimension that the School must take into account in considering whether to maintain sick pay at full rate.*

169. The respondents' solicitor replied to say that the request would be passed to their client but also noting that the payment terms were generous and that a continuation of full pay would be beyond what is reasonable (in the context of the duty under s20 EQA to make reasonable adjustments). The respondent refused to extend the time that the claimant received full pay.

170. By letter dated 22 September 2020 the claimant raised a grievance against the decision to reduce the amount she received during sickness absence from full pay to half pay (page 658). In that grievance the claimant noted that the decision to reduce her pay amounted to discrimination (contrary to section 15 EQA) and a failure in the respondent's duty to make reasonable adjustments.

171. As with the first grievance this grievance was dealt with on the basis of communication only from the claimant. It was considered and determined by Carol Burrow (CB) who wrote to the claimant on 4 November 2020, rejecting the grievance.

172. The reasons provided were as follows:-

a. That the school provides very significant financial support for employees who are unwell over a 12-month period.
b. Even if the claimant was disabled for the purposes of the EQA, refusing to extend an already generous sick pay scheme could not be regarded as unreasonable or unfavourable.
c. There are different arrangements in place for different employees and the claimant had the benefit of the most generous arrangements at the School
d. Having checked with SR, she was told that there had been no circumstances in which a discretion was exercised to extend sick pay beyond the amounts provided for in the policy.
e. The School's financial position had been adversely affected by the pandemic, including a loss of around £1million in boarding income. Jason Deardon (see below) provided this evidence. No accounts or other corroborative evidence was provided.
f. It is important that policies and procedures are applied fairly and consistently.

173. The claimant appealed this decision by letter dated 11 December 2020 (page 674).

174. That appeal was considered and determined by Jason Deardon (JD). JD was one of the 2 governors who had been unable to become involved in the first grievance, because of work/business commitments. As well as holding the office of governor, he was chair of the respondent's Finance Committee.

175. The appeal was rejected by letter dated 28 January 2021 (page 675).

<u>The claimant's resignation.</u>

176. The claimant resigned by letter dated 21 October 2020 (page 669), making clear her intention to claim constructive dismissal. She gave full contractual notice (a clear term therefore expiring on 1 April 2021) although did not return to work during her notice period.

<u>The claimant's disability.</u>

177. The respondents admit that the claimant had a disability (for the purposes of the Equality Act 2010) with effect from 1 July 2020. However, they do not accept that they knew (or ought reasonably to have known) until August 2020, that the claimant had a disability. We make the following relevant findings:-

a. By letter dated 5 June 2020 (page 641) the claimant's GP diagnosed anxiety and anticipated a full recovery, although not until the conclusion

of the grievance process. A copy of this letter was provided to the respondent shortly after 5 June 2020.

b. By email from the claimant's solicitor dated 27 August 2020 (page 690) the respondent was informed that the claimant had been diagnosed with Post Traumatic Stress Disorder and that she was being supported a consultant led multi-disciplinary mental health team.

Submissions

178. We received detailed written submissions from Mr Quickfall and Ms Winstone. Both provided further submissions at the hearing on 26 August 2022. We do not repeat the submissions here. Many submissions were made to guide our findings of fact and we have considered these carefully before making those findings. Other submissions helped guide us on the Law – see below. We are grateful to both counsel for their submissions and their hard work throughout the hearing

The Law

Constructive and unfair dismissal

179. The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996 (ERA).

180. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *"…..an* employee *is dismissed by his employer if…….the employee terminates the* contract *under which he is employed (with or without notice) in circumstances in* which *he is entitled to terminate it without notice by reason of the employer's conduct."*

181. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (**Western Excavating (ECC) Limited v. Sharp [1978] QC 761**).

182. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see for example **Malik v. BCCI [1997] IRLR 462** at paras 53 and 54). We refer to this term as "the Implied Term."

