EMPLOYMENT TRIBUNALS

Claimant: Mrs B Patel

Respondents: Leicestershire County Council (1)

Governing Body of Woodhouse Eaves St Paul's C of E Primary School (2)

Heard at: Leicester Employment Tribunal **On:** 26 September to 8 October 2022
and 9 to 10 October 2022 in Chambers

Before: Employment Judge K Welch
Mrs J Morrish
Mr A Wood

Representation

Claimant: Mr S Rahman, Counsel
Respondent: Mrs J Smeaton, Counsel

RESERVED JUDGMENT

The claimant's claims of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments are not well founded and fail.

RESERVED REASONS

1. The Claimant originally brought claims for constructive unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and discrimination on grounds of race and/or religion and belief.

2. Two claim forms were presented on 30 July 2020 following a period of early conciliation against each respondent from 1 July to 28 July 2020. Whilst there had been an earlier ACAS early conciliation, this was noted to be against the wrong respondent and was not relied upon for the purposes of the hearing. The claims were consolidated on 14 August 2020.
3. The main claim form, case number 2602932/2020, included claims for unfair dismissal, religion or belief discrimination, race discrimination and disability discrimination. The other claim form, case number 2602931/2020, was noted by EJ Britton as not containing any specifics and was more of a 'philosophical statement' which disclosed no arguable complaint. The claimant withdrew the second claim on 25 January 2021.
4. There were 4 preliminary hearings all before EJ Britton. These resulted in further and better particulars being provided by the claimant, and applications to amend the case to bring whistleblowing and post-termination victimisation complaints, which were refused. Ultimately, the claims to consider at the hearing were confirmed by Case Management Order dated 31 March 2022 as unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.
5. The hearing was a hybrid hearing, with both parties and their witnesses attending mainly in person, but for which some observers, and witnesses whilst not giving evidence, attended remotely via the cloud video platform (CVP). The respondents' Counsel attended remotely for submissions, with no objection from the claimant's Counsel. The Tribunal considered it just and equitable to conduct the hearing in this way. The parties were told that it was an offence to record the hearing. Other than slight technical issues during submissions, the CVP hearing worked well.
6. The parties had agreed 3 bundles of documents: A for pleadings and Tribunal documentation, B for contractual and policy documentation and C (the main one consisting of two lever arch folders and being in itself over 1,000 pages) for all other relevant documents. References to page numbers in this judgment relate to documents within those bundles.

7. The Claimant provided additional documents on the first day of the hearing. The Respondent did not appear to object to the documents the Claimant wished to adduce. After hearing from both parties, the panel agreed to allow them to be added to the bundle on the basis that appropriate consideration would be given to their relevance should we be taken to them. Further disclosure was provided by the respondent at the request of the claimant during the hearing.
8. The parties had helpfully agreed a chronology and cast list, which was used during the hearing. The respondent's Counsel also provided a written opening note.
9. The Tribunal heard evidence in an agreed order which best suited the parties and their witnesses. We heard from:
   9.1. The Claimant;
   9.2. Ms J Joslin, former teacher at the school;
   9.3. Ms L Gilchrist, Head Teacher
   9.4. Ms E Perkins, HR Adviser;
   9.5. Mr N Dean, Chair of Governors;
   9.6. Ms R Boulter, Investigating officer; and
   9.7. Ms C Butler, HR Manager.
10. All of the witnesses had provided written statements as their evidence in chief. The claimant provided a supplemental witness statement. Having heard from both parties, this was allowed to be adduced in evidence by the claimant.
11. The Tribunal ensured that appropriate breaks were given and asked the parties to request any additional breaks if they were required. We were mindful that the claimant's Counsel had indicated the need for additional breaks, particularly whilst the claimant was giving her evidence, and these were fully accommodated.
12. The respondent had, on 26 January 2021, conceded that the claimant was, at all material times, disabled due to stress and anxiety, but not that it knew of her disability.
13. Following discussions at the beginning of the hearing, the parties confirmed that the issues for the Tribunal to decide were as follows:

Issues

Unfair dismissal (constructive dismissal)

14. Was the claimant dismissed?

15. Did the respondent do the following things as more particularly set out in pages A200-224:

15.1. On 4 July 2019, the Head Teacher formed a prejudiced view of the claimant prior to taking up her appointment and took a dislike to her;

15.2. Between 16 September and November 2019, investigated concerns as safeguarding issues which were clearly not, and deliberately exaggerated them to remove the claimant from the School. The claimant was seen as a trouble maker and the Head Teacher's aim was to remove the claimant from the School;

15.3. On 7 November 2019, the unwarranted suspension of the claimant when there was no need to believe that the claimant would interfere with an investigation, there was not gross misconduct, there was no risk posed to other staff or children and no or insufficient details of the allegations were given to the claimant;

15.4. Between 16 September 2019 to 27 July 2020, the Head Teacher continued the claimant's absence from work, which advantaged another member of staff in being recruited for the Deputy Headship post, gave the Year 2 class to a supply teacher, and the Lead English role to Ms Joslin;

15.5. Between 16 September 2019 to 14 March 2020, the Head Teacher translated 5 original concerns into 13 allegations with a recommendation to Governors to dismiss the claimant by reason of gross misconduct;

15.6. On 4 October 2019, the Head Teacher and HR colluded with the Trade Union to force the claimant to accept a settlement. The choice was to accept a settlement and resign or the disciplinary process would continue; This was confirmed in submissions that it was no longer relied upon by the claimant;

15.7. The Head Teacher informed parents by letter on 7 October 2019 that "…by mutual consent…" the claimant "..would not be returning to the school…" despite having no signed agreement;

15.8. The Head Teacher made a referral to the LADO on 4 November 2019 with the express intention of preventing the claimant from returning to her job. The Head Teacher had already decided that the claimant's employment had to end;

15.9. Between 4 November 2019 and 18 December 2019, the Head Teacher and HR withheld information from the claimant (specifically the LADO referral and her GDPR rights as required by the LADO) thereby disadvantaging her in defending the disciplinary process;

15.10. The Head Teacher disguised the return to work meeting on 5 November 2019 as valid, when she intended to suspend the claimant within 2 days. Showing that the Head Teacher had already made up her mind that the claimant's employment was to end;

15.11. [same as 10 above];

15.12. On 7 November 2019, the Head Teacher with HR compliance suspended the claimant without reasonable and just cause;

15.13. On 18 December 2019, the Head Teacher with HR compliance lifted the suspension on different grounds, thereby undermining the grounds of suspension;

15.14. [same as 13 above];

15.15. The Head Teacher with HR compliance continued the investigation and disciplinary action on 15 January 2020 despite the LADO finding the allegations unsubstantiated; the Head Teacher failed to inform the claimant of the LADO outcome and substituted her own incorrect interpretation;

15.16. [same as 15 above];

15.17. The Head Teacher continued the disciplinary process between 18 December 2019 and 15 January 2020, despite the LADO decision, presenting a false picture to the claimant that there were sound reasons for continuing the disciplinary action;

15.18. On 19 November 2019, the Head Teacher went “fishing” for evidence from other staff;

15.19. From 25 October 2019 to 14 March 2020, the Head Teacher and Governors with HR compliance colluded to deepen the unfairness in terms of their inappropriate procedure and lack of timeliness;

15.20. On 14 March 2020, the claimant was not provided with all relevant and accurate paperwork as part of the disciplinary process. The name of a child in an allegation relating to wetting themselves was changed without disclosing this material fact to the claimant;

15.21. Between 16 March and 27 July 2020, the respondents colluded to deny the claimant fair representation based on an unsound understanding of the Law and the ACAS code;

15.22. On 22 July 2020, the respondents failed to engage with ACAS early conciliation;

15.23. On 27 July 2020, the respondents again failed to engage with ACAS early conciliation; and

15.24. Between March and 27 July 2020, the respondents failed to make reasonable adjustments for the claimant to be represented by Mr Laurent-Régisse.

16. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

16.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

16.2. whether it had reasonable and proper cause for doing so.

17. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

18. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant’s resignation.

19. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Discrimination arising from disability (Equality Act 2010 section 15)

20. The respondent accepts that the claimant was disabled at all material times with stress and anxiety.

21. Did the respondent treat the claimant unfavourably by:

21.1. Not allowing her to be represented by Mr Laurent-Régisse.

22. Did the following things arise in consequence of the claimant's disability:

22.1. An Impaired ability to interact and communicate with others, assert herself, have confidence in others and trust them.

23. Was the unfavourable treatment because of any of those things? Did the respondent fail to allow the claimant to be represented by Mr Laurent-Régisse because of that impaired ability to interact and communicate?

24. Was the treatment a proportionate means of achieving a legitimate aim? The respondents say that their aims were:

24.1. In operating the part of the disciplinary policy on representation, to have a fair and consistent approach for all employees to afford them appropriate representation in the circumstances of each case. [PA227]

25. The Tribunal will decide in particular:

25.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

25.2. could something less discriminatory have been done instead;

25.3. how should the needs of the claimant and the respondents be balanced?

26. Did the respondents know, or could they reasonably have been expected to know, that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

27. Did the respondents know, or could they reasonably have been expected to know, that the claimant had the disability? From what date?

28. A "PCP" is a provision, criterion or practice. Did the respondents have the following PCP:

28.1. To only allow representation by a trade union representative or work colleague.

29. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that people with stress and anxiety have an impaired ability to trust and need to feel familiar and comfortable with a representative of their choice? [A226].

30. Did the respondents know, or could they reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

31. What steps could have been taken to avoid the disadvantage? The claimant suggests:

31.1. Allowing the claimant to be represented by her choice of representative, namely Mr Laurent-Régisse.

32. Was it reasonable for the respondents to have to take those steps and when?

33. Did the respondents fail to take those steps?

Findings of fact

34. The Claimant was employed by the respondents as a teacher from 24 August 2016 until 27 July 2020, working with year 2 in the second respondent's school in Woodhouse Eaves ('the School'). The School is a maintained school, within the first respondent's

local authority. The claimant had management duties as the English subject leader and Deputy Designated Safeguarding Leader. She was also a member of the Senior Management Team (SMT) within the School.

35. The School is a small village school with approximately 200 pupils on the roll. There are 7 classes within the School, one class for each year group. Prior to Miss Gilchrist's appointment, only two of the teaching staff were not on the SMT.

36. The School was managed by its Head Teacher, who had been Ms Hurst during the first few years of the claimant's employment. When she left the School, the Head Teacher role was carried out on a temporary basis by Mr Foster for 2 terms prior to the Academic year commencing in August 2019.

37. During his temporary headship, Mr Foster agreed to increase a part time Deputy Head's pay to cover the other Deputy Head's maternity leave. This was thought by a number of the staff on the SMT and two Governors to be unfair. A meeting was arranged at the claimant's house to discuss this on 1 July 2019. Ms Yendall, who later brought a grievance against the claimant, attended the meeting and remained with the claimant and Ms Joslin to eat and drink with them following other people's departure. It was suggested that Ms Yendall's grievance was not credible in light of her attendance, but we do not accept that to be the case.

38. On 28 August 2019, Miss Gilchrist joined the School as a permanent Head Teacher. The evidence was that, following her appointment in February 2019 but prior to taking up her role, Miss Gilchrist had visited the school, and met with various members of the School. On one of these occasions, Miss Gilchrist had visited the claimant's classroom. Miss Gilchrist's evidence was that on visiting the claimant's classroom, she viewed 'post it' notes in the children's books with the correct spelling of words on them. No comment was made, but the Claimant thought that Miss Gilchrist believed that she had been 'cheating' in doing this.

39. Miss Gilchrist attended an SMT meeting on 4 July 2019, again prior to her appointment, at which the Claimant and other members of the SMT were present. At this meeting, the

claimant asked for some time during a forthcoming inset day to discuss English, for which she was the subject lead. Miss Gilchrist did not agree to this. Ms Joslin's evidence was that a number of staff tried to voice ideas during this meeting, but Miss Gilchrist was not interested in hearing any of them.

40. We believe that, by the time the term had started for the new academic year, the claimant believed that there was some ill feeling between herself and Miss Gilchrist. The claimant's evidence was that Miss Gilchrist had formed a dislike of her, and Miss Gilchrist's evidence was that she found the claimant challenging.

41. On 21 August 2019, Ms Granger, who worked as a higher level teaching assistant ('HLTA') in the claimant's classroom, resigned from the School. She emailed her letter of resignation [PC874-5] to Miss Gilchrist. This confirmed that the decision had been a hard one to make, but that a new opportunity had arisen to provide care for a family member. It was clear that this had been discussed in the School as the reason for her resignation.

42. On 28 August 2019, Miss Gilchrist commenced her position as Head Teacher. On this day there was an inset day for the School. At this inset day, Miss Gilchrist informed the staff about various changes she wished to make to the School or its procedures.

43. It was clear to us that Miss Gilchrist had made a decision to reduce the size of the SMT to what she considered to be a more appropriate number for the size of school. This meant that a number of teachers were removed from this, as Miss Gilchrist only wanted the Head Teacher, the special educational needs coordinator ('SENCO') and the Deputy Head(s) to be on the SMT. As Miss Gilchrist was the SENCO for the School, there were still 3 members of the SMT following this decision, since there were 2 Deputy Heads in post. It was apparent to us that there was no consultation or discussion concerning this change with the staff. However, we accept that it was not a contractual requirement to be part of the SMT, there was no reduction in pay in being removed from it and others beside the claimant were affected. The claimant's management duties continued despite

this removal. Miss Gilchrist considered that teachers would still be able to voice their views at staff meetings.

44. On this day, 28 August 2019, Ms Granger had a conversation with Miss Gilchrist at which Ms Granger volunteered additional reasons for her resignation, namely the atmosphere in the claimant's classroom due to the claimant. The claimant's evidence was that Miss Gilchrist had solicited this information from Ms Granger, although we do not accept that to be the case.
45. Following Miss Gilchrist's arrival, and during the early part of September 2019, various changes were implemented in the School, including the writing of objectives by children, the change of time for Worship (formerly known as assemblies), and the time tabling of the daily mile, which did not sit well with some members of staff, and especially with the claimant.
46. On 5 September 2019, Ms Yendall complained to Ms Gilchrist that the claimant had read her emails when she left her ipad unattended. Ms Yendall was clearly upset about this.
47. On 6 September 2019, Miss Gilchrist asked to speak to the claimant in her office and had a difficult discussion with her about Ms Yendall's concerns. There was a difference in evidence as to whether Miss Gilchrist raised the concerns about Ms Granger's resignation. We are satisfied that a difficult conversation took place between them.
48. On 9 and 10 September, there were further discussions over changes in school policy that Miss Gilchrist was implementing, which the claimant was concerned about. The claimant considered that she had been shut down without consideration during these conversations, but Miss Gilchrest said that she did not do so, and treated her respectfully and professionally.
49. On 12 September 2019, Miss Gilchrist was contacted by Ms Esposito, the Teaching School Manager from the Learning Alliance. The Learning Alliance place student teachers in schools for teaching placements. The claimant suggested that Miss Gilchrist had approached Ms Esposito to solicit complaints against the claimant. We found that to be highly unlikely and considered that the email evidence supported our view that

contact came from Ms Esposito, following a student teacher, Ms Forrest, raising concerns to her about her placement in the claimant's class. Ms Forrest did not wish to return to the School to complete her placement. The email trail between Ms Forrest, Ms Esposito and Miss Gilchrist appeared at [PC1-4] and included a long list of complaints about the claimant's behaviour in the classroom and interaction with the class. The issues raised by Ms Forrest (being 27 bullet points of child centred complaints) appeared to us to be serious in their nature and warranted investigation.

50. Later in the same day, Ms Esposito sent a further email to Miss Gilchrist [P5-7] attaching an earlier email from the previous student teacher in the claimant's classroom outlining concerns about the claimant's behaviour towards her.