183. In considering the Implied Term, Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** ("Woods"), said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

184. The claimant claims that the respondent breached the Implied Term in the manner it conducted and then rejected the claimant's grievance appeal. The judgment in **W Goold Pearmak Limited v. McConnell 1995 UKEAT 489** ("Pearmak") is authority for there being an implied term that employers must reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have and for that right to be a fundamental right.

185. One of the issues in the constructive dismissal claim is the extent to which the respondent should have provided the claimant with the notes, statements and other documents obtained in the course of the grievance investigation. Mr Quickfall referred us to the recent Court of Appeal decision in **Burn v. Alder Hey Childrens Hospital NHS Foundation Trust [2022] EWCA 1791.** This case did not concern a contractual grievance process; it involved a process of investigation following a death of a patient at the respondent's hospital and whether there were clinical conduct or performance issues. One of the clinicians applied for an injection to restrain the continuation and conclusion of the investigation until she had been provided with copies of all relevant documents. Her application (and subsequent appeal) failed. The terms of the contract were considered by the Court of Appeal who found that there was an express contractual right to some limited disclosure but there was no express right to full disclosure. An alternative argument made by the claimant on her initial injunction application was that the Implied Term entitled her to wider disclosure than had been provided. This was rejected by the High Court and was not one of the points of Appeal. However the Court of Appeal did comment on the possibility of an implied term that disciplinary processes must be conducted fairly. In terms of grievance processes, we have noted the implied term referred to in Pearmak.

186. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in **Nottinghamshire County Council v. Meikle [2004] IRLR 703**, is helpful:

> "33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has*

been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation."

187. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (**Berriman v. Delabole Slate Limited [1985] IRLR 305** at para 12).

Protected Disclosures

188. The claimant claims that she was subjected to detriments on the grounds that she had made protected disclosures. Section 47B Employment Rights Act 1996 ("ERA") provides as follows:

"(1) A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

189. Section 43A ERA - Meaning of "Protected Disclosure":

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

190. Section 43B ERA– Disclosures qualifying for protection

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

a. …..

b. That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

c. ……

d. ……..

e.

f. That information tending to show any matter falling within any of the preceding paragraphs has been or is likely to be deliberately

concealed."

191. Section 43C ERA:

> *"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure... –*
>
> (a) *to his employer, or*
>
> (b) *where the worker reasonably believes that the relevant failure relates solely or mainly to –*
>
> *(i) the conduct of a person other than his employer, or*
>
> *(ii) any other matter for which a person other than his employer has legal responsibility,*
>
> *to that other person."*

192. Section 48(2) ERA: This section provides that on a complaint under these provisions:

> *"…it is for the employer to show the ground on which any act or deliberate failure to act was done."*

193. In considering whether there have been one or more qualifying disclosures in this case we have considered guidance provided by a number of cases including

(1) **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** ("Chesterton"),

(2) **Kilraine v London Borough of Wandsworth [2018] ICR 1850** ("Kilraine").

(3) **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4** ("Korashi");

(4) **Kuzel v. Roche Products [2008] ICR 799** ("Kuzel v. Roche")

(5) **Parsons v Airplus International Limited UKEAT/0111/17**.

(6) **Simpson v.Cantor Fitgerald Europe 2020 ICR 236** ("Simpson")

(7) **Wharton v Leeds City Council EAT 0409/14**.

194. Having regard to the terms of the ERA and the case law referred to above, the following is relevant:

(1) The worker making a disclosure has to reasonably believe that it is made in the public interest and also has to reasonably believe that it *"tends to show"* one or more of the subject matters listed at 43B(a) to (f) ERA (see above).