51. Later on 12 September, there was a staff meeting, at which the claimant was present. The claimant was discussing new English resources at the start of the meeting and was asked by Miss Gilchrist to discuss this at the end of the meeting under 'any other business'. The claimant considered that Miss Gilchrist was rude and tried to embarrass her. Miss Gilchrist denied this. Although Miss Gilchrist did not witness it, several staff members reported to her that the claimant had been pulling faces and, some said, making hand gestures behind her back during the meeting. The claimant says that she had a migraine and may have been moving her hands because of this. We do not accept that to be the case.

52. On 13 September, Miss Gilchrist observed the claimant going into Ms Yendall's classroom during school hours. The claimant had left her class with a teaching assistant ('TA') who was employed to look after children with special educational needs. The claimant spoke to Ms Yendall about her complaint to Miss Gilchrist regarding the allegation that she had looked at emails.

53. Following HR advice, on 16 September 2019, Miss Gilschrist asked the claimant to come to a meeting with her first thing in the morning. Miss Gilchrist's notes of the meeting, which appeared to have been drafted after the meeting, appeared at PC8. There was a difference between what Miss Gilchrist and the claimant said was discussed during this

meeting and the manner in which the issues were raised. We accept that the following issues were discussed: the claimant pulling faces in the staff meeting, leaving her class with an inexperienced TA, an accusation of bullying, and that a student teacher and HLTA had left for reason of the claimant's conduct. The claimant was clearly upset and anxious by this meeting, and did not give any explanations, but confirmed that she wanted to go home to speak to her trade union, which we understand.

54. Miss Gilchrist called the claimant in the afternoon, asking the claimant whether she was coming back to School the next day or whether she needed to arrange cover. The claimant said that she had not yet spoken to her union and was not coming back until she did so. Miss Gilchrist reminded the claimant of her contractual obligation to work. The note of the meeting was at PC483.

55. That evening, Miss Gilchrist received an email from a parent [PC10] raising concerns about her child being in the claimant's class, and specifically about the shouting policy being breached. Miss Gilchrist did not respond to this email at this stage. We can find no evidence that Miss Gilchrist solicited this email from the parent, as alleged by the claimant.

56. Miss Gilchrist emailed the claimant on 17 September 2019 over what had been discussed in their meeting on 16 September 2019 [PC11]. The same matters were mentioned in the email as set out above. This email sought to arrange an informal meeting with the claimant, and her union representative or supporter, to discuss the issues. Two possible dates were provided for this meeting.

57. The claimant was absent from work with stress and anxiety from 17 September until 4 October 2019, which was confirmed to Miss Gilchrist in an email dated 17 September [PC15 and 29].

58. On 17 September 2019, the day before Ms Granger's last day of employment, she sent an email to "Miss Gilchrist and Governors" [PC14] giving reasons why she was leaving. These related to her not being happy to remain in year 2 with the claimant. She raised concerns about the claimant shouting and ripping pages out of books. Her email stated,

"*I won't remain in that class with these conditions*." We accept that Ms Granger raised these concerns without being prompted. We considered it likely that Ms Granger may have been reluctant to provide a written account about the claimant until she neared the end of her employment to avoid any possible repercussions.

59. A letter was sent to the claimant on 18 September 2019 [PC24] inviting the claimant to attend an informal meeting on 24 September 2019, as no response had been received from the claimant. At that point, the School had not received the claimant's fit note, and so believed she would be back at work for the meeting.

60. The claimant's trade union representative replied to Miss Gilchrist on 19 September 2019, confirming that the claimant had self-certified for 7 days, and requested that the School liaise with the claimant through her union. [PC25].

61. On 20 September, the trade union representative contacted the School [PC27] confirming that the claimant was waiting to see her doctor and was therefore unable to attend the meeting.

62. The claimant was signed off from 20 September to 4 October [PC29], a period of 2 weeks, with stress and anxiety.

63. Miss Gilchrist received an email from a different parent on 20 September 2019 [PC34] complaining about the claimant regularly shouting at her class, which said that her child was happier being taught by the TAs and supply teacher. We find no evidence of the School, or Miss Gilchrist, canvassing these complaints.

64. On 24 September, the claimant was invited to a re-arranged informal meeting [P35A] on 3 dates during the first week of October. This letter provided the claimant with the list of issues to be discussed and confirmed that the claimant could be accompanied by a friend, colleague or trade union representative. The union's reply was that the claimant was not due to return to work until 5 October, and that therefore an alternative date was required. The union confirmed that the meeting would have to await the claimant's return to work.

65. HR advice received by Miss Gilchrist on 26 September 2019 [PC38] suggested moving the issues with the claimant to a formal investigation meeting, in light of "*an accusation of bullying [that] needs to be taken seriously*." Also, it advised that there was no need to await the claimant's return to work to have an informal meeting.
66. Around this time, there were conversations between the claimant's trade union representative and the School about possible settlement and an agreed exit from the School. There were emails in the bundle about the possibility of settlement, [PC39-43] and we accept that the claimant's representative, with the claimant's knowledge, instigated these discussions.
67. On 4 October, Ms Perkins in HR sent a draft settlement agreement to Miss Gilchrist [PC46-48].
68. The claimant accepted the settlement proposal in principal on 5 October 2019 [PC60]. Her email said, "*I will not be in work on Monday and I am accepting the offer you have proposed to my union representative. From Monday I will be taking gardening leave*." It was clear from this, and other emails to her TU representative in the bundle, that she had decided to accept the offer and move on. It had been agreed in principal that the claimant would be on garden leave from 7 October until her employment ended on 31 October 2019.
69. Miss Gilchrist sent a letter to parents of children within the claimant's class on 7 October 2019 [PC68] confirming that, "*by mutual consent [the claimant] will not be returning to St Paul's. We are delighted that Mrs Swanton, who has been covering the class for the last three weeks, will be staying on as their permanent teacher*." Miss Gilchrist accepted that this letter was premature, since no agreement had been finalised.
70. On 10 October 2019, there was a Full Governing Body meeting of the second respondent. The minutes were handed in as supplementary documents. The font and colour of the minutes had been altered to highlight that in the 'any other business' part of the meeting, "*An update on [the claimant] was given to the Governors*". We do not find anything untoward in this.

71. The claimant returned her keys, laptop, pass and ID to the School early on 17 October 2019, and was still indicating that she was going to accept the offer and leave the school at this time, although she had not yet seen the settlement agreement. The claimant did not attend work between accepting the settlement in principal on 5 October and 18 October and nor did she provide a fit note for this period.
72. On 18 October 2019, the claimant sent an email to Miss Gilchrist, Mr Dean and the claimant's trade union representative [PC100-101] saying, "*Thank you for sending me the settlement agreement,… I have read it and I will not be signing the agreement. Having read this agreement it has caused me a huge amount of anxiety and stress which resulted in a panic attack and I'll be signing myself off sick….I will be seeking legal advice on this matter*." No explanation was given as to why the claimant was not accepting the settlement.
73. Around this time, Ms Yendall sent in a formal written grievance [PC61-64]. This contained many more allegations against the claimant than her original complaint in September. There was some dispute over the date of this grievance, but we find no relevance in this. We accept this was a genuine grievance from Ms Yendall raising concerns about the claimant from September 2018 until September 2019.
74. There appeared to be attempts to understand the reason for the claimant's change of heart. She was given further time to consider her position. During this time, the claimant's individual trade union representative changed.
75. In reply to an email from the claimant on 26 October confirming that it was "*not my intention to take any further action until that legal advice has been obtained*", Miss Gilchrist sent an email to the claimant on 28 October 2019 [PC108]. This said that she was "*surprised to hear that [she had] gone back on [her] word, after agreeing to the offer made, several weeks ago*." This was, in our view, unfortunate wording, and we can see how the claimant perceived this as a negative comment. The email also confirmed that the claimant would be referred to Occupational Health (OH) and that a full disciplinary

process would be instigated in line with the School's policies and that someone would be appointed to investigate the allegations.