(2) The terms of section 43B ERA require a reasonable belief of *the worker making the disclosure* (our emphasis). This wording provides a mixed objective and subjective test. The test is not whether there is a reasonable belief on the part of a reasonable worker; rather the test is whether the particular worker making the disclosure has a reasonable belief. *"The definition has both a subjective and an objective element: ….. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in subsection (1). The objective element is that that belief must be reasonable."* (**Chesterton** – at paragraph 8)

(3) The question as to whether the particular worker has a reasonable belief that there is or is not a disclosure in the public interest is a question to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

(4) There must be some objective basis for the worker's belief in order for that belief to be reasonable. Some evidence is required; rumours, unfounded suspicions, uncorroborated allegations and the like will not be good enough to establish a reasonable belief (**Korashi**).

(5) It is possible to consider 2 or more disclosures together in determining whether a protected disclosure has been made. As to whether 2 or more disclosures considered together amounted to a protected disclosure is a question of fact for an Employment Tribunal to determine (**Simpson** – paragraphs 31-34)

(6) The information disclosed only has to *"tend to show"* one or more of the matters set out in (a) to (f) of section 43B. It does not have to prove the matter and information may, in the reasonable belief of the worker *"tend to show"* one or more of the matters at section 43B(a) to (f) even if the worker is in fact mistaken. (**Kilraine**).

(7) A disclosure of information is required. On this we note the judgment in Simpson (paragraph 20) in which the earlier judgment in **Kilraine** was considered:

> *"As the decision of the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 makes clear, section 43B(1) of the 1996 Act should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. The question in each case, as has now been made clear, is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to*

> *show one or more of the [matters set out in paragraphs (a) to (f)]". However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the tribunal in light of all the facts of the case: see Kilraine at paras 31, 35 and 36."*

195. Mr Quickfall referred us to the EAT judgment in **Eiger Securities v. Korshunova [2017] ICR 561**, particularly the following guidance at paragraph 46:

> *"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."*

196. The respondents accept that, if other elements of the definition of protected disclosure are met, the disclosure was made in the public interest.

197. The claimant claims that she was subjected to detriments on the grounds that she made one or more protected disclosures. Section 48(2) ERA provides that on a complaint of being subjected to a detriment contrary to section 47B ERA, it is for an employer to show the ground on which any act or deliberate failure to act was done. The burden of proof therefore is on the employer/respondents. Although that burden of proof only applies in the event that the claimant proves:-

a. That she made one or more protected disclosures

b. That she was subjected to a detriment.

198. Where an employer is unable to show to the Tribunal the reason for an act or failure to act, it does not automatically follow that the claimant succeeds in an unlawful detriment complaint (**Ibekwe v. Sussex Partnership NHS Foundation Trust [2014] WLUK 593**).

199. On the issue of causation, we have been guided by the Court of Appeal's judgment in **Fecitt v. NHS Manchester [2011] EWCA 1190**, including:-

a. Paragraph 45: *"Section 47B will be infringed if the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."*

b. Paragraph 51 "... *where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical — indeed sceptical — eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower*

> *necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."*

200. We have also referred to the recent judgment of the Court of appeal in **Kong v. Gulf International Bank [2022] EWCA Civ 941**. The grounds of appeal in this case were about whether (and if so to what extent) Employment Tribunals can separate an employee's conduct in making protected disclosures or surrounding the protected disclosures, from the protected disclosures themselves (the term "separability principle" is used in the judgment). We have considered the Court of Appeal's guidance and instruction on the issue of separability, particularly at paragraphs 52 to 61. We note the comment at paragraph 56.

> *For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in Page, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.*

Claims under the Equality Act 2010 (EA)

Duty to Make Reasonable Adjustments

201. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision criterion or practice of* [the employer] *puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

202. We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

203. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied (or would be more widely applied. That is not an issue here. The PCP relied on (to return to work after 6 months of sickness absence in order to receive full pay) is applied to all teaching staff at the School, whether or not they have a disability.

Payments during sickness absence.

204. We note the judgments in **Meikle v. Nottingham County Council 2004 EWCA 859** and in **O'Hanlon v. HMRC 2007 EWCA 283.**

205. We note particularly paragraphs 67-69 of the judgment in **O'Hanlon**:

> *67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.*
>
> *68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed s.18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the tribunal will know precious little about? The tribunals would be entering into a form of wage fixing for the disabled sick.*
>
> *69. Second, as the tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in s.18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.*

206. In Meikle (a decision which, understandably Ms Winstone relies on) it was regarded to be a reasonable adjustment to extend enhanced sick pay; but the relevant

facts of that case were that the employer had failed to make other reasonable adjustments and, had they been made, Ms Meikle would have returned to work without having to take a lengthy absence.

Burden of Proof – EQA Claims

207. We are required to apply the burden of proof provisions under section 136 EA when considering complaints raised under the EQA.

208. Section 136 states:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection 2 does not apply if A shows that A did not contravene the provision."*

209. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance.

210. We are also clear that the wording of the statute itself, s136 EqA is the key reference in relation to burden of proof when reaching decisions about whether there has been a contravention of the EqA.

211. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassy v. Nomura International [2007 ICR 867]** where the following was noted in the judgment:

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

Conclusions

Issue 1 – did the claimant make a Protected Disclosure?

212. We have identified in our findings of fact the 6 occasions when the claimant says she made protected disclosures. All alleged protected disclosures relate to the same issue, compliance with the requirements of the IOC.

213. The information that the claimant claims to have disclosed is information that tended to show that some of the respondent's English teachers were breaching or likely to breach the IB's IOC requirements.

214. We have set out each alleged disclosure. Ms Winstone's submissons focussed on the impact of the disclosures overall, stating that it is clear from these that the claimant reasonably believed that the School was in breach or was likely to be in breach of its legal obligations to the IB and that she was disclosing information that showed this.

215. Mr Quickfall's submissions are that we should look at each alleged disclosure individually and when doing so we will find that none of the 6 amounts to a protected disclosure for the purposes of the ERA. Rightly in our view, Mr Quickfall places some emphasis on alleged disclosure 4, noting that it is potentially capable of qualifying as a Protected disclosure. However, he then goes on to make submissions that it does not meet the statutory test as, whilst it states what might amount to a breach, it does not say what has happened or why it is unlawful; nor does it make an allegation of a wrongdoing.

216. Our conclusions are (1) that it would be wrong to consider each alleged disclosure in isolation from the others and (2) by the time of alleged disclosure 4, the claimant had made a valid protected disclosure.

217. The various emails are part of a chain of email (and verbal) communication about the same issue. Significantly, by disclosure 4, the claimant had made clear that she was shocked by the approach proposed by EV (to teach towards the lower end of the number of extracts/passages) (alleged disclosure 1), that this approach would not have been permitted at her previous school and she would check with other schools (alleged disclosure 2). We also know by then her intention to make contact with the IB too.

218. By the stage of alleged disclosure 4, the claimant provided information in the form of an IB statement on a FAQ response. In providing this information (and when combined with the previous information provided) the claimant was informing the respondent that she believed it was likely that the school would breach its obligations in relation to the IOC unless it changed its approach.

219. We also find that a failure to comply with the IB obligations in relation to IOCs would be a breach of the respondent's legal obligations to the IB, to its students and to the paying parents or guardians of those students. We do not think this in dispute but we state it for certainty.

220. We have noted already our agreement with the respondents that the requirements of the IB in relation to IOCs in 2019 was confusing. However, given the clear statements made on behalf of the IB in response to questions asked (particularly

in response to EVs email of 22 November 2019 – see para 70 above) the belief that a breach was likely to happen must be a reasonable one.

221. Disclosure 5 in itself is not a protected disclosure and, in terms of the definition in the ERA, adds nothing when considered with the communications as a whole. Disclosure 6 does continue the dialogue in relation to the protected disclosure. By quoting again the information received from the IB (particularly when considered in the context of the overall communication) it repeats the protected disclosure. In this email the claimant effectively tells the recipients that that there will be a breach of legal obligations unless the School changes its approach.