76. On 29 October, Ms Boulter was appointed as the investigating officer, at an additional cost to the second respondent. The claimant's case was that Miss Boulter was not independent, as she was employed by the same local authority. We do not accept that this affected her independence in carrying out an investigation.
77. Initially there was some confusion over what Ms Boulter was investigating, and whether it was a grievance investigation or a disciplinary investigation. We find that it was reasonable that Miss Boulter carried out concurrent investigations into the grievance and the disciplinary concerns, since many of the same witnesses were involved. However, it was noted that 2 separate reports were provided following this investigation.
78. As part of the investigation, Ms Boulter called Miss Gilchrist on 4 November 2019 to suggest that Miss Gilchrist contact the Local Authority Designated Officer ('LADO'), if she had not already done so, for advice on whether there were safeguarding issues in any of the complaints being investigated. The LADO is concerned with safeguarding issues and not conduct matters generally.
79. Miss Gilchrist contacted the LADO by telephone and completed a referral form [P137-138] on the same date. The Claimant suggested that this referral exaggerated the concerns surrounding the claimant. We do not find that to be the case.
80. On 4 November, the claimant confirmed that she was well enough to return to work.
81. There was a return to work meeting on 5 November 2019 [the claimant's minutes appear at PC140-141, and a transcript of a covert recording by the claimant at PC880-889]. It was clear that the claimant's return to work was discussed. It was suggested by Miss Gilchrist that the claimant work from home the following day, as there may be safeguarding issues, and advice was being sought from "County".
82. Also on 5 November 2019, although after the return to work meeting with the claimant, Miss Gilchrist spoke with the LADO. He informed her that the matters raised in the referral met the threshold for a position of trust ('POT') meeting and that suspension

could be considered by the School. The LADO therefore arranged a POT meeting on 29 November 2019.

83. On 6 November, Miss Gilchrist, on advice from Ms Perkins at the first respondent, considered whether to suspend the claimant. She read the disciplinary policy [PB13-19] and, as can be seen from the bundle, undertook an assessment on this [PC167]. We are satisfied that this was a considered decision and was not a knee jerk reaction to the allegations under investigation. We are also satisfied that the second respondent's disciplinary procedure provided for suspension.
84. The claimant was suspended on full pay on 7 November 2019 and this was confirmed in writing the following day [PC170-171]. We consider that the claimant had sufficient information at this time from her meeting with Miss Gilchrist on 16 September, the email on 17 September, the letter of 24 September and the letter of suspension on 8 November to understand the nature of the allegations against her. This was not an invitation to a disciplinary hearing, where clearly, further detail would be required.
85. An OH assessment took place on 13 November 2019 and the subsequent OH Report dated 18 November 2019 [P185-6] refers to "*a number of workplace issues… that she feels contributed to her reactionary state*". It also stated, "*In my opinion she is fit to continue in her current role…..[The claimant] is fit to return to work once work factors and her work concerns have been addressed. In my opinion she is fit and willing to attend management type meetings with the support of a suitable person she has chosen to attend with her…*"
86. During November, and the beginning of December, Ms Boulter carried out investigations in to the grievance raised against the Claimant, and the disciplinary issues. She met with a number of witnesses during this period, including the Claimant, as evidenced within the bundle. A number of these witnesses raised concerns over the claimant's conduct, which the claimant denied.
87. During this period, Miss Gilchrist sent an unprompted statement to Ms Boulter from herself and a learning support assistant and confirmed that another TA would be

providing a statement. Ms Boulter had not requested these, and we are satisfied that she was carrying out her own independent investigation. She therefore confirmed this to Ms Perkins and asked that Miss Gilchrist was informed of this.

88. We found Ms Boulter's investigations to be both professional and thorough, and do not accept that there was any collusion between Miss Gilchrist and Ms Boulter about the outcome from those investigations.

89. The first POT meeting was held on 29 November 2019. The outcome from this meeting was that the investigation should continue, the claimant was to remain suspended, and the claimant should be kept up to date via her union representative. The minutes for the meeting, which were prepared by the LADO some time after the meeting took place and which were not distributed at the time [PC414-416] indicated that Miss Gilchrist had said various negative comments about the claimant, including that the children in her class would be "*absolutely devastated*" should the claimant return. Miss Gilchrist denied this, however, we found it likely that Miss Gilchrist did say some negative comments about the claimant's return to the School during this meeting, in light of the complaints that had been received.

90. The next POT meeting was held on 18 December 2019 [PC418-420]. This found that the safeguarding allegations were unsubstantiated which means that there was insufficient evidence to prove or disprove the allegations. The term does not therefore imply guilt or innocence.

91. The conclusion was that, "*while the school may decide to dismiss [the claimant], it was established that the reason for a dismissal would not be that she represents a risk to children and therefore today's meeting agreed that the allegations against her must logically be unsubstantiated.*

    [The claimant] will be informed of this outcome, and of her rights under GDPR, by her employer."

92. The respondents' witnesses who attended the meeting, cannot recall that GDPR was mentioned, which we accept. As the minutes were not distributed, they were, therefore,

unaware that they should have taken any action to inform the claimant of her GDPR rights, as outlined by the LADO.

93. It was clear to us that, despite the LADO's decision on the safeguarding issues, the School were able to continue with their disciplinary investigation. It was a separate process and we accept that not meeting the threshold for safeguarding issues with the LADO did not prevent the School from continuing with the investigation into the claimant's alleged conduct.

94. On the day after the LADO meeting, 19 December 2019, Miss Gilchrist reviewed the decision to suspend the claimant. She took advice from Ms Perkins and decided to lift the suspension, as Ms Boulter had concluded the investigation meetings, and the LADO's threshold for safeguarding issues had not been met. This was notified to the claimant without delay.

95. A letter confirming the outcome of the LADO POT meeting and the lifting of the claimant's suspension was sent to the claimant on 19 December 2019 [PC371]. This confirmed that "*although the suspension is lifted, the HR process will continue as the Investigation is still ongoing and we await the outcome of this*". It asked the claimant to contact Miss Gilchrist to arrange a meeting to discuss the claimant's return to work which would be after the Christmas holidays, since the holidays began the following day. The claimant remained off work until the return to work meeting could be arranged.

96. A return to work meeting was held on 15 January 2020. Just prior to this meeting, the claimant's representative requested that the claimant remain off work until the investigation had been completed. Ms Perkins advised that this was not possible, but that the second respondent would be flexible in terms of the claimant working from home.

97. At the return to work meeting [minutes PC484-495], there was a discussion about the claimant coming back to a co-teaching arrangement for the year 4 class, the largest class in the School. This meant that the claimant would be teaching part of the year 4 class, and the other year 4 teacher would be teaching the other part in a different area.

The year 2 class was to continue to be taught by the supply teacher who had covered the claimant's absence. It was suggested in the meeting that the claimant could have her English lead role back when she felt ready, and there was no suggestion that the claimant was to lose pay as a result of this.

98. Ms Joslin gave evidence that she had been offered the claimant's English lead role, but it was clear to us that there was no indication of when this temporary arrangement would end. Ms Joslin was not going to be paid any extra for doing so.

99. After the return to work meeting, the claimant was sent the minutes from the meeting [PC508-510].

100. On 16 January 2020, the claimant provided a fit note confirming that she was fit to work on a phased return basis, namely afternoons only initially [PC514]. This was agreed by the School. It appeared to us that support was being provided to reintegrate the claimant back into the School.

101. The reports for the disciplinary and grievance investigations were sent to the Chair of Governors, Mr Dean on 16 January 2020 [PC515-558]. These were not sent to Miss Gilchrist. The reports recommended that the matter should proceed to a disciplinary hearing, but requested that Mr Dean consider the reports and then confirm whether he wished to accept that recommendation and move forward to a disciplinary hearing.

102. We accept that Mr Dean made the decision to proceed with a disciplinary hearing against the claimant having read the reports, and that this was communicated to Ms Boulter and Miss Gilchrist.

103. On 17 January 2020, Miss Gilchrist agreed with the claimant a letter to be sent to the year 4 parents about the claimant's return to work in that class on 20 January.

104. Ms Gilchrist sent an email to the claimant on 20 January 2020 [PC561] to ask her to attend a brief meeting prior to going into the planning meeting. In this meeting, the claimant was told that the matter was proceeding to a disciplinary hearing and was given the choice as to whether to go home or stay in School. The claimant chose to go home.

105. The claimant was then signed off as sick from work from 20 January to 16 February 2020 with stress and anxiety. She therefore did not return to work at this stage and, in fact, never returned to School.

106. A letter was sent to the claimant on 23 January 2020 [PC580]. This letter confirmed that the decision had been made to proceed to a disciplinary hearing and they wanted to determine the claimant's fitness to attend such a hearing.

107. On 4 February 2020, Mr Dean tried to arrange a disciplinary hearing and gave possible dates for this, although was informed by HR that they were awaiting OH advice on the claimant.

108. The claimant asked whether she was able to bring a friend to help her present her case in an email on 6 February 2020. Following advice from Ms Perkins, Miss Gilchrist replied on 7 February [PC602] to say that the policy states that she may have a trade union representative or work colleague, but that she could bring a friend for support, although they must not answer questions or give any comment whatsoever.

109. On 6 February 2020, a letter was received from a parent of a child in year 4 expressing concerns about their child being taught by the claimant. [PC597]. This did not form any part of the disciplinary process.

110. On 12 February 2020, the claimant attended an OH assessment. The report came in on 18 February [P605-606]. The claimant was off sick with work related stress throughout this period. The report said that "*It is recommended that the correct disciplinary processes are followed, and [the claimant] must be able to appoint an appropriate representative to support her interests before this meeting can be executed…. Therefore, [the claimant] is fit to attend a disciplinary hearing based on my clinical assessment*." To us, it was unclear as to who the OH report was suggesting as an "appropriate representative".

111. The claimant was invited to a disciplinary hearing by letter dated 12 March 2020 [PC646] to be held at Beaumanor Hall on 30 March 2020. This letter was sent by Ms Boulter to the claimant by email on 14 March. We considered this to be a standard letter

which confirmed that the claimant could be accompanied by a work colleague or trade union representative. The email, and hard copy of the letter, included the pack of evidence to be referred to in the disciplinary hearing. We are therefore satisfied that the claimant knew the allegations against her. The letter made clear that the maximum possible sanction was dismissal.

112. On 16 March 2020, the claimant emailed Ms Boulter "*in strict confidence*" [PC675] and expressly stated that she did not wish the contents of the email to be made known to her union, "*or their officers, the Head Teacher or Governors of [the] School, nor any party to the current disciplinary procedure*". This email said that she may be wishing to dispense with representation from her union, and was seeking an '*in principle guiding statement*' on whether her chosen representative would be allowed to address the hearing, to put and sum up her case and respond to any views expressed at the meeting. This indication would enable her to make a competent decision on how she wished to be represented at the hearing. She did not wish to name the individual until she had this '*in principle guiding statement'*.

113. Ms Boulter went back later that day [PC676] confirming that the claimant could be represented by a trade union representative or colleague in line with the statutory rights. She was told that she would need to confirm her representative's name, and that he could address the hearing, but could not answer questions on the claimant's behalf.

114. The claimant presented a further fit note citing stress at work, dated 16 March 2020 until 13 April 2020 [PC679]

115. The claimant challenged Ms Boulter's response on 17 March 2020 and quoted the OH report referred to above and the ACAS guide. She again asked for strict confidentiality.

116. On 18 March 2020, Government guidance was issued to limit non-essential travel due to Covid-19, and the claimant's trade union sought to postpone meetings to avoid transmission of the virus. On the same day, Beaumanor Hall cancelled the booking

for the claimant's disciplinary hearing due to take place on 30 March 2020, as it closed its venue.

117. Also on the same day, there were further emails between the claimant and Ms Boulter about her representation at the disciplinary hearing. The claimant sent an email [PC683] which confirmed that her chosen representative "*because of [her] dissatisfaction with my current Trade Union, is not a TU official, but is a long-standing professional friend who has considerable background experience in another Local Authority with schools…. I believe this constitutes a reasonable request to enable my case to be presented appropriately and more accurately than I believed would have been obtained from the Union representation and will ensure a fair process*." It referred to the OH report dated 12 February 2020 but did not mention the claimant's disability.

118. Ms Boulter again confirmed on 18 March {PC686] the statutory right to be accompanied, but requested the name of the individual the claimant was seeking to bring. The claimant in reply asked again asked for an '*in principle agreement'* for someone else to represent her, although did not name the individual, and said that this was a "*request as within what any reasonable employer could facilitate*". She also highlighted the section of the OH report saying that she must be able to appoint an appropriate representative.

119. On 19 March 2020, further correspondence took place, between the claimant and Ms Boulter [PC693-4] about representation at the forthcoming disciplinary hearing. Ms Boulter informed the claimant that in order to make a decision outside of the statutory entitlement, they needed to know the name and status of the proposed representative. The claimant's reply confirmed that she could not name him, due to not knowing his availability for the hearing.

120. The panel considered that the first respondent had been relatively inflexible in its application of the disciplinary procedure as regards representation up until 19 March 2020. However, we noted that the respondents did confirm at this stage, that

consideration could be given to an alternative representative once they were informed of the identity of the representative.

121. On 20 March 2020, Ms Boulter emailed the claimant to confirm that she had passed the claimant's email onto one of her seniors to respond. [PC735-737]. We considered that Ms Boulter had no option but to elevate the concern in light of the claimant's latest emails, which indicated a conflict of interest for Ms Boulter.

122. Ms Butler, HR Manager, picked up the matter on 23 March 2020 [P737-738]. She confirmed that if the claimant was not willing to divulge the name of her representative, the School could not make judgment without it. This suggested to us that alternative representation might be possible.

123. On 24 March 2020, in light of Covid-19 restrictions, Mr Dean considered whether it was possible to have a remote hearing for the claimant's disciplinary. However, as the claimant wanted an in-person hearing, which we can understand, this was not possible, and therefore confirmation of the postponement of the hearing was sent to the claimant on 26 March 2020 [PC750]. This confirmed that a new hearing date would be sent in due course.

124. Nothing appeared to happen until May 2020, although we understand that this was due to the Covid-19 pandemic and the lock down that had ensued.

125. On 13 May 2020, the claimant sent an email [PC762] chasing up when the likely hearing might take place. The claimant was indicating that she would require approximately 5.5 hours of time within the hearing, and so the respondent considered that a 2 day hearing would be required. She went on to confirm that, "*when I am informed of a revised date for the Hearing I will be able to confirm the name of the person I wish to represent me… given that I now will not be being represented by a Trade Union officer*." The respondents confirmed that they were trying to organise a hearing date.

126. On 22 May, the claimant emailed Ms Butler [PC771] and amongst other things, confirmed the name of her proposed representative, Mr Laurent-Régisse, a former Head

Teacher. Ms Butler's response in red on the same email, was that Mr Laurent-Régisse could attend in a supportive capacity only and not representation in the formal sense.

127. On 28 May 2020, the claimant sent a further email about her representative. She highlights in this email that, "*you must be seen to act "reasonably", not least given the fact that you have clear evidence of my disability relating to stress and anxiety and two OH reports which should have guided you in your decisions*." The claimant chased this on 8 June, and Ms Butler responded on 12 June 2020 [PC775] to say that, "*LCC has acted reasonably by allowing your friend to accompany you even though they fall outside of the two categories outlined in the disciplinary procedure*." It also confirmed that an OH appointment would be expedited.

128. The claimant was signed off work with stress at work from 15 June to 19 July 2020.

129. On 17 June, Mr Dean emailed the claimant to confirm that they were trying to get an appropriate date for a disciplinary hearing, but they were struggling due to Covid-19 restrictions.

130. The claimant emailed Ms Butler again on 22 June 2020 [P781-3] providing further reasons why she should be represented by someone with appropriate skills and knowledge to assist her, and asked for a different interpretation to be placed on the OH report of 12 February 2020. She also attached a letter from her GP [PC784-5]. This confirmed that the claimant was very ill, although did not specifically mention disability and went on to say, "*She tells me that she has been unable to represent herself during meetings as her levels of stress and anxiety make it difficult for her to speak clearly and so she has required the support of a friend to represent her appropriately*."