222. As we have decided that the claimant did make a protected disclosure, we need to go on to consider whether she was subjected to a detriment. We list below the alleged detriments and provide our decision against each allegation.

<u>Alleged detriment 1 – EL used the disclosure as a means of attempting to put pressure on the claimant so that she could take her job.</u>

223. We have made findings that the claimant believed that EL wanted the claimant's role well before the protected disclosures were made and that this belief was unwarranted (para 96 above).

224. This allegation refers particularly to the decision by EL to report the claimant's behaviour on 17 January 2020 – the Smoothwall incident. We have made findings about this incident (para 121) and that we are satisfied that EL reported the claimant's behaviour because she was genuinely concerned that the claimant's behaviour was not in the interests of the welfare of the students. We are satisfied that EL would have reported the claimant's behaviour whether or not the claimant made a protected disclosure.

<u>Alleged detriment 2 – the manner in which EV spoke to the claimant at the meeting on 10 December 2019</u>

225. Relevant findings of fact are at paras 83-87 and particularly paragraph 87.

226. Our conclusions are as follows:-

a. EV's outburst at this meeting amounted to a detriment.
b. The outburst was about the IOC issue (and therefore the matter that gave rise to the protected disclosure).
c. At paragraph 86 we set out our findings as to why the outburst occurred. One of the reasons was the manner in which the claimant managed the IOC issue, particularly the poor communication within the department concerning this. Whilst this was not the only reason for EV's outburst it did influence the outburst and that influence was more than trivial.
d. EV was willing to address the concern raised directly with the IB. In doing so, she did not raise the concern anonymously. She did not resent

the concern being raised. EV, like other staff members, wanted to ensure compliance. She was however frustrated by the manner that the claimant had dealt with it in her role as head of Department; worsening the existing relationship difficulties. Importantly, EV's outburst was a temporary lapse in her professional approach. It was not an act which was done because of the disclosure itself. It was the claimant's conduct at the meeting of 10 December particularly which caused EV's temporary loss of control.

227. In reaching these conclusions we considered whether we may have drawn too fine a distinction between the protected disclosure and other matters – therefore misapplying the separability principle referred to in Kong. We are satisfied that we have not. Having heard from EV we do not doubt her professionalism and commitment to ensure compliance. It was the claimant's behaviour in the meeting itself and when handling with her colleagues the IOC issue that were the main causes the outburst. The protected disclosure itself did not in any significant way contribute to the outburst. Had the claimant made the protected disclosure but not behaved as described in the meeting, EV would not have made the outburst.

Alleged detriment 3 – the manner in which SR spoke to the claimant at the meeting on 19 December 2019.

228. We have made findings of fact about the meeting of 19 December 2019. See paras 89-91.

229. In her submissions, Ms Winstone stated that it was the claimant's failure to apologise that escalated the meeting. We have made findings that (1) no one was forcing the claimant to apologise (2) SR raised the issue of an apology because she was clear that the claimant had not apologised on 10 December even though the claimant claimed subsequently to have done so.

230. We do not find that the meeting was detrimental to the claimant. It was arranged with the intention of assisting the claimant; not subjecting her to any detriment. In any event, any detriment that the claimant was put to in this meeting was not because of the protected disclosures. In particular the issue of apology was raised for the reason noted.

Alleged detriment 4 – the decision to invite the claimant to a disciplinary investigation meeting by letter dated 30 January 2020

231. Relevant findings are at paras 129-134 above. We are satisfied that the claimant was invited to an investigation meeting because of concerns about her behaviour on 17 January 2020. The protected disclosure was irrelevant.

Alleged detriment 5 – refusing to pay the claimant full pay during the second six months or her sickness absence.

232. The claimant did not receive full pay during the second six months of her sickness absence because that was the respondent's policy. That policy would have been followed whether or not the claimant had made a protected disclosure.

Disability Discrimination.

Knowledge of disability

233. The allegations of disability discrimination relate to the application of the respondent's sick pay scheme and the reduction in the amount paid to the claimant, from full pay to half pay.