131. A further OH referral was made on 23 June 2020.

132. On 26 June 2020, Ms Butler contacted Mr Dean, the Chair of Governors, to suggest his approval that Mr Laurent-Régisse, be allowed additional rights to represent the claimant. This was agreed by Mr Dean, and an email was sent to the claimant on 1 July 2020 [PC819-820], which confirmed that her chosen representative could participate

beyond what had previously been stated. The only element that he could not do was to ask questions on behalf of the claimant (or indeed answer them, as with other representation), but the claimant was informed that the panel would consider whether to allow this on the day, depending on how the hearing was progressing and the claimant's needs.

133. An OH report dated 9 July 2020 was obtained [PC830-2]. This was received by the respondents on 16 July 2020. The report considered it unlikely that the claimant's condition would be classed as a disability under the Equality Act 2010. The report stated that the claimant was fit to engage with a workplace meeting with recommendations. This included "[*The claimant] has instructed someone to attend with her and due to her anxiety often struggles to articulate and becomes emotional, this appointed person is in place of a union rep and would have to act on [the claimant's] behalf, she would be unable to fully engage or represent herself without this due to the intrusive nature of her symptoms*."

134. The claimant sent a letter of resignation on 27 July 2020 [PC845], which cited breaches of the implied term of trust and confidence, following a series of unfair processes and practices and refusal to allow her to be fairly represented at the disciplinary hearing. This was not seen by Miss Gilchrist until 1 August 2020, which we accept, since this letter was received during the School holidays, and this is supported by emails within the bundle.

135. Prior to the respondents' knowledge of the claimant's resignation, Ms Butler advised the panel that, in light of the latest OH report, the representative should be able to fully represent the claimant, apart from answering specific questions put to her. At this point, the respondents were still looking for a venue for the hearing in light of extended local Covid-19 restrictions.

136. After finding out about the claimant's resignation, Miss Gilchrist asked the claimant to reconsider her decision to resign in an email to the claimant on 4 August 2020 [PC855]. Our view is that whilst the Chair of Governors, Nick Dean, needed to

approve this, this email was, in effect, confirming that the claimant's chosen representative could represent her in exactly the same way as a trade union representative would. The claimant refused this by email on 5 August 2020 [PC856] saying it was "*altogether too late*".

137. The claimant had contacted ACAS for early conciliation, as stated above, and the claimant gave evidence that there were discussions concerning representation through ACAS between the parties. Whilst we accept that there was some discussion concerning representation through ACAS, it is inappropriate for us to delve further into that.

Submissions

138. The Respondent provided the Tribunal with a written opening note and both parties provided us with written submissions and were given the opportunity to address us orally.

Respondent's submissions

139. In brief, the respondent contended that all claims should fail. The claimant had identified 24 issues which collectively breached the implied term of trust and confidence. Other matters had been referred to by the claimant in putting her case, but the respondent resisted any attempt to expand upon that list. There was no significant material non-disclosure on the part of the respondent.

140. The claimant's case was that collusion and conspiracy had occurred, spearheaded by Miss Gilchrist, which would have had to include a number of individuals to bring about the claimant's exit from the School. There was no evidence of any such conspiracy or collusion and it was more probable that the claimant had formed a negative 'gut feeling' to Miss Gilchrist. There was no witch hunt. The way that the claimant had put her case was a high bar to overcome, but even when considering a lower threshold, there was nothing in actions, individually or collectively, that could be taken to breach the implied term of trust and confidence.

141. The allegations raised against the claimant were not minor or insignificant. The body of concerns had to be addressed with the claimant. The claimant was not suspended on receipt of the allegations. Miss Gilchrist had sought to raise these informally with the Claimant on 16 September 2019. These concerns were then outlined in writing. Matters were put on hold whilst settlement negotiations were underway. The claimant's suspension was not a knee jerk reaction.

142. The section 15 claim did not get off the floor and had not been put to the respondent's witnesses. The respondent's counsel took the panel through the chronology relating to the section 20 claim and contended that there was no knowledge of the claimant's disability and/or substantial disadvantage. Further, the PCP relied upon did not, in fact, put the claimant at a substantial disadvantage, as the claimant's disciplinary hearing had not yet been arranged.

Claimant's submissions

143. The claimant contended that her claims were made out in whole or substantial part. Miss Gilchrist had a closed mind and set out to establish a case (referred to as a witch hunt) against the claimant, assuming her guilty from the outset.

144. All of the allegations contained within the further and better particulars for the constructive dismissal claim were made out, save that the claimant was not relying upon allegation 6 (collusion between the trade union and the Head Teacher to force the claimant to accept a settlement).

145. The final straw was not allowing the claimant fair representation, and the ACAS involvement was linked to this.

146. Miss Gilchrist had gone out of her way to find disciplinary issues to use against the claimant and had presented those issues in a blinkered, one-sided way. Her statement was peppered with language which painted the claimant in a bad light and showed her intention. The allegations were exaggerated,

147. There were many instances of complaints appearing, when Miss Gilchrist had interacted with individuals. The allegations were all brought through the Head Teacher

and HR did not challenge or question how they had arisen. Others may not have realised that they were part of a conspiracy, but it was clear that Miss Gilchrist rewarded people for helping her.

148. The only independent person was the LADO, and he used common sense in finding that old allegations were difficult to prove, uncorroborated allegations were difficult to prove, and where there were no dates or times provided, they were very difficult to prove. The allegations should not have been proceeded with. It was improper to proceed in light of this.

149. Therefore, there were clearly fundamental breaches in this case and breach(es) of statutory duty at the end, such that the constructive unfair dismissal claim should succeed.

150. With regards to knowledge of the Claimant's disability, the reality of the position is that the respondent had knowledge of the claimant's disability, and should not have simply relied on the view of the OH officers. Therefore, all 3 claims should succeed.

LAW

Unfair dismissal

151. The Claimant claimed that she had been constructively dismissed. She resigned following, she says, a series of acts by the Respondent, which amounted to a breach of the implied term of trust and confidence. The relevant law is as follows:

152. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that, *"there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct*." This is what is commonly called constructive dismissal.

153. In the leading case in this area, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends*

to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

154. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in Malik v BCCI; Mahmud v BCCI [1997] 1 IRLR 462 where Lord Steyn said that an employer shall not: "…*without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*."

155. In order to successfully claim constructive dismissal, the employee must therefore establish that:

155.1. there was a fundamental breach of contract on the part of the employer;

155.2. the employer's breach caused the employee to resign;

155.3. the employee did not delay too long before resigning, so as to affirm the contract and lose the right to claim constructive dismissal.

156. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract — Lewis v Motorworld Garages Ltd [1986] ICR 157. However, unreasonable behaviour by an employer will not, of itself, be enough to allow an employee to resign and claim to have been constructively dismissed. The behaviour must be so serious as to amount to a fundamental breach of the employee's contract of employment, as confirmed in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, where the Court of Appeal upheld the decision of the Employment Appeal Tribunal (EAT) that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

157. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — Logan v Customs and Excise Commissioners [2004] ICR 1, CA.

158. In Omilaju v Waltham Forest London Borough Council [2005] ICR 481, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. Whilst it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in Chadwick v Sainsbury's Supermarkets Ltd EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

159. In terms of causation, that is the reason for the resignation, a Tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — Wright v North Ayrshire Council [2014] ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in Abbeycars (West Horndon) Ltd v Ford EAT 0472/07: "*the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon*"

160. Where an employee has mixed reasons for resigning, their resignation will constitute a constructive dismissal, provided that the repudiatory breach relied on was at

least a substantial part of those reasons (see Meikle v Nottinghamshire County Council [2004] EWCA Civ 859, [2005] ICR 1).

161. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

Right to be accompanied

162. We had regard to section 10 Employment Relations Act 1999, which provides:

"*This section applies where a worker—*

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—

(i) put the worker's case;

(ii) sum up that case;

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

(a) answer questions on behalf of the worker;

(b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or

(c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers."

163. We also considered the ACAS Code of Practice on disciplinary and grievance procedures and the ACAS Guide: Discipline and Grievances at Work. The ACAS code provides that, "*Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative*."

Discrimination

Burden of Proof and discrimination claims

164. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EqA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.

165. In considering the reverse burden of proof as it relates to a duty to make reasonable adjustments, which is one of the claims brought by the Claimant, we had regard to Project Management Institute v Latif [2007] IRLR 579*. "The Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably*

be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be some evidence of some apparently reasonable adjustment which could have been made".