234. The respondent accepts that the claimant was a disabled person with effect from 1 July 2020. They do not however accept that they knew the claimant was disabled until August 2020.

235. From the information available to the respondent. up to and including the letter from the claimant's GP dated 5 June 2020, it was not apparent that the claimant had a disability. A full recovery was expected and we find the anticipated timescale at that stage was for a full recovery before the end of 2020. The cause of the claimant's illness and absence from work was the grievance and once the grievance procedure was completed and the outcomes known and worked through) the claimant would make a full recovery.

236. This position changed on or about 27 August 2020 when the respondent was informed by the claimant's solicitors, that the claimant had suffered a post traumatic episode (page 690). Other than the claimant's ongoing absence following delivery of the grievance outcome, no other information was available to the respondent. The respondent could have obtained a separate occupational health report. However we note that it had received information from the claimant's own GP about the claimant's health and it was willing to accept that information. It did not therefore need a second and independent opinion.

237. Whilst this knowledge post-dated the decision to reduce the salary paid to the claimant (that was effective from 6 July 2020) it pre-dated the outcomes to the grievance raised by the claimant about the reduction in pay. We have decided therefore that it is appropriate that we determine the complaints brought under the EqA.

Discrimination arising from the claimant's disability – section 15 EqA.

238. The claimant's absence from work is something arising in consequence of the claimant's disability for the purposes of section 15(1)(b).

239. The respondent has a generous sickness absence scheme. We considered whether the provision and application of such a generous scheme amounts to unfavourable treatment at all. We have decided that it does at the point that pay is reduced. Were it not for the claimant's absence (the something arising) the claimant would have been in work and receiving full pay. Receiving less than full pay is unfavourable.

240. It was necessary therefore to consider whether the application of the sick pay scheme was a proportionate means of achieving a legitimate aim. Mr Quickfall put forward the following legitimate aims:-

a. The respondent had limited financial resources (particularly during the pandemic when its income dropped considerably) and it was a legitimate aim to direct those limited resources to paying the salaries of those employees in work.

b. To encourage people back at work

241. Mr Quickfall also made submissions that it would have been an unreasonable adjustment to extend sick pay and, if it is unreasonable to require an employer to do something, a decision not to do it is likely to be justified.

242. Sick pay schemes are often important in attracting, supporting and retain employees. Where (as here) those schemes give rise to contractual obligations then the parties will be expected to meet those. That is what the respondent has done.

243. We accept that an employer has a legitimate aim of encouraging employees back in to work and to limit its financial obligations to absent employees. We need to decide therefore whether the application of the respondent's sick pay scheme was proportionate in achieving those legitimate aims. An important starting point for us in deciding on proportionality is the scheme itself. That is the contractual agreement reached between the parties and it was met. In addition, it is relevant to note that the scheme is generous. We accept that the strict exercise of the scheme MIGHT be disproportionate where the employer had breached one or more duties owed to the claimant and caused or extended disability related absence. However, our findings do not support that.

<u>Failure to make reasonable adjustments.</u>

244. Our decision is that it would be unreasonable to expect the respondent to continue to provide full pay to the claimant beyond the contractual obligation to maintain full pay for 6 months. The reasons set out at para 243 above apply here. Whilst it MIGHT be a reasonable adjustment to extend the claimant's full pay even further than the sick pay scheme provided for, in circumstances where the employer was at fault for preventing or delaying a return to work, that would be a rare case. The claimant's circumstances do not fall into a category of rare cases.

Constructive dismissal.

245. We have decided that the respondent did not breach the Implied Term and therefore that the claimant was not constructively dismissed. Our conclusions against each individual issue raised by the claimant under this heading are set out below.

246. Before we go through each individual point raised, we note the following conclusions:-

a. The claimant chose to raise a formal grievance and in there she made serious allegations.
b. She required the various allegations to be investigated and for her to be provided with a written outcome.
c. She required this course of action, having had the benefit of legal advice. By that stage the claimant required correspondence to be with her solicitor rather than with her directly.
d. The governors investigated her grievance which included speaking with various colleagues as well as some follow up correspondence with the claimant's solicitors.
e. In general terms the governors accepted the evidence of those colleagues and did not accept the versions of events put forward by the claimant. They set out their conclusions in writing, the terms of which were unfavourable to the claimant.
f. The claimant appealed. She was entitled to do so and to expect the respondent to investigate the terms of her appeal and then reach and communicate its decisions and write to her (via her solicitors) setting out the appeal outcome.

247. The process set out above was what the claimant required. She did not for example, seek an informal resolution of her grievances. She was entitled to raise a formal grievance, through solicitors. Having done so the respondent was required to investigate those grievances, reach conclusions and write in detailed and formal terms with their decision. Similarly, in relation to the appeal. The grievance (and appeal) decisions are almost certain to have worsened relations between the claimant and respondent. The claimant disagrees strongly with the decisions. We have considered whether some of the language in the decisions could have been "softened" (for example a reference to a grievance not being upheld rather than rejected) but have concluded that any softening of language would not in this case have made any material difference.

248. As is clear from our findings of fact, we are satisfied that the grievance panel and then the appeal panel investigated and reached conclusions acting reasonably. The respondent's actions in investigating and communicating its conclusions at both stages was carried out with reasonable and proper cause.

Conclusions against points raised in the grievance appeal

249. *A1 and 2 – entitlement to see full file of documents*. See our findings of fact at para 146, 151. We agree with Mr Quickfall that there is no legal requirement to provide full disclosure of documents obtained during an internal grievance investigation. There is an implied term requiring an employer to provide a reasonable opportunity to employees to address grievances (**Pearmak**). We are satisfied that the respondent complied with that implied term. The grievance outcome letter provided a full explanation of the outcome and reasons; the claimant was then provided with an opportunity to appeal.

250. *A3 – identity of governors considering the grievance*. See our findings of fact at paras 137 and 151. We accept AC's explanation as to the choice of governors involved in the different stages of the 2 grievances. The respondent was intitled to proceed as it did. The choice of governors was reasonable and pragmatic in the circumstances.

251. *A4. Absence of documents passing between members of senior management*. This allegation is a general one. The claimant appears to be of the view that more documents might exist but has not specified with any precision what those documents might be. There has been disclosure in these proceedings and the claimant has taken steps in accordance with her rights under Data Protection legislation. The bundle includes significant amounts of internal correspondence from 2019 and 2020. There are no obvious gaps. Importantly, correspondence disclosed includes emails passing between members of senior management. It was not for the appeal panel to carry out its own disclosure exercise. By that stage both parties were relying heavily on legal representation. The appeal panel were entitled to rely on the respondent and its solicitors to provide relevant documents. Were there obvious gaps in the documentation then we would have expected them to question these. But there were not.

252. *A5. Comments by grievance panel implying a level of criticism but rejection of allegation of further detriment.* See our findings at para 145. The grievance outcome did include some criticism of the claimant. It was perhaps inevitable in reaching outcomes which did not uphold the claimant's grievances that there would be some criticism of the claimant. However, as our findings of fact make clear, we are satisfied that they investigated the grievance impartially. The grievance panel made their own findings and conclusions as a result of their investigations. We note at para 158, that it was reasonable for the panel to have reached conclusions on the basis that they preferred the evidence of other employees. Those conclusions include criticisms of the claimant. We agree with the conclusions of the Appeal Panel that *"although these comments might have been expressed differently, that does not make the findings incorrect."* That was a fair conclusion (and is consistent with our own comments above about whether any language could have been "softened").

253. *B6. Claimant treated differently to colleagues, particularly those arranging theatre visit to "An Inspector Calls"* See our comments at para 159 above and our findings at 120.