Discrimination arising from disability Section 15 EqA

166. The Claimant complained that she had been treated unfavourably because of something arising as a consequence of her disability. The protection is laid out in Section 15 which states:

"(1) a person (A) discriminates against a disabled person (B) if -

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

(b) A cannot show the treatment is a proportionate means of achieving legitimate aim.

(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability."

167. No comparator is required for this assessment. In order for this to apply, the employer must have treated the claimant unfavourably. The EHRC employment code explains at paragraph 5.6 it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link to the unfavourable treatment and the claimant's disability.

168. The code states, *"Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment but sometimes unfavourable treatment may be less obvious. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably"* [paragraph 5.7 of the code].

169. This is a 2 stage test (Basildon & Thurnock NHS Foundation Trust v Weerasinghe UKEAT 0397/14):

169.1. Did the claimant's disability cause, have the consequence of, or result in "something"?

169.2. Did the respondent treat the claimant unfavourably because of that "something"?

170. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim.

Section 20 EqA Duty to Make Adjustments

171. Section 20 provides:

(1) "Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises of the following three requirements.

(3) The first requirement is a requirement, where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

172. Section 21 Failure to comply with duty provides:

"(1) A failure to comply with the first…..requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first….requirement applies only for the purpose of establishing whether A has contravened

this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this act or otherwise."

173. There is no onus on the disabled person to suggest what adjustments should be made, although it is good practice for employers to ask.

174. The employer must know, or reasonably be expected to know, that the employee has a disability, and is likely to be placed at the disadvantage referred to in section 21 EqA to be under a duty to make reasonable adjustments (paragraph 20 Schedule 8 EqA).

175. The Tribunal must identify:-

175.1. The PCP applied by or on behalf of any employer;

175.2. The identity of non-disabled comparators where appropriate; and

175.3. The nature and extent of the substantial disadvantage suffered by the Claimant. This is an objective test. There is no need to show group disadvantage. Substantial disadvantage is more than minor or trivial although this was noted to be a low threshold to overcome.

176. The Tribunal had regards to paragraphs 6.16 of the code relating to the use of comparators in cases concerning alleged failure to make reasonable adjustments. There is no requirement, unlike direct or indirect discrimination under the duty to make adjustments, to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person.

177. The test of whether an adjustment is reasonable is an objective one to be determined by the Tribunal. The code lists a number of factors that might be taken into account in deciding what are reasonable steps for an employer to take, these being:

a) the extent to which the steps would have prevented the substantial disadvantage;

b) the extent to which the adjustment was practicable;

c) the financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities;

d) the financial and other resources available to the employer;

e) the nature of the employer's activities and the size of the undertaking.

Conclusion

178. In reaching our conclusions we have considered carefully the evidence before us, the legal principles set out above, and the written and oral submissions made by the parties. The following conclusions are made unanimously.

179. We considered the constructive unfair dismissal claim first. We considered whether the respondents had behaved in the ways suggested by the claimant and listed fully on pages A200-224. We refer to them as allegations below. Some of these appeared to us to be repeated, but we considered each of them, other than the allegation that the Head Teacher and HR colluded with the Trade Union to force the claimant to accept a settlement, by confirming that the disciplinary procedure would continue if she did not do so. The claimant confirmed in submissions that this was not pursued by her in her claim.

Allegation 1

180. In considering the other allegations, we believe that Miss Gilchrist may have formed a slightly negative view of the claimant, in light of her interactions with her prior to joining the school, including the claimant's practice of correcting spelling in the children's books by way of post it notes. However, we do not accept that this was a prejudiced view, nor do we accept that Miss Gilchrist disliked the claimant.

Allegation 2

181. From our findings of fact, we do not accept that Miss Gilchrist arranged for an investigation of concerns as safeguarding issues, when they clearly were not so. Some of the concerns raised by a number of individuals within the School could have been identified as safeguarding issues, and it was correct that, when pointed out by Ms Boulter, these were identified to the LADO, for his consideration. We find there to have been no exaggeration in the referral form to the LADO, as outlined above.

Allegations 3 and 12

182. We disagree that the suspension of the claimant was unwarranted in the circumstances. We consider that there was reasonable and just cause for suspending the claimant. Whilst the claimant never attended a disciplinary hearing to fully answer the allegations, we accept that the allegations, including one of bullying, were sufficiently serious for an employer to consider suspension. In light of the claimant going to speak with Ms Yendall, following her complaint that she had read her emails, we accept that Miss Gilchrist had some concerns over ensuring that the investigation was carried out without the claimant's involvement. We also accept that there were possible gross misconduct allegations. At that point, without the benefit of the LADO's confirmation that the allegations were unsubstantiated, it was not clear that there was no risk posed to other staff or children. Finally, we do not accept that there was no or insufficient detail of the allegations given to the claimant at the point of her suspension. She was aware from the meeting on 16 September with Miss Gilchrist, the subsequent email sent following that meeting, and the suspension letter of the nature of the concerns. We accept that more detail would be required for a disciplinary hearing, but that is not what we are concerned with here.

Allegation 4

183. We do not agree that the Head Teacher continued the claimant's absence in order to give advantages to other members of staff for the Deputy Head role in the School. Whilst it may be inevitable that someone is unlikely to get promoted whilst on suspension, we do not consider this to have been a deliberate act in order to prevent her from doing so. The claimant was informed of the opportunity and chose not to apply.

184. We do not accept that the claimant's role was given to a supply teacher. We accept that the supply teacher continued in place, even after the return of the claimant to the School following her suspension being lifted. However, the claimant was still under investigation for alleged misconduct, and we understand why the claimant was given an

alternative role within the School until it had concluded. We do not accept that the English Lead role was given to Ms Joslin, save on a temporary basis.

Allegation 5

185. Miss Gilchrist did not prepare, or even see, the investigation report prepared by Ms Boulter. Therefore, it is not correct that she translated 5 original concerns into 13 allegations with a recommendation to Governors to dismiss the claimant, as alleged. Ms Boulter recommended that disciplinary action was appropriate and suggested this, although it was subject to further scrutiny by Mr Dean, the Chair of Governors, who made the decision without any input from Miss Gilchrist, that a disciplinary hearing be convened.

Allegation 7

186. Miss Gilchrist did inform parents about the claimant's departure in her letter dated 7 October 2019. This was unfortunate, since no signed agreement had been entered into, and was, as stated by Miss Gilchrist, premature, however, we find it understandable in the circumstances. The claimant had indicated her agreement to leave in principal from 5 October. There had been some unrest in the year 2 class, without its teacher for almost a month, so that the parents may have felt a lack of continuity. With hindsight, the Head Teacher should never have sent this letter, but we can understand why she did so, particularly as it was clear that parents were raising with her at the School gates what was happening.

Allegation 8

187. We do not find that the Head Teacher made a referral to LADO specifically with the intention of preventing the claimant returning to her role. We consider that this is evidenced by the lifting of the suspension once the LADO's recommendations had been given. Miss Gilchrist could have decided to continue with the suspension, but reviewed whether it was necessary once LADO had found that safeguarding concerns were unsubstantiated. We do not find that Miss Gilchrist had already made up her mind that

the claimant's employment was to end. The process was being followed, and Ms Gilchrist was not interfering with this in any way.

Allegation 9

188. Miss Gilchrist did not withhold information from the claimant during the disciplinary process. The claimant was informed of the LADO referral and was provided with the outcome as soon as it was known. The suspension of the claimant was lifted the day after the LADO confirmed the safeguarding allegations were unsubstantiated. The LADO's minutes were provided to no one until the claimant made a subject access request. We do not accept that the respondents were told to inform the claimant of her GDPR rights, despite being stated in the minutes created by the LADO some time after the meetings themselves.

Allegations 10 and 11

189. The return to work meeting on 5 November was not disguised in any way. We consider it a valid return to work meeting. Our findings are that Miss Gilchrist did not have the discussion with the LADO until after the return to work meeting had taken place.

Allegations 13 and 14

190. When the suspension was lifted, we accept that this had been reviewed by Miss Gilchrist and that a number of the reasons for suspending the claimant no longer remained of concern, eg the safeguarding issues referred to the LADO and the investigation had been completed. We do not fully understand the claimant's allegation here. We find that it was reasonable to lift the suspension at this time following a review of that suspension in light of the LADO outcome, and as the investigation by Ms Boulter had concluded by this stage.

Allegation 15, 16 and 17

191. It was entirely appropriate to continue with the disciplinary process for the remaining alleged conduct issues. This was a separate procedure to the LADO safeguarding referral and outcome, and the respondents were clear about this with the

claimant throughout. The claimant was informed of the LADO outcome, but also that the disciplinary procedure would continue into the complaints against her. Miss Gilchrist did not substitute her own incorrect interpretation of the LADO outcome, nor did she paint a false picture to the claimant. We consider that, as the conduct issues remained outstanding, there were sound reasons to continue with the disciplinary process, which would have provided the claimant an opportunity to respond, at the disciplinary hearing.

Allegation 18

192. We do not find that Miss Gilchrist went "fishing" for evidence against the claimant, whether on 19 November 2019 or at any other time. There was no evidence to support this. We also find that there was no suggestion of collusion between Miss Gilchrist and any of the other staff at the School.

Allegation 19

193. There was considerable delay in this matter coming to a disciplinary hearing. At the time of the claimant's resignation, no disciplinary hearing date had in fact been agreed. The investigation, whilst thorough, took a long time to complete. Had the investigation reports come out sooner, and had referrals to OH been more timely, the matter could have been completed before the Coivid-19 pandemic took hold. However, we do not find any evidence of collusion or anything untoward between the respondents to make the process take longer. We have some sympathy with the claimant's complaint that the process took too long, particularly in light of the claimant's deteriorating mental health, which cannot have benefited from this delay. Clearly, the Covid-19 pandemic added additional problems in trying to get the matter to a hearing, including venues closing and an inability to arrange meetings other than remotely (which the claimant did not want). We do not accept that the procedure followed was inappropriate, but accept that it took a long time, but this delay was understandable in the circumstances.

Allegation 20

194. We do not accept that the claimant was not provided with all relevant and accurate paperwork as part of the disciplinary process. Whilst we understand that there

were references to two different children in the investigation regarding being refused permission to go to the toilet and wetting themselves, we do not consider that Ms Boulter changed allegations without disclosing material facts. If there was anything, it was a mistake and confusion between the claimant and Ms Boulter over who the claimant was referring to in her investigation meeting. The notes were sent to the claimant, who had the opportunity to amend them to refer to the correct child, but did not do so.

Allegation 21

195. We do not consider that there was any collusion between the respondents to deny the claimant fair representation based on an unsound understanding of the Law and the ACAS code of practice. We find that the respondents initially applied a correct, but inflexible approach to the claimant's request to be accompanied by a friend to her disciplinary hearing. Many employers would not like someone to bring a legally qualified individual to disciplinary meetings, and the ACAS guidance suggests that workers should inform their employer of the name of their chosen representative. However, the respondents had, in any event, adapted their procedures to enable the claimant to be accompanied by a colleague and had, by 1 July 2020 confirmed that Mr Laurent-Régisse could provide more than support to the claimant. We find that there was no collusion to deny the claimant fair representation at the disciplinary hearing.

Allegations 22 and 23

196. We make no findings about the respondents alleged failure to engage with ACAS early conciliation. We did not hear evidence from the respondents on what, if any, involvement there was with ACAS. It was clear that an ACAS early conciliation certificate was issued for the period 1 to 28 July 2020. This is a purely voluntary process and there is no contractual right or obligation conferred by this. We note that schools in Leicestershire were closed on 22 and 27 July 2020 and accept that it may have been difficult to get hold of people at the second respondent during this period.

Allegation 24

197. For the reasons set out below, we do not accept that there was a failure to make reasonable adjustments for the claimant to be represented by Mr Laurent-Régisse. The respondents were attempting throughout the period to reach agreement on representation for the claimant. Once information had been provided by the claimant, there was a relaxing of the strict rules on what the claimant's representative could and could not do. By time of the claimant's resignation Mr Laurent-Régisse had been afforded almost full representation rights and the respondents were going further to allow full rights as Ms Butler was suggesting this to the Chair of Governors, without the claimant's knowledge, as she did not know the claimant had resigned by this stage.

198. In light of our findings in respect of the above, and considering all of the claimant's points in the further and better particulars provided to the Tribunal and set out fully on pages A200-224, we do not consider that there was a breach of the implied term of trust and confidence, either singly or collectively. We do not consider that the respondents behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondents. It is possible that the taking of disciplinary action might destroy or seriously damage trust and confidence between the parties, but noting that the claimant would have had opportunity to defend herself, we do not find that to be the case. However, even if it did, the respondents had reasonable and proper cause for taking disciplinary action. There were a number of separate complaints brought against the claimant, which had to be properly investigated and appropriate action taken. Clearly, the claimant might have been able to defend some, or all, of these allegations had a disciplinary hearing taken place. We therefore do not find that there has been a fundamental breach of the implied term of trust and confidence and the unfair dismissal claim fails.

199. Turning to the claim for discrimination arising from disability, we consider that this was really a claim for failure to make reasonable adjustments, since it does not fall squarely within the section 15 EqA framework. For completeness, however, we find that

the respondents' response to the claimant's request to be represented by Mr Laurent-Régisse was not because the claimant had "*an impaired ability to interact and communicate with others, assert herself, have confidence in others and trust them*" from the further particulars provided by the claimant. The reason was that they applied their policy, which did not provide for representation from anyone other than a trade union representative or colleague, and wished to understand who the claimant's representative was before making a decision. This claim therefore must fail.

200. Finally, turning to the claim for failure to make reasonable adjustments under sections 20 and 21 EqA.

201. We considered if and, if so, when the respondents had knowledge or imputed knowledge of the claimant's disability. We find that the respondents knew or ought to have known of the claimant's disability on 22 June 2020. By this time, the claimant had sent an email on 28 May 2020 saying, in part, that the respondents had "*clear evidence of [her] disability relating to stress and anxiety and two OH reports which should have guided you in your decisions".* The two OH reports had also been received, which whilst not stating that the claimant was disabled, did provide some details of the claimant's condition. The fact that the later OH report stated that the claimant was unlikely to satisfy the definition of disability in the EqA, has no bearing on our decision. On 22 June 2020, the claimant had forwarded a letter from her GP, which detailed the extent of the claimant's condition.

202. Even though we find that the respondents knew or ought to have known that the claimant was disabled by 22 June 2020, we do not accept that they had knowledge of the substantial disadvantage, as is required in order for the duty to make reasonable adjustments to trigger.

203. By 23 June, the claimant had been referred to OH for a further assessment to take place. Additionally, by 26 June, Ms Butler had suggested to Mr Dean, Chair of Governors, that Mr Laurent-Régisse be allowed additional rights to represent the claimant. Our findings are that by 1 July 2020, the claimant had been told that Mr

Laurent-Régisse could do everything other than ask questions on her behalf. Additionally, the panel would consider whether to allow him to do this on the day of the disciplinary hearing, depending on how the hearing was progressing and the claimant's needs. We therefore consider that by 1 July 2020, the claimant was not subject to substantial disadvantage for two reasons. Firstly, the disciplinary hearing had not yet been arranged, and secondly, the respondents had agreed to adjustments to their policy to allow Mr Laurent- Régisse to represent her other than asking questions on her behalf, and that further adjustments may be considered at the hearing, if necessary.

204. In any event, we do not accept that the respondent knew there was a substantial disadvantage at the time, and we find that there was no such substantial disadvantage. The adjustments put in place by the respondents, in our view, ameliorated any disadvantage and there was a possibility of further adjustments taking place, should they be required at the time of the disciplinary hearing.

205. Therefore, this claim also fails and all claims are therefore dismissed. As all claims have failed, there is no need to list the case for a remedy hearing.

Employment Judge Welch
Date: 12 October 2022

JUDGMENT SENT TO THE PARTIES ON

18 October 2022

FOR THE TRIBUNAL OFFICE