254. *B7. Rejection of claimant's account of the meeting of 16 January 2020*. See paragraph 160. We find that the conclusion of the grievance panel was reasonable and it was reasonable for the appeal panel to reject her ground of appeal in relation to this meeting.

255. *C10. Abrogation of responsibility to consider the IB regulations and determine whether the claimant's position was correct.* It was not for the appeal panel to reach decisions about the interpretation of the IB Regulations. That was a matter for the IB itself. The appeal panel agreed with the conclusion of the grievance panel that the claimant had created an environment in which her colleagues (HR and EV) felt they had been accused of malpractice by the claimant. See our findings of fact at paras 161-164.

256. *D15. Unreasonable rejection of concern that second respondent was not seeking to build a case against the claimant.* And *D19. Rejection of grievance about the tone of the second respondent's letter of 17 January 2020 (pagers 549-550).*

257. Neither the grievance panel nor the appeal panel had concerns about IL's decision that the claimant's behaviour should be looked in to. See para 165 and 166 when we find the appeal panel's outcome on this issue to be reasonable. Our own findings of fact support their conclusion.

258. As for the tone of the letter of 17 January 2020,

a. there is no specific reference to this as a separate grievance item although the claimant described (at para 4(xiii) of the grievance letter) being distressed by the letter.
b. The appeal panel did reach conclusions about the letter (page 668). The panel concluded that it was inappropriate for IL to have suggested HR might raise a grievance against the claimant although also concluded the claimant had been treated fairly and reasonably in verbal and written communications. The panel did not conclude that the tone of the letter was threatening.
c. We are satisfied that the panel's decision was a reasonable one. In any event, a finding that one part of a letter was inappropriate (when the decision was that communications as a whole were fair and reasonable) would not amount to a breach of the Implied Term.
d. The appeal panel's decision is supported by our own findings in relation to this letter. It is plain when looking at the letter as a whole that IL's intention, when drafting and then sending the letter, was to be supportive. See our findings at paras 125-127.

Case Numbers: 2405170/20
2417650/20
2410527/21

Employment Judge Leach

Date: 7 October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10 October 2022

FOR EMPLOYMENT TRIBUNALS

Case Numbers: 2405170/20
2417650/20
2410527/21

ANNEX

EMPLOYMENT TRIBUNALS

Claimant: Ms Katie O'Hara

Respondents: 1. Windermere Educational Trust Limited
2. Mr Ian Lavender
3. Ms Ellie Vermeulen
4. Ms Elizabeth McLoughlin

CASE MANAGEMENT ORDER

Employment Tribunal Rules of Procedure 2013

Pursuant to rules 50(1). 50(3)(b) and rule 29 of the Employment Tribunals Rules of Procedure 2013, it being in the interests of justice to do so and having given full weight to the principle of open justice, it is ORDERED as follows:

1. that the parties shall omit or delete from any witness statement and any document referred to in any witness statement any identifying matter which is likely to lead members of the public to identify any of the Persons (as defined below) as being in any way involved in the facts relating to and/or referenced within these proceedings;

2. that any document entered on the Register, or which otherwise forms part of the public record, shall not contain any information which is likely to lead members of the public to identify any Person;

3. that the identities of any Persons referred to in the proceedings shall not be disclosed as being involved in the facts relating to and/or referenced within the proceedings.

4. That a Restricted Reporting Order shall apply preventing the disclosure of any identifying matter in relation to any Person.

For the purposes of this Order:

"Persons" means anyone who was a pupil of the First Respondent on or before 1st April 2021.
"Register" means the register of Employment Tribunal judgments and written reasons.

"Restricted Reporting Order" means an order prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain.

Employment Judge Leach

Dated: 25 March 2022

The Order remains in force indefinitely unless revoked earlier.

The publication of any identifying matter or its inclusion in a relevant programme is a criminal offence. Any person guilty of such an offence shall be liable on summary conviction toa fine not exceeding level 5 on the standard scale.